

## Rajesh Kumar Vs Devendra Singh

**Court:** Madhya Pradesh High Court

**Date of Decision:** April 18, 2013

**Acts Referred:** Constitution of India, 1950 " Article 173(a)

Evidence Act, 1872 " Section 45

Representation of the People Act, 1950 " Section 16

Representation of the People Act, 1951 " Section 100, 30, 33, 33(1), 33(4)

**Citation:** (2013) ILR (MP) 1072 : (2013) 3 MPLJ 640

**Hon'ble Judges:** R.C. Mishra, J

**Bench:** Single Bench

**Advocate:** Manoj Sharma with Rajmani Mishra, for the Appellant; Imtiyaz Husain with R.B. Patel, for the Respondent

**Final Decision:** Dismissed

### Judgement

R.C. Mishra, J.

In this petition, election of the returned candidate viz. the respondent to the M.P. Legislative Assembly Constituency No.

143, Silwani has been called in question on the ground of improper rejection of the nomination paper, as contemplated in clause (c) of sub-section

(1) of S. 100 of the Representation of the People Act, 1951 (for short "the Act"). The petitioner has sought declarations to the effect that (a) the

order dated 8.12.2008 passed by the Assistant Returning Officer was illegal and (b) election of the respondent to the Constituency is void. The

corresponding calendar was notified as under:--

2. Indisputably, on 11.8.2008, the petitioner's nomination paper, a copy of which has been tendered in evidence as Exhibit P-1, was rejected for

the reason that he, being an elector of a different constituency namely M.P. Legislative Assembly Constituency Udaipura No. 140, had failed to

submit a copy of the electoral roll of that constituency or certification from ERO of that constituency, as per requirement of sub-section (5) of

Section 33 of the Act.

3. According to the petitioner, rejection of the nomination paper was wholly arbitrary, illegal and against the relevant provisions of the Act, as

contained in Sections 33(4), 33(5), 36(2)(b), 36(4) and 39(2)(c) thereof. In support of the assertion, he has further pleaded that:--

(A) the nomination form, in the prescribed format, filed in support of his candidature as an independent candidate, was:--

(i) duly completed by him in all respects and

(ii) signed by himself

(iii) subscribed by 10 proposers, who are electors of the constituency as required by Section 33(1) of the Act.

(B) Since he was an elector of a different constituency, he had also filed a copy of the relevant part of the electoral roll of that constituency as

required by sub-section (5) of Section 33 of the Act.

(C) Letter of Tahsildar (Annexure P-2) clearly reflected that he had annexed a copy of the relevant part of the electoral roll in compliance with

provision of sub-section (5) of the S. 33 of the Act and even otherwise, in view of the decision in Rakesh Kumar Vs. Sunil Kumar, , the Assistant

Returning Officer should have afforded an opportunity of hearing to him before rejecting the nomination paper.

4. While raising preliminary objections to the effect that the petition deserves to be dismissed at the threshold for:--

(a) want of compliance with the provision of Section 81(3) of the Act.

(b) non-compliance with the requirements of Section 83(1)(c) of the Act.

(c) absence of a common authorship in signatures on the nomination paper as well as on the petition,

- the respondent, in his written statement, has submitted that rejection of the petitioner's nomination paper was justified in view of the facts that

despite grant of opportunity, he did not furnish certified copy of the electoral roll of the constituency which he belonged to and that the photocopy

of the electoral roll submitted on his behalf, was not sufficient to establish his identity. According to him, the nomination form was liable to be

rejected for other reasons also namely:--

(i) It did not bear signature of the petitioner.

(ii) Provision of Article 173(a) of Constitution of India was not complied with.

(iii) The petitioner had made contradictory statements regarding his caste.

5. In the light of these pleadings, the following issues have been framed and amongst them, issue Nos. 3(a) and 3(b), based on legal objections,

have already been decided vide order dated 11.1.2010 as preliminary issues:--

ISSUE Nos. 2(i) and 3(c)

