

**Lal Singh Vs. State of Jandk and Others**

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**Court :** Jammu and Kashmir

**Decided On :** Jan-31-2014

**Judge :** Hasnain Massodi

**Appeal No. :** OWP. No. 238 of 2012, CMA. No. 2067 of 2012 & CMA. No. D-1086 of 2012

**Appellant :** Lal Singh

**Respondent :** State of Jandk and Others

**Judgement :**

1. Petitioner and respondent no.7 contested election of Sarpanch, Panchayat Halqa, Kumait, District Ramban held on 16.05.2011. In all 1148 voters cast their votes. Petitioner secured 526 votes while respondent no.7 got 525 votes, 81 votes went in favour of one Mohd. Mubeenthird candidate in the fray. While counting was on and petitioner likely to be declared elected, two tendered votes were opened by the Assistant Returning Officer. Both the votes went in favour of respondent no.7. His tally, therefore, got increased to 527, while petitioners votes remained at 526.

2. Petitioner objected to counting of two tendered votes on the ground that, the votes could not be counted in terms of JandK Panchayati Raj Act, 1989 and rules made there under. The matter was reported to Chief Electoral Officer through proper channel. The District Panchayat Election Officer, Ramban-Deputy

Commissioner recommended re-poll, as according to him, election to aforementioned constituency was void.

3. The Deputy Chief Electoral Officer, in response to the communication No. 191/DCR/PS dated 17.05.2011 received from District Panchayat Election Officer (Deputy Commissioner) Ramban vide communication No. 5309/CEO/P.E/Gen/6236 dated 19.05.2011, directed recounting and also issued instructions to be observed during recounting. One of such instructions was not to count the tendered votes. On recounting, petitioner was found to have polled 525 votes as against 523 votes secured by respondent no.7. Number of votes secured by Mohd. Mubeen remained at 81. Petitioner was, accordingly, declared elected Sarpanch, 28-Panchayat Halqa Kumait, District Ramban.

4. Respondent no.7, not satisfied with the election result, filed statutory appeal under Section 43 of JandK Panchayati Raj Act, 1989 before Additional Deputy Commissioner, Ramban-the appellate authority under Panchayati Raj, Act. Petitioner filed his objections to the appeal.

5. The appeal was allowed and the order of Returning Officer 28-Halqa Panchayat, Kumait, District Ramban, dated 20.05.2011, set aside. Petitioners election as Sarpanch 28-Panchayat Halqa, was resultantly set aside.

6. Petitioner aggrieved with the order of Additional Deputy Commission, Ramban, the appellate authority, dated 15.02.2012, has come up with the writ petition on hand. He seeks quashment of the order impugned on the grounds set out in the petition.

7. The respondent no. 7 oppose the writ petition on the grounds that as the Tendered Votes, were on enquiry found to be genuine and the voters namely Manohar Lal and Gayatri Devi to have been impersonated, it was incumbent on the Returning Officer to count the votes in favour of respondent no. 7 and declare the result accordingly. It is pleaded that fake votes were cast in favour of the petitioner on behalf of late Pulla Singh (S.No. 5 in the voter list), Ram Chand (S. No. 31 in the voter list), Sarban (S. No. 25 in the voter list), who had died much before the polling date and that two voters, namely, Parvez Ahmad (S. No. 124 in

the voter list) and Zareena Begum (S. No. 125 in the voter list) were allowed to cast their votes in favour of petitioner, though they belong to Panchayat Halqa Ghari and had no right to cast their vote in Panchayat Halqa Kumait.

8. I have gone through the pleadings and the record available on the file. I have heard learned counsel for the parties.

9. Facts are not in dispute. The election in question was conducted on 16.05.2011. In all 1148 voters cast their votes. The votes were counted in the afternoon of date of polling. Petitioner was found to have secured 526 votes and respondent no. 7 secured 525 votes. His tally, however, increased to 527 votes after two tendered votes were opened and counted in his favour. It appears that the results of election infuriated the petitioner, who created a law and problem and the government employees deputed for election duty were rescued with the help of police party headed by Shri Updesh Kumar, Dy.SP/SHO Police Station, Ramban. In the said background, the Returning Officer did not declare the election result and instead he and Assistant Returning Officer submitted a joint report to the District Panchayat Officer (Deputy Commissioner) Ramban narrating the events of 16.05.2011 at Polling Station, Kumait. The District Panchayat Officer, addressed a communication on 19.05.2011 itself to the Chief Electoral Officer, Srinagar, recommending re-poll and conduct of free, fair and transparent election of Sarpanch, Panchayat Halqa, Kumait.

10. The Chief Electoral Officer, seemingly, did not accept the recommendation made by the District Panchayat Officer, Ramban and through Deputy Chief Electoral Officer vide communication No. 5309/CEO/P.E/Gen/6236 dated 19.05.2011, issued following directions to the District Panchayat Officer:

1) Tender votes cannot be counted.

