

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on: 02.12.2011

Judgment Pronounced on: 05.12.2011

+ CS(OS) 2969/2011

NIRANJAN LAL GUPTA & ANR.

..... Plaintiffs

Through: Mr. K.T.S.Tulsi, Mr. Raman
Kapur, Sr. Advocates with Mr. Manish
Kumar, Advocate for Plaintiff No.1
Mr. Aman Lekhi, Sr. Advocate with Mr.
Amit Kumar, Advocate for Plaintiff
No.2

versus

GURMEET SINGH BAWEJA & ORS.

..... Defendants

Through: Mr. Rajiv Nayyar, Sr.
Advocate with Mr. Z. Anwer, Advocate
for D-3
Mr. Maninder Singh, Sr. Advocate with
Mr. P.S.Bindra & Mr. Harish Sharma,
Advocate for D-4 & 5

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

V.K. JAIN, J

IA No. 18992/2011 (u/O 39 R.1&2 CPC)

Defendant No.3 of All India Motor Transport Congress is stated to be a body consisting of more than 5000 members, representing more than 01 lac transport companies and approximately 72 lac truckers, Light Motor Vehicles, buses, commercial vehicles etc. The Articles of

Association of defendant No.3, which has been registered as a company, provides for formation of a Managing Committee consisting of not less than 15 and not more than 121 members to be elected zone-wise by its members. The members of the Managing Committee elect the President and Vice-Presidents of the body from amongst themselves, for the tenure of two years each. For the period 2011-13, plaintiff No.1 Mr. Niranjana Lal Gupta, defendant No.4 Mr. Bal Malkit Singh and one Mr. Nimesh J. Patel, all of whom are members of the Managing Committee filed the nominations for the post of President whereas plaintiff No.2 Mr. Harish Sabharwal and defendant No.5 Mr. Kultaran Singh Atwal filed nominations for the post of Vice-President from North Zone. Since Mr. Nimesh J. Patel withdrew his nomination, only plaintiff No.1 and defendant No.4 remained in the fray for the post of President. The election is held by postal ballots, the members of the Managing Committee being from all over India. Accordingly, ballot papers were sent to 109 elected members of the Managing Committee and 09 former Presidents, who were to cast vote for the aforesaid post. It is alleged in the plaint that out of total voters numbering 118, 60 cast their votes in presence

of the plaintiffs by ticking on the ballot paper, since it was not a secret ballot. On 24th November, 2011 during the process of counting, it was observed that some ballot papers had been tampered with by erasing/removing the tick mark placed against the names of the plaintiffs and putting a new tick mark against the names of defendants No. 4 & 5. It is alleged that the aforesaid tampering was done after dispatch of ballots by the voters and before the counting had begun. The plaintiffs lodged protest in this regard before the counting was complete. Defendant No.1, however, continued with the process of counting and declared defendants No. 4 & 5 elected to the post of President and Vice-President (North Zone) respectively. The case of the plaintiffs is that, had the rejected ballot papers been counted as the votes cast in their favour, they would have been elected President and Vice-President (North Zone) respectively of defendant No.3. The plaintiffs have sought a declaration declaring the election for the posts of President and Vice-President (North Zone) for the term 2011-13 to be illegal, null and void. They have also sought a direction to defendant No.1 to recount the votes taking into account the 08 rejected votes and declared them as the successful

candidates for the aforesaid posts. They have also sought an injunction restraining defendants No. 4 & 5 for representing themselves as President and Vice President (North Zone) of defendant No.3. The Plaintiffs have also filed IA No. 18992/2011 seeking an interim injunction restraining the defendants No. 4 & 5 from taking charge on the post of President and Vice-President (North Zone) respectively and staying the operation of the result declared on 24th November, 2011.

2. The suit has been contested and the application opposed by defendants No. 3 to 5, though Written Statement is yet to be filed by them.

3. The dispute between the parties is with respect to 08 postal ballots for the post of President and 08 postal ballots for the post of Vice President (North Zone). The ballot box containing all the ballot papers was opened in the Court on 2nd December, 2011 in presence of the parties after they had seen the paper seals on it and satisfied themselves that there was no tampering with the box or the lock put on it. Ballot papers in question were taken out and were examined in the Court. It appears to me that on 07 out of 08 ballot papers for the post of President, initially, the tick

mark was put against the name of plaintiff No.1 but later on that tick mark was erased and another tick mark against the name of defendant No.4 was put. It also appears that on all the disputed ballot papers for the post of Vice President (North Zone) the voter had initially put tick mark against the name of plaintiff No.2 but later on that tick mark was erased and another tick mark was put against the name of defendant No.5. There can be two possibilities with respect to erasing of the tick marks initially put on these ballot papers and putting of other tick mark on them. The first possibility and which I feel is more likely is that someone who had access to the envelopes in which these ballot papers were sent by the voters, erased the marks which were initially put on them and put another mark against the name of defendant No.4 on the ballot papers for the post of President and against the name of defendant No.5 for the post of Vice-President (North Zone). To my mind, it is unlikely to be a mere coincidence that at least 08 voters who are casting votes from different places would conduct themselves in an identical manner by erasing the tick mark initially put by them and putting another mark against the name of the other candidate. Prima facie it

appears to me that these ballot papers have been tempered with after they were dispatched by the voters. This obviously would have been done in connivance with the winning candidates, they being the only beneficiary of the tempering. The next question, which comes up for consideration is as to whether, at this stage, the Court should direct counting of the ballot papers in favour of the plaintiff or should direct re-election, on account of this tempering.

