Sushil Kumar Vs. Rakesh Kumar

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Court : Supreme Court of India

Decided On : Oct-16-2003

Reported in : AIR2004SC230; 2004(1)BLJR129; JT2003(Suppl2)SC575; 2003(8)SCALE659; (2003)8SCC673

Judge : V.N. Khare, C.J. and; S.B. Sinha, J.

Acts : Representation of People Act, 1951 - Sections 36(2), 116A and 146; Constitution of India - Articles 164, 164(3) and 173; Evidence Act - Sections 17 to 20, 21, 35, 58, 103 and 106; Code of Civil Procedure (CPC) - Order 8, Rules 3 and 5 - Order 29, Rule 13

Appeal No. : Civil Appeal No. 8585 of 2002

Appellant : Sushil Kumar

Respondent : Rakesh Kumar

Advocate for Def. : Pranab Kumar Mullick, Adv.

Advocate for Pet/Ap. : Saiyad Uruj Abbas,; Md. Akram and; Sudhir Nandrajog, Adv

Disposition : Appeal allowed

Prior history : From the Judgment and Order dated 7.8.2002 of the Patna High Court in E.P. No. 3 of 2000

Judgement :
ORDER

OF THE GOVERNOR OF THE STATE OF BIHAR :

48. The report of the Chief Electoral Officer had been marked exhibit without any objection. A contention could validly be raised that the said report is not admissible in evidence, but the counsel for both the parties relied thereupon and placed before us the findings recorded therein in extenso. The parties cannot be permitted to rely upon a part of a document and at the same time raise a contention that the same is inadmissible. The said report is thus, admissible in evidence, although it may not have any statutory backing. In any event, having regard to the pleadings of the parties as also the stand taken before us the said report can be looked into, inter alia, for the purpose (i) that an inquiry had been made as regard the underage of the respondent; (ii) in said inquiry the respondent was given an opportunity to prove that he was not below the age of 25 years when he was sworn in as Minister; (iii) He had been given an opportunity to place all the materials in support of his case; and (iv) it was found that he did not complete 25 years of age on the date of his having been appointed as a Minister.

49. The report of the Chief Electoral Officer clearly suggests that the respondent herein did not cooperate with him in any manner whatsoever. He made all attempts to delay the proceedings as far as possible. He despite giving opportunities did not place on record any affidavit in support of his plea that he had studied in New St. Zaviers School and Swami Vivekananda Vidyalaya, Mithapur. He even did not deny that he had an alias name of Samrat Choudhary.

Such a conduct on the part of a Minister of a Government speaks a volume.

50. The said report was placed before Hon'ble the Governor of Bihar, who upon considering the materials on records came to the conclusion that the allegations made by Shri P.K. Sinha, a member of Samta Party, were correct. He, therefore, advised the Chief Minister to drop the respondent from his council of ministers.

51. It may be a matter of co-incidence that at that time, the period of six months envisaged under Article 164 of the Constitution of India was coming to an end but the fact remains that he resigned at a point of time when the Chief Minister was advised to drop him from his council of ministers. The said report as also the order of the Governor never came to be questioned by the respondent. It is accepted that at the relevant time, the matter received the attention of the media wherein inter alia the alias name of the respondent as Samrat Choudhary was highlighted, but the respondent did not make any attempt to deny the same. Such a conduct must be viewed in its proper perspective. A person against whom an allegation of violation of constitutional provisions has been made and who has taken Minister's berth without being properly qualified therefore, expectedly would question the said decision before an appropriate forum, if not for the sake of the office but for maintaining his own reputation in the public field. It will, thus, be safe to infer that he had accepted the said report and the order of the Governor sub-silentio.

ELECTORAL ROLL AND ELECTION COMMISSION OF IDENTITY CARD :

52. In both the aforementioned documents the age of the respondent was stated to 24 years as on 1.1.1995. According to the respondent he was born in 1968 and, thus, on the said date he would have been more than 24 years of age. Why such an inconsistency crept in has not been explained. The High Court, however, did not give much importance to the said fact and proceeded on the basis that these documents go to show that the respondent was major on that day. It is conceded by Mr. Mullick, learned counsel appearing on behalf of the respondent that the date of birth of a voter contained in the voter list and the election identity card issued by the Election Commission of India is not conclusive. They are recorded as per the statements made by the person concerned. Be that it may, it was for the High Court and consequently for this Court in appeal to consider the said materials on records in their proper perspective. We may, however, observe that the said documents do not conclusively show that the respondent was major on that day.