6. The petitioner (PW2) has clearly asserted that the nomination paper (Ex. P-1), though filled by Neeraj Shrivastava (PW3), an Advocate

practicing at Udaipura, bears his signatures only. His statement has drawn ample support not only from evidence of Neeraj Shrivastava but also

from a candid admission made by respondent Devendra Singh (DW1) in his chief examination recorded on 2.2.2012 to the effect that the form

was submitted before the Returning Officer by the petitioner only. From the tenor of his deposition, it is evident that his objection to the

genuineness of signatures of the petitioner on the nomination form is based on the allegation that the same are dissimilar to his admitted signatures

on the petition. In such a situation, his application, u/s 45 of the Evidence Act, for summoning an handwriting expert to compare the signature was

rejected vide order-dated 20.6.2012 while endorsing the contention raised by the petitioner that it is not uncommon to find difference in the

signatures of the same person even after a short interval of time. The relevant excerpt of the order may be reproduced as under:--

20. However, fact of the matter is that in accordance with Section 81(1) of the Act, an election petition has to be presented in person before the

Registrar of the Court and the corresponding report of the Registry raises a presumption, though rebuttable, that the petition was filed by the

petitioner himself Moreover, for establishing that while filing the nomination paper, someone else has impersonated himself as the petitioner, the

Returning Officer would be the best witness. The well-settled position of law on the comparison of disputed signature/writing with the admitted

signature/writing has already been discussed. This apart, it is trite that the effect of an alleged admission depends upon the circumstances in which it

was made. For this, the following illuminating observations made by the Supreme Court in Nagubai Ammal and Others Vs. B. Shama Rao and

Others, may usefully be quoted:--

an admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must

depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has

not acted upon it to his detriment, when it might become conclusive by way of estoppel.

21. To sum up, it is neither expedient in the interests of justice nor desirable to summon the Handwriting Expert for opinion on the aforesaid point.

This I.A. also deserves rejection with costs.

7. It is relevant to note that for the reasons recorded in the same order, respondent's yet another application for summoning the Returning Officer

as a Court Witness was dismissed with liberty to call the officer in evidence as his own witness. But, the respondent has not preferred to do so.

8. In the light of the oral evidence brought on record as well as the presumption attached to the correctness of the report of the Registry, it is not

possible to hold that signatures of the petitioner either on the nomination form or on the election petition were not genuine. Both the issues,

therefore, deserve to be and are answered in the favour of the petitioner.

ISSUE No. 2 (ii) AND 2 (iii)

9. Even though, respondent Devendra Singh (DW1) has been emphatic in stating that during his presence from 1 p.m. to 2 p.m. in the election

office, the petitioner, despite being asked by the Returning Officer to do so, had failed to make and subscribe the requisite oath, as enjoined by

Article 173(a) of the Constitution of India yet, he has not been able to explain his own conduct in not making any complaint before the Returning

Officer as well as in not incorporating the corresponding pleading in the written statement. Moreover, as concluded already, none of the signatures

on the nomination form purporting to be appended by the petitioner including the one available on the form of oath can be treated as an ingenuine

one. Thus, there is nothing on record to doubt correctness of the contents of the form of oath, duly signed by the authorized person, suggesting that

the petitioner had subscribed the oath on 7.11.2008 at 1.20 p.m.

10. Coming to the issue No. 2(iii), it may be observed that, admittedly, Silwani Seat in the Legislative Assembly Constituency was declared

reserved for the Scheduled Castes of the State. The nomination form (Ex. P-1) read as a whole clearly reflects that the petitioner had sought to

contest the election as a member of Scheduled Caste "Mehra". As such, the error crept in showing him as a candidate belonging to General

Category on one of the pages of the form was not sufficient to reject the same on the ground of disqualification.

11. For these reasons, both the issues are decided in the negative.

ISSUE No. 1

12. At the outset, it may be observed that in absence of corresponding pleadings, the statement on oath made by petitioner Rajesh Kumar to the

effect that neither at the time of presentation nor at the time of scrutiny, he was informed about any defect in the nomination form cannot be

accepted. Further, contents of the letter (Ex. P-2) dated 12.1.2009 authored by Aditya Sharma, the then Tahsildar, Begumganj, clearly indicates

that the petitioner had filed only a photocopy of the relevant extract of electoral roll of Udaipura Constituency.

13. As pleaded by the petitioner, he has substantially complied with the requirement of sub-section (5) of Section 33 of the Act by annexing copy

of the relevant part of the electoral roll. In order to show that copy [Ex. P-1A] is a true copy of the relevant extract of the electoral roll, the

petitioner, while placing reliance on decision of the Punjab High Court in S. Balwant Singh and Others Vs. Union of India (UOI) and Others, has

sought to bring on record a certified copy of the electoral roll (Ex. P-3). The objection taken by the respondent on the ground that the covering

page of the certified copy containing description of the document to be copied, was not filed along with the election petition, was kept reserved for

being decided on merits.

