

## FULL BENCH

*Before A. N. Grover, Harbans Singh and D. K. Mahajan, JJ.*

KARTAR SINGH,—*Petitioner.*

*versus.*

RANDHIR AND OTHERS,—*Respondents.*

## Election Petition No. 6 of 1967

August 9, 1967.

*Conduct of Election Rules (1961)—Rule 56—Ballot paper not bearing a mark with the instrument supplied—Whether valid—Ballot paper bearing a faint or incomplete mark—Whether to be rejected.*

*Held*, that a ballot paper bearing a mark which cannot reasonably be ascertained to have been made with the instrument provided for the purpose, which makes the mark of a cross within a circle, has to be rejected.

*Held*, that if the ballot paper bears a part of the mark from which it can be ascertained with certainty that it was made with the instrument provided but the whole of the mark is not clearly visible or has not been transposed to the ballot paper because of improper inking of the rubber stamp, that would not necessarily make the ballot paper invalid because it can be said that the remaining part of the mark is indistinct or faint.

*Petition under sections 80 and 81 of the Representation of the People Act, 1951 praying that the election of respondent No. 1 from Samalkha Assembly Constituency to Haryana Vidhan Sabha be declared as void and further praying that the petitioner be declared duly elected from the said constituency.*

C. L. LAKHANPAL WITH I. S. VIMAL, ADVOCATES, for the Petitioner.

P. S. JAIN, WITH N. C. JAIN, ADVOCATES, for the Respondents.

## ORDER

HARBANS SINGH, J.—One of the points arising in this election petition relates to the validity of certain ballot papers which have been rejected as invalid by the Returning Officer on the ground of there being no mark or proper mark on them. The point being of some importance, this matter has been referred for decision to a

Kartar Singh *v.* Randhir, etc. (Harbans Singh, J.)

Larger Bench, and that is how this matter is before this Full Bench.

Clause (b) of sub-rule (2) of rule 56 of the Conduct of Election Rules, 1961, (hereinafter referred to as the rules) runs as follows:—

“56. (1) \* \* \* \* \*

(2) The returning officer shall reject a ballot paper—

(a) \* \* \* \* \*

(b) if, to indicate the vote, it bears no mark at all or bears a mark made otherwise than with the instrument supplied for the purpose, \* \* \* \* \*.”

The second proviso to this rule is in these terms:—

“Provided further that a ballot paper shall not be rejected merely on the ground that the mark indicating the vote is 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.”

Apparently under the powers of superintendence, direction and control vested in the Election Commission by Article 324 of the Constitution, the Election Commission issued in 1966 a hand-book for Returning Officers containing instructions etc. for the general elections held in 1967. In annexure VII at page 123 of this book, there is an indication as to the instrument referred to in the above-mentioned sub-rule, with which the mark is to be placed by an elector against the symbol of the candidate he wants to vote for. The instrument is to be a rubber stamp which makes the impression of a cross or plus mark in a circle. One of the allegations of the petitioner in this case was that a large number of valid votes were rejected on the ground that the marks thereupon placed by the electors against the symbol of the petitioner were indistinct or faint. Some specific evidence was led showing that this was the case *qua* booth No. 55 in which, at the time of the scrutiny, as many as 22 votes cast in favour of the petitioner, which had been rejected, in fact, were valid. Inspection of these votes was allowed to the petitioner and he picked out about 20 votes out of the rejected votes, which bore either some sort of faint smudge mark or a line or some little mark with red ink which was not complete or distinct mark with the rubber stamp supplied at the booth.

At this booth the rubber stamp made a clear red mark of a cross within a circle and these marks were clearly visible on those ballot papers which had been rejected for multiple markings. On behalf of the petitioner the argument was that no ballot paper should be rejected unless it is clear that the mark appearing on the ballot paper was put with something other than the instrument provided for the purpose, and if one is left in doubt whether it is with the instrument or otherwise, the benefit of the doubt should be resolved in favour of declaring the ballot paper valid because it clearly gave an indication of the intention of the elector to show his preference for the particular candidate. On the other hand, on behalf of the respondent, the contention was that clause (b) of rule (2) of rule 56 directing the Returning Officer to reject the ballot paper if, "to indicate the vote, it bears a mark made otherwise than with the instrument supplied for the purpose," is a new clause added in the year 1966 by notification No. SO 3875, dated 15th December, 1966, and is very specific and definite, and the Returning Officer is bound to reject the ballot paper unless he can say with reasonable certainty that the mark made to indicate the vote was with the instrument. He further urged that the requirements of a valid vote, in view of the amended clause (b) when read with the instructions referred to above, are two; first that it should bear a mark which the rubber stamp is supposed to make, i.e., a cross within a circle, and, secondly, this mark of cross within the circle must be with the instrument supplied. Thus, if an elector makes a mark of a cross within a circle with a red pencil or in red ink, even then, notwithstanding the fact that the elector has clearly indicated his choice and further has indicated the same by the prescribed mark, the vote has to be declared as invalid inasmuch as the mark is not with the instrument supplied.

Rule 39 prescribes the voting procedure. Clauses (a) and (b) of sub-rule (1) are to the following effect:—

"39. (1) The elector on receiving the ballot paper shall forthwith—

- (a) proceed to one of the voting compartments,
- (b) there make a mark on the ballot paper with the instrument supplied for the purpose on or near the symbol of the candidate for whom he intends to vote,

\* \* \* \* \*

Kartar Singh *v.* Randhir, etc. (Harbans Singh, J.)