2) Ballot paper account/invalid votes/Presiding Officers Diary should be scrutinized minutely before starting recounting exercise.

3) As reported, Sh. Lal Singh has won by one vote. So, in order to set the controversy at rest the votes should be recounted in the presence of contesting

candidates under your supervision. The whole process shall be video-graphed.

4) Notice in writing should be given to all the contesting candidates specifying date, time and venue of the re-counting. Candidates should also be informed through notice them in the case of their failure attend the recounting centre all specified time the schedule process for re-counting of votes shall be carried on in normal course without any further information.

5) The detailed factual Report along with the CD of re-counting made may be sent to the office after completion of the whole exercise. The result should only be declared after seeking approval from the Election Authority.

11. The Returning Officer, Kumait in compliance of the instructions recounted the votes in presence of the contesting candidates. The tendered votes and rejected votes were segregated and on counting the votes polled following position emerged:-

| S.No. | Name of the contesting candidate | Votes Secured |
|-------|----------------------------------|---------------|
| 1.    | Sh. Sher Ali                     | 523           |
| 2.    | Sh. Lal Singh                    | 525           |
| 3.    | Mohd Mubeen                      | 81            |
|       | Total                            | 1129          |
|       | Rejected Votes                   | 17            |
|       | Tendered Votes                   | 02            |
|       | G. Total                         | 1148          |

12. The Returning Officer, accordingly, issued CERTIFICATE OF ELECTIONS in Form PEL-16 declaring petitioner elected as Sarpanch Panchayat Halqa, Kumait

13. The Returning Officer while recounting the votes, did not adhere to the instructions conveyed vide communication No. 5309/CEO/P.E/Gen/6236 dated 19.05.2011 and the procedure laid down by Rule 30 of JandK Panchayati Raj Rules, 1936. It would be appropriate to reproduce the Rule hereunder:-

30. Tendered Vote

(1) If a person representing himself to be particular voter named in the electoral roll applies for a ballot paper after another person has voted as such voter, he shall, after duly answering such questions as the Presiding Officer may ask, be entitled to vote through a tendered ballot paper. A tendered ballot paper shall be the same as other ballot papers used at the polling station except that:-

(a) Such tendered ballot paper shall be serially the last in the bundle of ballot papers,

(b) Such tendered ballot paper and its counterfoil shall be enclosed on the back with the words Tendered Ballot Paper by the Presiding Officer in his hand and signed by him;

(c) The elector after marking, a tendered ballot paper in the voting, compartment and folding, it shall hand over the same to the Presiding Officer instead of putting in the ballot box; and

(d) The Presiding Officer shall then endorse the name of the elector and his serial number in the electoral roll and place the ballot paper in a separate cover.

(2) The name of the voter, his serial no. In the electoral roll and the name of the constituency to which the roll relates shall be entered in a list bearing Tendered Voters List. The person tendering such ballot paper shall sign his name and address thereon or affix his thumb impression against the entry in that list.

(3) The Tendered Voter List shall be prepared by the Presiding Officer in Form No. 18.

14. A bare look at the Rule would reveal that in case a voter approaches the Presiding Officer on the election day, complaining that he has been impersonated by someone and his vote has been cast by such person, the Presiding Officer is to make a brief enquiry and allow the person to cast his vote through a tendered ballot paper. The voter after marking the tendered ballot paper is to hand it over to the Presiding Officer who after recording necessary details like name of the voter, serial number in the voter list, place the tendered ballot paper in a separate cover. The tendered ballot paper may not be opened in case the gap/difference in

number of votes secured, between two contesting candidates is more than the number of tendered votes. In such case, tendered votes are not to change the result of the election. However, tendered votes assume importance in case the difference between votes polled by two contesting candidates is narrow and may be tilted either way by the tendered votes.

15. The Returning Officer, where the position emerging from the counting of votes warrants counting of tendered votes as well, is to find out whether the vote(s) cast in place of the voters permitted to offer tendered votes, were cast by fake persons and whether the tendered votes were cast by genuine voter. In this regard, the parties are to be given opportunity to adduce evidence in support of their respective stand. In case, on the basis of evidence brought on record, the Returning Officer is satisfied that vote of the voter permitted to offer tendered ballot paper was cast by someone else, and that the voter permitted to cast a tendered vote is genuine voter, the Returning Officer has not only to add the tendered vote to the credit of the candidate in whose favour it is cast but also delete the vote cast by impersonation from the vote account of the candidate in whose favour vote by impersonation was cast. The procedure to be followed by the Returning Officer in case of Tendered Ballot Papers fell for consideration before the Supreme Court in *Dr. Wilfred Dsouza v. Francis Menino Jesus Ferrao*, (1977) 1 SCC 396. The Court emphasizing that the proper occasion to scrutinize Tendered Ballot Paper would normally arise only when the difference between the number of votes polled by the candidate declared elected and his nearest rival is so small that there is possibility of that difference being wiped out and the result materially affected if the courts take into account the tendered ballot papers and exclude from consideration the corresponding votes which were cast by the persons other than the genuine votes, held that before a tendered ballot paper can be taken into account during the proceedings wherein election is questioned, evidence would have been led on the following two points:-

(1) The person who cast the initial vote as a voter on a particular serial number in the electoral roll was someone other than the genuine voter mentioned at that number.