ANALYSIS OF THE EVIDENCE :

53. We have examined the admission register of the school, Pagination of the register had been done by hands. The name of the respondent is at Sl.No. 320.

The guardians including that of the respondent purported to have signed in English. A bare perusal of the said register would show that entries have been made by one person with two different pens in one sitting. It is curious to note that the entries at Sl. Nos. 310 and 311 relate to the same person and in relation to the names of the two students two pens had been used. Entries 312 and 313 are dated 23.9.1980 whereas entries 315 and 318 are dated 23.9.1990. For all those students, the same person has signed as guardian, although admissions were effected on different dates. So far as Entry No. 314 is concerned, the same has been altered from 334. There is an alteration in the date of admission being 12.11.1980 as against Sl.No. 319. The address of the father of the respondent is shown as Lakhanpur Tarapur, District Munger. There is no evidence on record that the respondent used to stay with some relative at Patna as the school is not a residential one. At page 66 of the register alternations have been made as regard date of admission from 1981 to 1980, although at the top of the page, the figure '1981' has been written.

54. The school authorities, thus, must have used some blank space of the register for the year 1980 at the instance of the respondent. No credence thereto, thus, can be given. Forgery in this register has been done in a crude form. As noticed hereinbefore, even the High Court placed its needle of suspicion in relation to the said document but still proceeded to rely thereupon which amounts to misdirection in law.

55. So far as Ext.I is concerned, no witness has taken oath to prove the entries made therein. The said school is a minority institution situate in the heart of capital of the State, The residential address of the respondent had been shown as Lakhanpur Tarapore, District Munger. For the students who had taken admission in the primary school, it is expected that the name of the local guardian and his local address, if any, would be disclosed.

56. The father of the appellant was a member of the Legislative Assembly as also Member of Parliament. He had deposed that he had disclosed the respondent's age while getting him admitted in the New St. Xaviers Junior School, This, however, has not been corroborated by any other witness. The school register

(Ext.D) and (Ext.I) were, thus, required to be taken into consideration in their proper perspective by the High Court, which was not done. The respondent purported to have read in Class II to Class-IV from 12.11.1980 to 13.11.1983 whereas he allegedly read in Swami Vivekananda School, Mithapur from 12.4.1984 to 31.12.1986 from Class V to Class VII. He attended classes from the middle of the session. But still he is said to have completed his studies from Class II to Class IV within three years and V to VII only in two years 8 months. The respondent as on the date of admission in Class II would have been aged about 12 years. If the evidence of the Vice-Principal is to be believed, the same was impermissible inasmuch as the maximum age for admission in Class I was 5 years. It is difficult to believe that a boy aged about 15 years would be reading in Class IV in a Christian School situate in the heart of the State capital.

57. As the respondent only had special knowledge as to in which school did he study; he should have disclosed the same. It is relevant to note that he respondent in his deposition alleged that he started his education in some school at his native village, but for reasons best known to him no details thereof or document to prove the same were brought on record.

In Punit Rai v. Dinesh Chaudhary : AIR 2003 SC4355 , it is stated :

'...These are the material facts relating to the plea raised by the appellant that the respondent is not a Scheduled caste. We don't think if the respondent means to say that the petitioner should have stated in the petition that the respondent is not born of Deo Kumari Devi said to be married to Bhagwan Singh in village Adai. If at all these facts would be in the special knowledge of respondent, Bhagwan Singh and Deo Kumari Devi hence not required to be pleaded in the election petition. It is not possible as well. In this connection, a reference may be made to a decision of this Court in Balwan Singh v. Lakshmi Nrain and Ors. : [1960]3SCR91 . This case also relates to election matter and it was held that facts which are in the special knowledge of the other party could not be pleaded by the election petitioner. It was found that particulars of the arrangement of hiring or procuring a vehicle would never be in the knowledge of the petitioner, such facts need not and cannot be pleaded in the petition.'

59. The respondent instead of disclosing the said facts took recourse to suppressio veri and suggestio falsi. He produced documents which are apparently forged and fabricated. He, according to DW 7 could not have been admitted in New St. Xaviers Junior School being overaged. The High Court has relied upon the evidence of the father of the respondent but he is not trustworthy keeping in view the fact that he not only denied that any inquiry made by the Chief Electoral Officer on the application filed by Shri P.K. Sinha but even went to the extent denying that the respondent had in a criminal case filed any application for bail.