14. To fortify the objection that the document (Ex. P-3) cannot be taken into consideration, reliance has been placed to the following observations

made by a Constitution Bench in *Ranjit Singh Vs. Pritam Singh and Others*,

Section 33(5) requires that it is the copy produced by the candidate which should show whether he is qualified or not and for that purpose a copy

produce a by the candidate should be complete whether it is of the roll or of the relevant part thereof. To such a case S. 36(4) has no application.

15. Before proceeding further, it would be necessary to advert to the relevant provisions as contained in sub-section (5) of Section 33 and sub-

sections (1) and (4) of Section 36 of the Act. The provisions read:--

Section 33. Presentation of nomination paper and requirements for a valid nomination

(5) Where the candidate is an elector of a different constituency, a copy of the electoral roll of that constituency or of the relevant part thereof or a

certified copy of the relevant entries in such roll shall, unless it has been filed along with the nomination paper, be produced before the returning

officer at the time of scrutiny.

Section 36. Scrutiny of nominations

36. Scrutiny of nominations.--(1) On the date fixed for the scrutiny of nominations u/s 30, the candidates, their election agents, one proposer of

each candidate, and one other person duly authorised in writing by each candidate, but no other person, may attend at such time and place as the

returning officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates

which have been delivered within the time and in the manner laid down in Section 33.

(2)...

(3)...

(4) The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.

16. A bare perusal of the judgment rendered in *Bansi Ram's case* (ibid) would reveal that it is based on a three-judge Bench decision of the

Supreme Court in *N.T. Veluswami Thevar Vs. G. Raja Nainar and Others*, propounding that:--

..evidence can be adduced before the Election Tribunal on the point of the nomination paper having been improperly rejected; the Election Tribunal

is not confined only to the material actually placed before the Returning Officer, Section 36 unequivocally lays down that the Returning Officer has

only to hold such summary enquiry as he thinks necessary. The statute does not lay down anywhere that the Election Tribunal trying the issue

relating to improper rejection of a nomination paper in an election petition is bound to confine itself only to the material available to the Returning

Officer at the time of scrutiny. Keeping in view the paramount importance of the election of the representatives of the people to our Legislatures the

right to seek election could not have been intended by the Parliament to depend on summary enquiry of the Returning Officer as contemplated by

Section 36. The Election Tribunal is therefore well within its power in considering the question of the propriety and legality of the order of rejection

of nomination papers on the evidence produced in the course of the trial of the election petition.

17. Accordingly, the objection is overruled and the document (Ex. P-3) is admitted in evidence. However, the fact remains that the copy (Ex. P-1

A) is an incomplete copy of the part of the electoral roll of which Ex. P-3 is a certified copy. Apparent defects are:--

(i) it is a photocopy and, as such, there was no possibility of the document being compared with original, which, at the relevant point of time, was

in the office of Returning Officer for Udaipura Constituency.

(ii) it is not attested even by the petitioner himself.

(iii) copy of the covering page containing description or the receipt comprising particulars of copying application, if any, made by the petitioner is

not annexed thereto.

(iv) details of the part of the electoral roll are not reflected.

(v) it included details of most of the other voters as mentioned in the electoral roll along with his/her photograph but the space for photograph of

the petitioner is left blank.

18. In Ranjit Singh Vs. Pritam Singh and Others, , a Constitution Bench had the occasion to consider the purport and object of sub-section (5) of

Section 33 of the Act. K.N. Wanchoo, J. (as his Lordship then was), speaking for the Court, observed:--

7. The object of this provision obviously is to enable the returning officer to check whether the person standing for election is qualified for the

purpose. The electoral roll of the constituency for which the returning officer is making scrutiny would be with him, and it is not necessary for a

candidate to produce the copy of the roll of that constituency But where the candidate belongs to another constituency the returning officer would

not have the roll of that other constituency with him and therefore the provision contained in S. 33(5) has been made by the legislature to enable the

returning officer to check that the candidate is qualified for standing for election. For that purpose the candidate is given the choice either to

produce a copy of the electoral roll of that other constituency, or of the relevant entries in such roll before the returning officer at the time of the

scrutiny, if he has not already filed such copy with the nomination paper.....

... ..