(2) It was such genuine voter who marked the tendered ballot paper. The Court proceeded to observe:-

So far as the first point is concerned, the evidence of the genuine voter that he had not cast such initial vote would normally and in the absence of any circumstance casting doubt regarding its veracity be sufficient. Once the above two points are proved, the following consequences would follow:

(a) The court would exclude the vote initially cast by the person other than the genuine voter from the number of votes of the candidate in whose favour it was cast; and

(b) The court would further take into account the tendered ballot paper in favour of the candidate in whose favour it is duly marked.

16. In the present case, there admittedly was a narrow gap of two votes between petitioner and respondent no. 7, even on recounting. The two tendered votes that could have wiped out difference between the two close contestants were not considered at all by the Returning Officer. Having regard to the narrow gap between petitioner and respondent no. 7, occasion arose, as laid down by Supreme Court in Dr. Wilfred D souzas case (supra) for scrutinizing the tendered ballot papers. The Returning Officer, unmindful of the mandate of law, did not make an exercise to find out whether the votes initially cast in the name of voters allowed to offer tendered ballot papers, were cast by persons other than such voters. The parties were not given an opportunity to adduce evidence in support of their respective stand. The Returning Officer set apart two tendered votes, and declared the result on counting rest of the votes. He failed to realize that in case two tendered ballot papers were on strength of

the evidence to be adduced, held to be counted and the two votes went in favour of respondent no. 7, his tally would increase to 525 and in case two votes cast in the name of the voters permitted to offer tendered votes, were cast in favour of petitioner, his tally would come down to 523 votes after the two votes were subtracted from his tally. The respondent no. 7, therefore, would have a right to be declared as Sarpanch, Panchayat Halqa, Kumait.

17. The Appellate Authority against the above backdrop was right in allowing the appeal against the election of petitioner as Sarpanch, Panchayat Halqa, Kumait. However, the Appellate Authority did not proceed further to scrutinize the tendered ballot papers and afford the parties an opportunity to adduce evidence on the two points i.e. (1) The person who cast the initial vote as a voter on a particular serial number in the electoral roll was someone other than the genuine voter mentioned at that number. (2) It was such genuine voter who marked the tendered ballot paper. It did not either direct the Returning Officer to embark on such exercise. It needs no emphasis that even where tendered ballot papers are excluded from consideration at the time of counting of votes after the poll, these can be taken into account in proceedings throwing challenge to the validity of election. It would be advantageous to reproduce para 14 of the judgmentt in Dr. Wilfred Dsouzas case (supra):-

14. Learned counsel for the parties are, however, agreed that such tendered ballot papers, even though excluded from consideration at the time of counting of votes are the poll, can be taken into account in proceedings to challenge the validity of the election of the returned candidate provided certain conditions are fulfilled. We agree with the learned counsel for the parties in this respect, and find that this position of law is supported by two English decisions, Borough of St. Andrews and Stepney Division of the Borough of Tower Hamlets as also by two Indian decisions, Kalicharan Singh V. Ramcharitar Rai Yadava and A. K. Subbaraya Gounder v. G. Palanisami Gounder.

18. For the reasons discussed, the writ petition is disposed of with the following direction:-

The Appellate Authority shall allow the parties to lead evidence touching issues:

(i) whether the persons who cast the initial votes on a particular serial number in the voter list, were other than genuine voters mentioned at said serial numbers; and that

(ii) whether it was such genuine voters who marked the tendered ballot papers .



The Appellate Authority shall scrutinize the tendered ballot papers on the anvil of evidence so adduced. The scrutiny of the tendered votes shall govern counting of tendered ballot papers for the candidate in whose favour these have been cast and deletion of the votes initially cast in the name of voters permitted to offer tendered votes, from the tally of the candidate in whose favour these were cast. The result of Sarpanch, Panchayat Halqa, Kumait shall be declared accordingly.

19. The matter shall stand remanded to the Appellate Authority for fresh consideration in light of above direction, with the expectation that it would be taken to its logical end, expeditiously as far as possible within four weeks from the date it is taken up by the Authority. Since petitioner has been declared elected Sarpanch, Panchayat Halqa, Kumait by the Returning Officer and his election is under challenge. He shall continue as Sarpanch, Panchayat Halqa, Kumait till the appeal is disposed of subject to orders as may be passed by the Appellate Authority regarding the extent of duties to be performed as such.

20. The writ petition is disposed of accordingly.

21. The parties to appear before the Appellate.

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