60. He denied with impunity the factum of the complaint made by Shri P.K. Sinha to the Governor of the State of Bihar as also the inquiry proceedings conducted in that behalf. When through the media a large section of people of Bihar came to know about such inquiry and the result thereof, it is unbelievable that the father of the respondent who not only was in politics but also was a member of Parliament would be totally ignorant thereabout, He is, thus, a totally untrustworthy witness. It is well known that a man may lie but the circumstances do not.

HOROSCOPE:

61. The horoscope purported to have been filed by the respondent does not inspire confidence, It was said to have been prepared at the instance of one Damodar Pathak. It was purported to have, however, been written by his brother, DW2 was a by-stander. He had nothing to do either with the preparation of horoscope or with the writing thereof. His evidence is, thus, not trustworthy. The horoscope therefore, could not have been looked into by the High Court for any purpose whatsoever. The paper oh which the said horoscope has been drawn up does not appear to be an old one. It is self-serving document, Furthermore, the maker of the horoscope being dead could not be examined to prove as to what was the primary evidence of date and time of the birth of the respondent on the basis whereof the same was prepared.

BAIL APPLICATION :

62. It is not in dispute that an application for bail was filed in a case in which the respondent as well as his father were accused. It is difficult to eschew the

contention raised on behalf of the respondent that the statements made in the bail application were made without any instruction. How without instruction a lawyer would come to know that the respondent at the relevant time was reading in a school? The occurrence took place in April 1995. If the date of birth as disclosed by the appellant is correct, the respondent would be about 14 years as on that date, and, thus, would be below 16 years in the year 1996. He at that age could have also appeared in the matriculation examination in the year 1996. The contents of the bail application are suggestive of the said fact. The High Court, in our opinion, is not correct in observing that it is a common experience that all such pleas are taken for the purpose of obtaining bail. No presumption in this behalf can be raised as such allegations would be subject to judicial scrutiny. Thus, a person is not expected to take false grounds regarding his age or to make a statement that he had been reading in a school.

63. Furthermore, the advocate who had filed the said bail application stated that the Chief Judicial Magistrate, did not accept the contention that the respondent was less than 16 years of age on the ground that in the records his date of birth was mentioned as 17 years. Even if the age of the respondent being 17 years as on the date of commission of the offence is considered to be correct, he would not still be of the age of 25 years as on the date of filing of the nomination.

64. In Thiru John etc. v. The Returning Officer and Ors. : [1977]3SCR538 , the law is stated in the following terms :

'It is well settled that a party's admission as defined in Sections 17 to 20, fulfilling the requirements of Section 21. Evidence Act, is substantive evidence proprio vigore. An admission, if clearly and unequivocally made, is the best evidence against the party making it and though not conclusive. shifts the onus on to the maker on the principle that 'what a party himself admits to be true may reasonably be presumed to be so and until the presumption was rebutted the fact admitted must be taken to be established.'

65. Even otherwise making a false statement before the court whether on affidavit or not is not to be treated lightly. The court acts on the basis of the statement made by a party to the lis. Whether such defence has been accepted or not is not

of much importance but whether a false statement to the knowledge of the party has been made or not is. In any view of the matter, the court must draw an adverse inference in this behalf against the respondent.

66. Furthermore, a person should not be permitted, to take advantage of his own wrong. He should either stand by his statement made before a court of law or should explain the same sufficiently. In absence of any satisfactory explanation, the court will presume that the statement before a court is correct and binding on the party on whose behalf the same has been made.

ROHIT KUMAR @ RA.JESH KUMAR :

67. The contention of the appellant in this behalf assumes significance in the peculiar facts and circumstances of the case.

68. The appellant in paragraph 18 of the election petition alleged :

'That it is most significant and relevant to state here that the elder brother namely Sri Rajesh Kumar of Sri Rakesh Kumar was and is a student of B.I.T. Meshra School where he got his age recorded as 22 years on 28.7.1999. So an easy and clear conclusion can be drawn that his younger brother namely Rakesh Kumar was at least less than 22 years in the year 1999.'