4. The specific case of the plaintiff is that 60 voters had cast their votes in their presence, meaning thereby that the tick mark against their names was put by those voters in their presence. The election for the post of President and Vice-President (North Zone) is not held up by show of hands. As per instructions issued by the Election Officer, voter was required to put the ballot paper in an envelope, flap of the envelope was to be gum pasted, preferably sealed, that envelope to be put it into another envelope which was to be sent to the Election Officer. The plaintiffs themselves have placed on record the letter dated 3rd November, 2011 sent by the Election Officer to all the voters, inclusive two ballot papers one for the post of President and other for the

post of Vice President (North Zone). One of the instructions given to the voters requires them not to write or put any other mark on the ballot paper which may disclose his identity in which case the ballot is liable for cancellation. It would thus be seen that the polling process was to be a secret process in which the voter was precluded from disclosing his identity and if he did so the ballot cast by him was liable to be rejected/cancelled. If 60 voters out of 118 cast their vote in presence of the plaintiffs, as is specifically claimed by them, they by doing so disclosed their identity to the plaintiffs, which in turn, rendered their ballot liable to rejection/cancellation. The case of the plaintiffs in para 28 of the plaint is that the ballot was not a secret ballot and that is why 60 voters had cast their votes in their presence. This being contrary to the instructions contained in letter dated 3rd November, 2011 cannot be accepted. Had it not been a secret ballot, the voters would not have been instructed not to disclose their identity while casting their votes. It was contended by the learned Sr. Counsel for the parties that the ballot would be liable to be cancelled only if the voter writes something or puts any mark other than tick mark on the ballot paper and since there was neither any

writing nor any other mark on the ballot papers at the time these 60 voters cast their ballot in favour of the plaintiffs, these ballot papers could not have been rejected. I, however, do not find any merit in this contention. It is quite evident from additional instruction (a) that the prohibition is against disclosure of identify of the voter, writing something or putting any other mark on the ballot paper being only two of the manner in which the identity of the voter could possibly be disclosed to the candidates. If the voters were precluded from disclosing their identity, it is immaterial whether they disclose it by writing something on the ballot paper or putting some mark on it or by casting vote in presence of a candidate or some other manner. Once, it is found that the voter has disclosed his identity the vote cast by him is liable to be rejected irrespective of the mode whereby the identity has been disclosed. Therefore, assuming averments made in the plaint to be correct, the Election Officer had no option but to reject these ballot papers in case the vote was cast in presence of the plaintiffs as is claimed by them. If these ballot papers are excluded from consideration as the Election Officer has done, though on a different ground, the plaintiffs cannot claim to be the

winning candidates and defendants No. 4 & 5 would be the successful candidates for the post of President and Vice President (North Zone) respectively. Since the dispute between the parties is only with respect to these ballot papers, which, in my view, are invalid, vote having been cast in the presence of the plaintiff, there is no ground to order re-election at this interim stage itself.

5. The learned Senior Counsel for the plaintiffs during the course of arguments relied upon the decision of Supreme Court in **S.Raghubir Singh Gill v. S.Gurcharan Singh Tohra & Ors.** 1980 Supp. SSC 53 in support of his contention that the voters are not prohibited from disclosing their identity even during the process of casting their vote. A perusal of this decision would show that in election for members to Council of States, 08 MLAs who were detained under MISA, preferred to vote through postal ballots. The appellant and respondents No. 1 had received equal number of first preference votes, which was below the ascertained quota. The surplus first preference votes were added to the first preference votes polled by the appellant and he was declared elected. Respondents No. 2 & 3, who were sitting MLAs belonging to the opposition party, filed an Election

Petition challenging the election of the appellant and it was alleged that the Returning Officer had tampered with the postal ballots. When the petition came up for hearing those who had cast their votes by post appeared as witnesses and were examined. The witnesses claimed that they had cast only the first preference votes in favour of respondent No.1 and had not indicated any other preferences. The Court held that the ballot papers were tampered with and were improperly received in favour of the appellant and improperly refused to respondent No.1. Recounting was ordered, in which respondent No.1 was declared elected and the election of the appellant was set aside. While dismissing the appeal preferred, Supreme Court observed that secrecy of ballot being is an indispensable adjunct of free and fair election and ordinarily this secrecy has to be guarded. Noticing that despite tampering with the ballot papers, the Returning Officer did not reject them as being invalid, the Court was of the view that if the circumstances permit and evidence of unquestionable character is available it would be perfectly legitimate for the Court, in an Election Petition, to ascertain for whom the vote was cast before it was tampered with and if it can be ascertained as a valid vote it