12.....That provision [sub-section (4) of S. 36] is to the effect that the returning officer shall not reject any nomination paper on the ground of any

defect which is not of a substantial character. But the non-production of a complete copy of the relevant part in our opinion is a defect of a

substantial character for it makes it impossible for the returning officer to decide whether the candidate is qualified or not. Qualification for standing

for election is a matter of substantial character"".

19. Still, making extensive reference to Paragraphs 19 to 21 of a three-judge Bench decision in Rakesh Kumar's case, learned counsel for the

petitioner has strenuously contended that principles of natural justice could not be excluded from the election process. According to him, non-grant

of opportunity of hearing by the returning officer to meet the objection before rejecting the nomination form, by itself, is sufficient to render the

rejection as illegal.

20. However, a close analysis of the factual aspects in Rakesh Kumar's case (supra) would show that:--

(a) the last date of filing nominations was 20-1-1997 and the date of polling was 6-2-1997 and, therefore, the case related to a period prior to the

amendment of the Symbols Order on 20-5-1999 by which para 13-A has been added. Two persons, namely, Sunil Kumar and Veer Abhimanyu

had submitted Forms A and B claiming to be candidates of the Bhartiya Janta Party. At the time of scrutiny, the Returning Officer suo motu raised

an objection to the effect that since BJP had set up more than one candidate, none could be treated as a candidate of the said political party and

rejected the nomination papers of both Sunil Kumar and Veer Abhimanyu. Sunil Kumar made an application stating that he was the official

candidate of the party and he requested for twenty-four hours" time to produce an official confirmation of his candidature but the application was

rejected and no time was given, though no other candidate (including Veer Abhimanyu) had raised any objection.

(b) Since the political party in question had not rescinded the earlier Form B notice, the Returning Officer after declining the request made by one

of the candidates for time to produce the official confirmation of his candidature by the party, proceeded to reject the nomination of both the

candidates set up by the party as well as the nomination of the substitute candidates.

21. It was in the context of the aforesaid facts that the Apex Court proceeded to hold that the Returning Officer ought to have granted him time to

meet the objection in the interest of justice and fair play as he was not expected to reject nomination paper without giving an opportunity to the

candidate or his representative present at the time of scrutiny to meet an objection capable of being made, particularly, where such an opportunity

is sought for by the candidate or his representative. For a ready reference, the relevant observations may be reproduced thus:--

..The legislature in its supreme wisdom did not amend the proviso to Section 36(5) of the Act after Section 33(1) was amended in 1996, thereby

clearly exhibiting its intention that the said proviso was required to be given its full effect, more particularly because the duty which a returning

officer performs while scrutinising the nomination papers is quasi judicial in character, even after Section 33(1) had been amended.

The proviso to Section 36(5) of the Act lays down;

Provided that in case (an objection is raised by the returning officer or is made by any other person) the candidate concerned may be allowed time

to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to

which the proceedings have been adjourned.

Through the proviso, the legislature has provided that in case an objection is raised during the scrutiny, to the validity of a nomination paper of a

candidate, the Returning Officer, may, give an opportunity to the concerned candidate to rebut the objection by giving him time ""not later than the

next day"". This is in accord with the principles of natural justice also. Since, no other candidate had raised any objection to the claim of the

respondent of being the official candidate of BJP, and the objection had been raised by the Returning Officer suo motu, the mandate of the proviso

to Section 36(5) of the Act warranted the holding of a summary enquiry, to determine the validity of the nomination paper by the returning officer,

while exercising his quasi-judicial function. In the present case, the respondent had sought an opportunity to meet the objection, but even if he had

not sought such an opportunity, the returning officer ought to have granted him time to meet the objection in the interest of justice and fair play

22. This apart, as pointed out farther:--

The Returning Officer would have been justified in rejecting the nomination paper of the respondent, had the respondent either not sought an

opportunity to rebut the objection raised by the Returning Officer or was unable to rebut the objection within the time allowed by the returning

officer....

Having raised the objection suo motu, the request of the respondent who was present and sought time in writing to seek clarification from the BJP

as to who was its official candidate, the Returning Officer in all fairness was obliged to grant time to the respondent as prayed for by him and

postponed the scrutiny to the next day but he ought not to have rejected his nomination paper in hot haste. The Returning Officer, obviously, failed



to exercise his jurisdiction u/s 36(5) of the Act properly and thereby fell into a grave error in rejecting the nomination paper of the respondent.