69. The said statements, as would appear from paragraph 15 of the written statement, had not been traversed in accordance with law. Paragraph 15 of the written statement is as under :

'That the statement made in para 18 of the election petition under reply is not correct. Merely on imagination Sri Rajesh Kumar has been mentioned as elder brother. The petitioner has no knowledge about that and wrong statement has been made.'

70. In terms of Order VIII, Rule 3, a defendant is required to deny or dispute the statements made in the plaint categorically, as an evasive denial would amount to an admission of the allegation made in the plaint in terms of Order VIII, Rule 5 of the Code of Civil Procedure.

71. Under Section 58 of the Indian Evidence Act a fact admitted need not be proved.

72. In paragraph 15 of the written statement, the respondent has not specifically contended that the statements made in paragraph 18 of the election petition are incorrect or how they are so. Merely the said allegations have been denied as being imagination of the election petitioner without making a statement of fact that Rohit Kumar is not the elder brother of the respondent or in fact younger to him. Such an evasive denial attracts Order VIII, Rule 5 of the Code of Civil Procedure. The statements made in paragraph 18 of the election petition must, therefore, be deemed to have been admitted. The Birla Institute of Technology, Mesra, has produced the Application for Undergraduate Admission for Rohit Kumar, where in his date of birth has been shown as 1.3.1979. Even in the inquiry made by the Chief Electoral Officer, the respondent had not specifically denied the said fact. The Governor of the State of Bihar in his order (Ext.4) observed :

'Sri Rakesh Kumar has not denied that his elder brother is a student of Birla Institute of Technology. Documents furnished by Birla Institute of Technology about the age of his elder brother are extremely significant and relevant to determine Shri Rakesh Kumar's likely age. The documents furnished by the Institute reveal that the date of birth of the elder brother of Sri Rakesh Kumar is 1.3.1979. Hence, on 19.5.99 Sri Rakesh Kumar's elder brother was 20 years, 2 months and 18 days old. So, it can be safely and conclusively assumed that on 19.5.99 Sri Rakesh Kumar, when he was sworn in as a minister, was less than 20 years, and definitely much less than 25 years, the qualifying age to become a member of the State Legislative Assembly.'

73. The High Court, on the other hand, observed :

'..... It is true that it has not been specifically stated in the reply to paragraph 18 of the election petition that Rajesh Kumar happens to be younger brother of Rakesh Kumar but making him an elder brother has been totally denied. In that way, it cannot be said that only evasive reply is there and when this fact could not be proved by any cogent evidence from the side of the election petitioner that Rajesh Kumar happens to be the elder brother of the respondent Rakesh Kumar rather

when contrary evidence is there from the side of the respondent then the age group of Rohit Kumar @ Rajesh Kumar does not come in aid to the ejection petitioner to prove the underage of Rakesh Kumar the respondent.'

74. In our opinion, the approach of the High Court was not correct. It failed to apply the legal principles as contained in Order VIII, Rules 3 and 5 of the Code of Civil Procedure. The High Court had also not analysed the evidences adduced on, behalf of the appellant in this behalf in details but merely rejected the same summarily stating that the vague statements had been made by some witnesses. Once it is held that the statements made in paragraph 18 of the election petition have not been specifically, denied or disputed in the written statement, the allegations made therein would be deemed to have been admitted, and, thus, no evidence contrary thereto or inconsistent therewith could have been permitted to be laid.

75. In Badat and Co (supra) this Court upon referring to Order VIII, Rules 3, 4 and 5 of the Code of Civil Procedure, observed :

These three rules form an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written-statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary. The first paragraph of Rule 5 is a re-production of Order XIX, Rule 13, of the English rules made under the Judicature Acts. But in mofussil Courts in India, where pleadings were not precisely drawn. It was found in practice that if they were strictly construed in terms of the said provisions, grave injustice would be done to parties with genuine claims. To do justice between those parties, for which Courts are intended the rigor of Rule 5 has been modified by the introduction of the proviso thereto, Under that proviso the Court way, in its discretion, require any fact so admitted to be proved otherwise than by such admission. In the matter of mofussil pleadings, Courts, presumably relying upon the said proviso, tolerated more laxity

