(1963) 04 AHC CK 0016

Allahabad High Court

Case No: Civil Miscellaneous Writ No. 575 of 1963

Satya Ketu		APPELLANT
	Vs	
The Election Tribunal and Others		RESPONDENT

Date of Decision: April 19, 1963

Acts Referred:

- Representation of the People Act, 1951 - Section 97

Citation: AIR 1964 All 225

Hon'ble Judges: R.S. Pathak, J; B. Dayal, J

Bench: Division Bench

Advocate: S.N. Kackar and K.N. Seth, for the Appellant; K.L. Misra, R.K. Shukla, S.C. Khare and Padmanath Singh, for the Respondent

Final Decision: Allowed

Judgement

B. Dayal, J.
This is a writ petition under Article 226 of the Constitution by Sri Satya Ketu who was a returned candidate for a seat in the U.P. Legislative Council from Rohilkhand Graduate Constituency. An election petition was filed by Sri Shyam Sunder challenging the election of Sri Satya Ketu and apart from praying that the election of respondent No. 1 Satya Ketu be declared void also prayed that the petitioner Shyam Sunder be declared to be duly elected.

2. In the election petition he made allegations that some invalid votes had been counted in favour of Sri Satya Ketu. In his written statement in paragraph 4 Sri Satya Ketu alleged as follows:

"That in case in the opinion of this Hon''ble Court it is found that any rule of voting and marking of ballot papers was contravened by the electors as a result of which certain ballot papers are to be rejected, then the same rule and principle should be applied to all

the ballot papers whether cast in favour of the petitioner or any other candidate so that justice may be done to all parties concerned and a fair result of the election be arrived at .....

The clear purport of this pleading was that if the Election Tribunal came to the conclusion, that some votes cast in favour of Sri Satya Ketu were invalid, on account of some rule having been violated and the Returning Officer having ignored that rate in counting votes then similarly votes cast in favour of the election petitioner Sri Shyam Sunder should also be rejected and if that was done the mult would be that the result of the election would not be altered and Sri Satya Ketu who had obtained the majority votes and had succeeded in election would still remain the successful candidate. By this allegation be was merely defending his election. It was not the intention of this allegation to say that if upon a correct counting of valid votes it was found that Sri Satya Ketu had not received the majority of votes and that the election petitioner Sri Shyam Sunder had in fact succeeded in obtaining the majority of votes yet no declaration as prayed for the election petition should, be granted in favour of Sri Shyam Sunder on the basis of some allegations of corrupt practice or other illegality, making his election void. At the trial the election petitioner applied for inspection of the voting papers, in order to be able to supply particulars about invalid votes counted in favour of Sri Satya Ketu. This inspection was permitted but at the time of inspection the election petitioner merely opened and scrutinised the ballot papers which had been put in a packet as being valid votes cast in favour of Sri Satya Ketu and also the exhausted votes. He did not open and did not see the votes which had been placed in a packet as valid votes cast in favour of Shyam Sunder with the result that the respondent did not have the chance Of seeing those votes also. This inspection was finished on the 28th January 1963.

On the very next day 29th January, 1963, Sri Satya Ketu applied that he should be permitted to inspect all the ballot papers in order to be able to know how many invalid votes were cast in favour of the election petitioner and to bring them before the notice of the Tribunal. The Tribunal considered this application on 12th February, 1963, and disallowed inspection of ballot papers other than those which had been inspected by the election petitioner. The reason which appealed to the learned Tribunal was that respondent No. 1 Sri Satya Ketu had not filed any recriminatory notice u/s 97 of the Representation of the People Act and consequently had no right to challenge any votes that had been counted in favour of the election petitioner. The Tribunal thought that decision of this Court which was on all fours on the point reported in Lakshmi Shanker v. Kunwar Sripal Singh 22 E LR 47 was not binding upon the Tribunal because later two decisions of the Supreme Court had taken a different view and the Tribunal, therefore, thought itself free not to follow the decision of this Court.

3. Against that order the present writ petition has been filed by Sri Satya Ketu and the contention of learned counsel for the applicant is that the Tribunal was bound by the decision of this Court, that the Supreme Court decisions do not touch the matter and there is an apparent mistake in the judgment of the Tribunal whereby it considered itself

free not to follow the decision of this Court. The learned counsel has also contended that the case reported in E LR (All) 47 (supra) has been rightly deckled and the Tribunal was wrong in refusing inspection of the voting papers which had been counted as valid votes in favour of the election petitioner.