must be accepted as such. The Court was of the view that it was the bounden duty of the Returning Officer, in view of sub rule 2 of Rule 56 of Conduct of Election Rules 1961, to ascertain the intention of the voter by finding out for whom the vote was cast and add the vote for the candidate for whom it was meant to be. It was noted that proviso to sub rule 2 of Rule 56 showed that the ballot paper could not be rejected merely on the ground that mark indicating vote was indistinct or made more than once, if the intention that the vote shall be for a particular candidate clearly appears from the way the paper is marked. During the course of arguments, it was claimed by the appellant that the order passed by the High Court violated the mandate of Section 94 of Representation of The People Act which provides that no witness or other person shall be required to state for whom he had voted. The Court was of the view that Section 94 only prohibits compelling a witness to disclose, against his will, as to how he had voted and for whom he had voted and when questioned in this regard he can refuse to answer the question without incurring any penalty or forfeiture but if he chooses to open his lips of his own free will without any direct or indirect compulsion and waive the privilege

nothing prevents him from disclosing how he voted. This judgment to my mind in the context of the case before this Court would mean that the voters who cast these disputed ballot papers, are at liberty, post elections, if they so desire, without any direct or indirect compulsion on them, to disclose to whom they had given their vote through these postal ballots. At this stage, there is no material on record except the claim of the plaintiffs is that as many as 60 voters had cast their votes in their favour in their presence. The plaintiffs have not filed the affidavits of those 60 voters who according to them had cast the votes in their favour. Moreover, even if these votes were cast in favour of the plaintiffs as is claimed by them, in view of additional instruction (a) to the voters, casting the votes in presence of the plaintiffs by itself rendered these postal ballots liable to rejection since by doing so they fail to maintain the secrecy of the polling process and contravened the instructions issued to them by the Election Officer, while signing the postal ballots to them. Casting a vote in the presence of a candidate, being altogether different from disclosing the option, post election, the decision in the case of **Raghubir Singh** (supra) does not apply. Prima facie, the plaintiffs

have not able to make out a case for counting these disputed votes in their favour, for the purpose of deciding the interim application.

6. During the course of arguments it was submitted by the learned Senior Counsel for defendants No. 3 to 5 that defendants No. 4 & 5 have already taken over from the erstwhile incumbents and therefore there can be no question of restraining them from assuming charge of the office to which they were elected. This was strongly refuted by the learned Senior Counsel for the plaintiffs and relying upon the minutes of the meeting of Transport Development Council held on 28th November, 2011 wherein the outgoing President Mr.G.R.Shanmugappa has signed as the President of AIMTC. Their contention was that had defendants No. 4 & 5 taken charge on 25th November, 2011 itself, the outgoing President would not have attended the meeting held on 28th November, 2011 and would not have described himself as the President of AIMTC while signing the minutes of the meeting. This was countered by the learned Senior Counsel for defendants No. 3 & 4, who stated that the outgoing President was duly authorized to represent defendant No.3 in the aforesaid meeting since notice of the

meeting was received much before the results of the election were declared and according to them, describing himself as the President by Mr. G.R.Shanmugappa was only inadvertent. They also stated that after defendants No. 4 & 5 had taken charge of their respective offices, press release was duly issued in this regard, even before filing of the suit and the concerned banks were also intimated on 30th November, 2011. I, however, need not go into these aspects of the matter since I am of the view that the plaintiffs have failed to make out a prima facie case for counting these disputes ballot papers in their favour.

The learned Senior Counsel for the plaintiffs referred to decision of Supreme Court in **Murray & CO. v. Ashok Kr. Newatia & Anr.** (2000) 2 SCC 367 where the Court was of the view that making a false statement on oath constitutes criminal contempt. The contention was that by filing a forged and fabricated handing over and taking over report dated 25th November, 2011 the defendants No. 4 & 5 have rendered themselves liable to punishment for criminal contempt. This aspect, to my mind, cannot be gone into at this stage. Whether defendants No. 4 & 5 took charge on 25th November, 2011 - is a matter which requires recording

of evidence and no firm view in this regard can be taken at this stage. I am of the view the whole of the process of the election need not be set at naught on account of tampering with these disputes ballot papers since the Election Officer has not taken them into consideration and they were in any case liable to be rejected.

7. For the reasons given in the preceding paragraphs I find no ground for grant of any interim order to the plaintiffs. The application is hereby dismissed.

CS(OS) No. 29692/2011

Written Statement be filed within the prescribed period. Replication, if any, can be filed within 04 weeks after getting the copy of the Written Statement.

The parties are directed to appear before the Joint Registrar on 24th January, 2012 for admission/denial of documents.

List before the Court on 22nd May, 2012 for framing of issues.

(V.K. JAIN)
JUDGE

DECEMBER 05, 2012
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