in the pleadings in the interest of justice. But on the Original side of the Bombay High Court, we are told, the pleadings are drafted by trained lawyers bestowing serious thought and with precision. In construing such pleadings the proviso can be invoked only in exceptional circumstances to prevent obvious injustice to a party or to relieve him from the results of an accidental slip or omission but not to help a party who designedly made vague denials and thereafter sought to rely upon them for non-suiting the plaintiff. The discretion under the proviso must be exercised by a Court having regard to the justice of a cause with particular reference to the nature of the parties, the standard of drafting obtaining in a locality, and the traditions and conventions of a Court wherein such pleadings are filed. In this context the decision in Tildesley v. Harper will be useful. There, in an action against a lessee to set aside the lease granted under a power the statement of claim stated that the donee of the power had received from the lessee a certain sum as a bribe and stated the circumstances; the statement of defence denied that that sum had been given, and denied each circumstance, but contained no general denial of a bribe having been given. The Court held, under rules corresponding to the aforesaid rules of the Code of Civil Procedure, that the giving of the bribe was not sufficiently denied and therefore it must be deemed to have been admitted. Fry J, posed the question thus : What is the point of substance in the allegations in the statement of claim and answered it as follows :

The point of substance is undoubtedly that a bribe was given by Anderson to Tildesley, and that point of substance is nowhere met ..... no fair and substantial answer is, in my opinion, given to the allegation of substance, namely that there was a bribe. In my opinion it is of the highest importance that this rule of pleading should be adhere to strictly, and that the Court should require the Defendant, when putting in his statement of defence, and the Plaintiff, when replying to the allegations of the Defendant, to state the point of substance, and not to give formal denials of the allegations contained in the previous pleadings without stating the circumstances. As far as I am concerned, I mean to give the fullest effect to that rule, I am convinced that it is one of the highest benefit to suitors in the Court.It is true that in England the concerned rule is inflexible and that there is no proviso to it as is found in the Code of Civil Procedure. But there is no reason why in Bombay on the original side of the High Court the same precision in pleadings shall not be

insisted upon except in exceptional circumstances.

76. The pleadings in an election petition must likewise be construed strictly. The provisions of the Code of Civil Procedure apply to an election petition. The election petition is not an action at law or a suit in equity. It is a special proceeding and even withdrawal of an election petition may not be permitted.

77. In R.M. Seshadri v. G. Vasantha Pal and Ors. : [1969]2SCR1019 , it has been held :

'...The policy of election law seems to be that for the establishment of purity of elections, investigation into all allegations of malpractices including corrupt practices at elections should be thoroughly investigated...'

OTHER EVIDENCE :

78. Reliance placed on the witness of Md. Ekramul Haque by Mr. Mullick appears to be misplaced. He stated that the date of birth of the respondent was entered in the register maintained in the Police Station on the very next day of his birth. If that be so, the same should have been produced. Non-production of the said document would again give rise to drawal of an adverse inference to the effect that had such documents been produced, the same would have gone against the interest of the respondent. Such a fact, having regard to the statement of DW 3 in his examination in chief must be held to have been made with the knowledge of the respondent, but he did not make any attempt to produce or cause production of the said evidence.

79. In National Insurance Co. Ltd., New Delhi v. Jugal Kishore and Ors. : [1988]2SCR910 , this Court stated the law thus:

'This Court has consistently emphasized that it is the duty of the party which is in possession of a document which would be helpful in doing justice in the cause to produce the said document and such party should not be permitted to take shelter behind the abstract doctrine of burden of proof.'

CONCLUSION

80. The election Tribunal while determining an issue of this nature has to bear in mind that Article 173(5) of the Constitution of India provides for a disqualification. A person cannot be permitted to occupy an office for which he is disqualified under the Constitution. The endeavour of the court shall therefore should be to see that a disqualified person should not hold the office but should not at the same time, unseat a person qualified therefore. The court is required to proceed cautiously in the matter and, thus, while seeing that an election of the representative of the people is not set aside on flimsy grounds but would also have a duty to see that the constitutional mandate is fulfilled.

81. The upshot of the discussions aforesaid is that the materials on records taken in their entirety together with the circumstantial evidence goes to show that the respondent was not above the age of 25 years on the date of filing of the nomination. The findings of the High Court to the contrary cannot be sustained.

82. For the reasons aforementioned, the impugned judgment is set aside, The appeal is. allowed and the election of the respondent from 181 Parbatta Assembly Constituency is declared as void. Consequently the same is set aside. Let the substance of this decision be intimated to the Election Commission and the Speaker of the Bihar Legislative Assembly and further a certified copy of the decision be sent to the Election Commission forthwith. There shall be no order as to costs.