4. We have heard learned for the parties at length on the question whether the respondent to an election petition can challenge the votes recorded in favour of the election petitioner otherwise than by giving a notice u/s 97 of the Representation of the People Act. The view taken by the Division Bench of this Court in Lakshmi Shanker''s case ELR (All) 47 was that a respondent had a right to challenge the validity of the votes counted in favour of the election petitioner if the purpose of the challenge merely ware to indicate that the result of the election will not be affected even though some invalid votes had been counted in favour of the successful candidate because of invalid votes also having been counted in favour of the election petitioner. According to that Division Bench case Section 97 only applied to those cases where the respondent did not merely wish to defend his own election and show that the election remained valid but wanted further to show that although his election may be void the election of the election-petitioner also was invalid. Thus a clear distinction was made between a defence raised in order to defend his own title and an attack on the election petitioner''s right to be elected. We need not repeat the reasons which have been elaborated by the learned Judges in that case. Suffice it to say that we respectfully agree with the conclusions arrived at in that case.

5. The next question that arises is whether the authority of that ruling has been shaken by the pronouncements of the Supreme Court in the two cases relied upon by learned counsel for the respondents in this Court and by the learned Member of the Tribunal who decided the case, the first case which has been cited in that connection is Bhim Sen v. Gopali ELR (SC) 288 , which has been misquoted in the judgment as at p. 285. In that case the successful candidate as a respondent had denied the allegations in the election petition that any irregularity had been committed and any irregular vote whatever had been counted as void by the Returning Officer.

When after inspection it was discovered that 37 invalid votes had been counted for the successful candidate he filed an additional written statement and then attempted to raise the question that invalid votes had also been received in favour of the election petitioner. By that time the period for filing a recriminatory notice u/s 97 had expired. It was contended that even though the period for recriminatory notice had expired yet the respondent had the right to challenge the votes cast in favour of the election petitioner. This argument was raised in the High Court for the first time. The High Court did not decide that question because it was of the opinion that in the election petition itself the challenge of the votes in favour of the successful candidate had been made for the first time after amendment of the election petition. That amendment was itself invalid and, therefore, it was not necessary to go into the question whether the respondent had such a right other than by filing a recriminatory notice or not. The High Court thereupon allowed the appeal on the sole ground that the Tribunal was wrong in allowing the amendment of

the election petition. The matter then went to the Supreme Court. Their Lordships of the Supreme Court came to a different conclusion and held that the amendment was rightly allowed and on that basis set aside the judgment of the High Court. It was then argued in the Supreme Court that the respondent should have been allowed the inspection of voting papers cast in favour of the appellant in order to see if the appellant also got the benefit of void votes. This contention was repelled by the learned Judges of the Supreme Court. They then observed as follows:

"As we have already pointed out, in his written statement respondent 1 made a positive averment that no void votes had been allowed to be used by the Returning Officer and that the Returning Officer had fully discharged his duties u/s 63. It is true that after it was discovered that he had received 37 void votes respondent 1 attempted to make an allegation that the appellant may likewise have received similar void votes, but it was too late then, because the time for making such an allegation by way of a recriminatory proceeding had elapsed and respondent 1 had failed to furnish the security of Rs. 1,000/- as required by Section 97(2) of the Act. If under these circumstances respondent 1 was not allowed to pursue his allegation against the appellant, he is to blame himself."

This passage clearly indicates that the Supreme Court was not deciding the question whether such a defence could be taken only by way of recriminatory notice. Taken as a general defence, the respondent had contended that no mistake had taken place and as such could not plead otherwise later on. Taken as a recriminatory statement, it had become too late. Their Lordships, therefore, disallowed this objection to be raised in either situation. If in the opinion of the learned Judges the position was that such a statement could only be taken in recriminatory proceeding, then the first part of the reason for disallowing it was wholly redundant. The very fact that their Lordships thought if fit to say that in the original written statement the defendant had alleged that no mistakes had taken place necessarily indicates that the defendant, if he so chose, could have taken that defence in the original statement as a general defence instead of denying the allegations of the election petitioner. To our mind, the whole passage clearly negatives the idea of the Supreme Court holding that a defence of this kind is barred unless taken in recriminatory proceedings.

6. The other case which was referred in this connection was Inamati Mallappa Basappa Vs. Desai Basavaraj Ayyappa and Others, . That case appears to be wholly irrelevant for this purpose, and merely lays down that the right to file a notice of recrimination u/s 97 accrues to the returned candidate or any other party as soon as an election petition is presented containing a claim for a further declaration that the petitioner himself or any other candidate has been duly elected. This authority cannot be taken to mean that simply, because a right to file a recriminatory notice u/s 97 accrues to a successful candidate his right to defend his title without filing a recriminatory statement becomes barred. We are, therefore, unable to see how there two cases of the Supreme Court affect the question which was considered by this Court in the case of Lakshmi Shanker E LR (All) 47 .

7. In the result, we find that the Tribunal was bound to follow the decision of this Court in Lakshmi Shanker, etc. E LR (All) 47 This is a mistake apparent in his judgment and the decision is liable to be quashed. On that ground, we accordingly allow the petition and grant a writ in the nature of certiorari quashing the order of the Election Tribunal dated 12th February 1963. The Tribunal will dispose of the application for, inspection according to law and proceed further in the matter. We fix the cost at Rs. 250/-. The stay order dated 19th February, 1963 is discharged.