This rule existed in this very form prior to 1966, but before the amendment of clause (b) of sub-rule (2) of rule 56, that rule was as follows:—

“The Returning Officer shall reject a ballot paper—

(a) \* \* \* \* \*

“(b) if no vote is recorded thereon.”

It will thus appear that although prior to the amendment of clause (b) of sub-rule (2) of rule 56, the method of marking the ballot paper was the same as during the last general elections, i.e., by marking a mark by an instrument supplied for the purpose, yet the mere fact that the mark was not by the instrument was not made a ground for rejection of a ballot paper. The only ground was “if no vote was recorded thereon”. It was contended on behalf of the respondent with some force, that the fact that the Central Government has deliberately amended clause (b) of sub-rule (2) of rule 56, by specifically providing that a ballot paper shall be rejected if it is marked otherwise than by the instrument supplied for the purpose, shows that the direction in rule 39 to mark the vote with the instrument supplied, which was apparently directory before, is mandatory now. He, therefore, urged that unless the Returning Officer can reasonably be certain that the mark appearing on the ballot paper has been made with the instrument supplied, he has no option but to reject the ballot paper and, in view of the above, therefore, he further stated that the authorities prior to 1966 to the effect that any mark clearly indicating the preference of the elector for a particular candidate would be enough to make the vote valid, are altogether irrelevant and inapplicable in the light of the amended clause (b) of sub-rule (2) of rule 56.

Reference was made to Parker's Election Agent and Returning Officer (sixth edition) at page 198 where the author has distinguished between mandatory provisions and directory provisions. It was observed as follows:—

“Keeping these principles in mind, it will be found that the following are absolute enactments which must be obeyed exactly, and a breach of which will render the vote void:— the voter shall mark his paper secretly \* \* \* \*; the ballot paper shall be marked on the back with the official

mark \* \* \* \* \*; the ballot paper shall not be so filled up or marked as that the voter can be indentified, \* \* \* \* \*

But the manner in which the voter shall secretly mark his ballot paper is regulated by the rules and forms contained in P.E.R., and, as these are directory merely, it is sufficient if they be obeyed substantially \* \* \* \* \*. There is, therefore, no objection to making the mark with ink instead of with a pencil, provided it be not a peculiar ink \* \* \* \* \* or with a blunt knife, piece of wood, or finger nail, \* \* \* \* \*

*The form of the mark is also, in the absence of evidence of collusion or pre-arrangement, immaterial \* \* \* \* \*.*

At page 201 onwards of the aforesaid book the author has given a number of instances wherein the particular markings were found to contravene the mandatory provisions and were held to be invalid while others were held to be valid because they only related to the form of the mark without disclosing the identity of the voter. These observations based on decided cases would not be relevant in the light of the specific provisions in clause (b) of sub-rule (2) of rule 56 noted above. In the English Law, there is no corresponding provision, and the provision therein is apparently similar to clause (b) of sub-rule (2) of rule 56, as it originally existed prior to 1966. On behalf of the respondent reference was made to *Bennet v. Shaw* (1), a decision by the Alberta Supreme Court, subsequently affirmed by the Supreme Court of Canada. There, the relevant enactment had provided that marking of the ballot paper was to be made by making a cross with a *black lead pencil* within the space containing the name of the candidate. In the case before the Court it had been marked with pen and ink. Reference was made to the English decisions but it was felt that in Canada the provision having been made in the Statute the same was imperative. The ballot paper was held to be invalid notwithstanding the fact that in section 66 (2), dealing with the cases directing the rejection of the ballot papers, the ground that the mark was not made by a black lead pencil was not included as one of the grounds.

In the present case, whatever may have been the case before the amendment of clause (b) of sub-rule (2) of rule 56 as regards the type of mark that may be made to indicate the choice of a voter, in view of the amendment incorporating specific provision that the

(1) 67 D.L.R. 742.

**Kartar Singh v. Randhir, etc. (Harbans Singh, J.)**

mark made otherwise than with the instrument provided shall be rejected, it is impossible to uphold the view of the petitioner that in case of a doubt, the ballot paper should be held to be valid. The plain meaning of the provision appears to be that if the mark on the ballot paper can reasonably be said to have been made by the instrument provided, the vote is valid, and if it cannot reasonably be ascertained that it is made with that instrument, then the same has to be rejected. *Jildar Ram v. Gouri Shankar* (2), cited by the counsel for the petitioner has no relevancy to the matter because that was only a case where after making the mark, when the elector folded the ballot paper the impression of the mark got transposed to another part of the ballot paper and the Court held that it could easily be ascertained which mark was the original mark and which mark was only the ink impression. There is nothing of the type in the present case.

The contention of the learned counsel for the respondent that a ballot paper, which does not bear the complete mark of a cross within a circle must necessarily be rejected, however, cannot be accepted in view of the second proviso to rule 56, according to which no ballot paper is to be rejected simply because the mark thereon is faint. If the ballot paper bears a part of the mark from which it can be ascertained with certainty that it was made with the instrument provided but the whole of the mark is not clearly visible or has not been transposed to the ballot paper because of improper inking of the rubber stamp, that would not necessarily make the ballot paper invalid because it can be said that the remaining part of the mark is indistinct or faint.

In view of the above discussion, therefore, I feel that there is only one way of answering the question referred to the Full Bench, namely, that a ballot paper bearing a mark which cannot reasonably be ascertained to have been made with the instrument provided for the purpose, which makes the mark of a cross within a circle, has to be rejected. The matter will now go to the Single Bench.

A. N. GROVER, J.—I agree.

D. K. MAHAJAN, J.—I agree.

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(2) A.I.R. 1965 Pat. 449.

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B.R.T.