23. However, the facts of the instant case are distinguishable as it has nowhere been pleaded by the petitioner that he or his authorized

representative had remained present at the time of scrutiny of the nomination paper and had requested for postponing the scrutiny to the next day

so as to enable him to file a complete copy of the relevant extract of the electoral roll.

24. It is trite that if an election petitioner wants to put forth a plea that a nomination was improperly rejected to declare an election to be void it is

necessary to set out the averments for making out the said ground. The reason given by the Returning Officer for refusal to accept the nomination

and the facts necessary to show that the refusal was improper is required to be set out in the election petition. In the absence of the necessary

averments it cannot be said that the election petition contains the material facts to make out a cause of action (See Nandiesha Reddy Vs. Mrs.

Kavitha Mahesh, . In this view of the matter, the petitioner's assertion that he himself had remained present at the time of scrutiny, not being in line

or consistent with the pleadings, cannot be looked into or relied upon and as an obvious consequence, the principle laid down in Rakesh Kumar's

case is of no avail to the petitioner.

25. The other provisions relevant to the present discussion and contained in sub-sections (6), (7) & (8) of Section 36 of the Act, may also be

extracted thus:--

(6) The returning officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is

rejected, shall record in writing a brief statement of his reasons for such rejection.

(7) For the purposes of this section, a certified copy of an entry in the electoral roll for the time being in force of a constituency shall be conclusive

evidence of the fact that the person referred to in that entry is an elector for that constituency, unless it is proved that he is subject to a

disqualification mentioned in Section 16 of the Representation of the People Act, 1950 (43 of 1950).

(8) Immediately after all the nomination papers have been scrutinized and decisions accepting or rejecting the same have been recorded, the

returning officer shall prepare a list of validly nominated candidates, that is to say, candidates whose nominations have been found valid, and affix it

to his notice board.

26. As indicated already, the so called copy of relevant part of the electoral roll (Ex. P/1A) pertaining to Udaipura Constituency was not a

complete copy and in terms of Sub-section (5) of Section 33, the requisite copy of the Electoral Roll could be produced only either with the

nomination paper or at the time of scrutiny. While pointing out that the statute does not contemplate any other time for production of such copy, a

three Judge Bench of the Supreme Court in Jeet Mohinder Singh Vs. Harminder Singh Jassi, following to the Constitution Bench judgment in

Ranjit Singh's case (above) has restated the settled legal position in the following words:--

.....Where the candidate is an elector of a different constituency, Section 33(5) prescribes the "manner" of proving the factum of the candidate

being an elector of a different constituency in one of the three modes :"(i) by producing a copy of the electoral roll of that constituency or (ii) a

copy of the relevant part thereof or (iii) a certified copy of the relevant entries in such roll. Any other mode of proof is excluded. This has been

explained by the Constitution Bench of this Court in Ranjit Singh Vs. Pritam Singh and Others, So far as the time is concerned, as we will deal with

shortly hereinafter the earliest and outer limits of time are prescribed. The requisite document has to be produced either with the nomination paper

which is the earliest point of commencement of time limit or at the scrutiny of the nomination papers which is the outer limit. It is pertinent to note

that Section 33(5) does not specifically provide who shall produce the requisite document before the returning officer. All that it provides for is that

one of the three the documents must be produced.

27. Taking into consideration all these factual and legal aspects of the matter, it is also not possible to hold that the Returning Officer had

committed any impropriety in rejecting the petitioner's nomination form. The conclusion can be summed up in no better words than the following

used by the Apex Court in Narbada Prasad Vs. Chhaganlal and Others, --

There was no compliance with the provisions of Section 33(5) of the Representation of the People Act and there was no power in the court to

dispense with this requirement. It is a well-understood rule of law that if a thing is to be done in a particular manner it must be done in that manner

or not at all. Others modes of compliance are excluded.

..... non-compliance with Sec. 33(5) is a defect of a substantial character and is not covered by Section 36(4) of the Act. The Returning

Officer in this case rightly"" rejected the nomination paper of Jivabhai and the rejection cannot be held to be improper.

Accordingly, the issue No. 1 is decided in favour of the respondent.

ISSUE No. 4

28. In the light of the findings of issue Nos. (1), (2) and (3), no case is made out for interference with the result of the election in question. The

issue is, accordingly, answered in the negative.

ISSUE No. 5

29. Consequently, the election petition is dismissed. There shall be no order as to costs. A copy of this judgment be forwarded to the Election

Commission as well as to the Speaker of the State Legislative Assembly.