

Tikam Singh Vs. State of U.P. and Others

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Court : Allahabad

Decided On : Mar-31-2011

Judge : Ashok Bhushan; Ran Vijai Singh, JJ.

Acts : [Constitution of India](#) - Article 226; Representation of People's Act, 1951; Conduct of Election Rules, 1961. - Rules 75(4), 81(3) ; Madras Panchayat Act, 1958 - Rule 17; Ballot Act, 1872 - Section 2

Appeal No. : WRIT - C No. - 3899 of 2011

Appellant : Tikam Singh

Respondent : State of U.P. and Others

Advocate for Def. : C.S.C.; C.K. Parekh, Advs

Advocate for Pet/Ap. : Vijendra Singh, Adv

Judgement :

1. Heard Sri Vijendra Singh, learned counsel for the petitioner, Sri M.C. Chaturvedi, Chief Standing Counsel, for the Staterespondents and Sri C.K. Parekh learned counsel appearing for respondent No.4.

2. The petitioner as well as respondent No.4 contested the election of Pramukh of Kshetra Panchayat, Fatehpur Sikri held on 22 nd of December, 2010. The counting of votes took place on 22 nd of December, 2010. In the counting both the candidates received 33 votes each. The Returning Officer, after informing both the

candidates that result of the election shall be declared by draw of lot, asked a minor girl of five years to take out one slip out of two containing name of the candidates. It was also informed that the name slip of the candidate which shall remain in the box after the draw of lot shall be declared elected. The names of both the candidates (petitioner and respondent No.4) were written down on two slips and the minor girl took out one of the slips which contained the name of Tikam Singh (petitioner). The Assistant Returning Officer declared respondent No.4 as elected and issued declaration in Form-VIII in her favour. The petitioner has filed an election petition being Election Petition No.34 of 2011 before the District Judge, Agra challenging the election of respondent No.4 which is said to be pending. The petitioner has come up in this writ petition under Article 226 of the [Constitution of India](#) praying for the following relief:-

(i) Hold and declare the instruction no.4(1)(b) of the Schedule II under Rule 27 of the U.P. Kshettra Panchayat (Election of Pramukhs and Up-Pramukhs and Settlement of Election Disputes) Rules, 1994 to be ultra-vires being violative of Article 14 and Part IX of the [Constitution of India](#) and also of Section 264-B of the U.P. Kshettra Panchayat and Zila Panchayat Act, 1961, and quash the same issuing a writ of Certiorari.

(ii) Issue a consequential writ, direction or order in the nature of Certiorari calling for the record and quash the Form VIII under Rule 29 declaring the respondent no.4 to have been elected as Pramukh of the Kshettra Panchayat, Fatehpur Sikri and also the procedure adopted for drawing the lottery between the petitioner and the respondent no.4.

(iii) Issue any other writ, order or direction to which the petitioners are found entitled in law by this Honble Court.

3. Sri Vijendra Singh, learned counsel for the petitioner, has submitted that by this writ petition, the petitioner is challenging³ Instruction 4(1)(b) of Schedule II of the U.P. Kshettra Panchayat (Election of Pramukhs and Up-Pramukhs and Settlement of Election Disputes) Rules, 1994 (hereinafter referred to as the 1994 Rules) being violative of Article 14 and Part-IX of the [Constitution of India](#) and also violative of Section 264-B of the U.P. Kshettra Panchayats and Zila Panchayats Act, 1961

(hereinafter referred to as the 1961 Act). He submits that in several statutes framed for conduct of election including Section 65 of the Representation of People Act, 1951, Rule 54 of the U.P. Panchayat Raj (Election of Members, Pradhans and Up-Pradhans) Rules, 1994 and Rule 55 of the U.P. Kshettra Panchayats and Zila Panchayats (Election of Members) Rules, 1994 whenever a lot is to be drawn the person whose name is taken out is treated to have received an additional vote and is declared elected. He submits that provisions of Schedule II, Instruction 4(1)(b) being contrary to the general rule of lottery system, are unreasonable and are liable to be struck down. He submits that Article 14 of the [Constitution of India](#) enjoins the Legislature to frame law which shall apply equally to all persons and Instruction 4(1)(b) being discriminatory is liable to be struck down. Strong reliance has been placed on the judgment of the Madras High Court in the case of S.P. Shanmughasundaram vs. Marudachala Goundar and others reported in (1963)1 MLJ 291.

4. The petitioner, for the proposition that the 1994 Rules violates Article 14 of the [Constitution of India](#) which enjoins the State not to deny any person equality before law, has placed reliance on the cases of Shrikishan vs. State of Rajasthan reported in (1955)2 SCR 531, Chiranjeet Lal vs. Union of India reported in (1950) SCR 869, Ramana vs. International Airport Authority reported in A.I.R. 1979 SC 1628, Kasturi vs. Jammu & Kashmir reported in A.I.R. 1980 S.C. 1992, Ameeroonissa vs. Mehbood reported in 1953 SCR 404, Babu Lal vs. Collector of Custom reported in 4 A.I.R. 1957 SC 877 and Gopichand vs. Delhi Administration reported in A.I.R. 1959 SC 609.

5. Sri C.K. Parekh, learned counsel appearing for respondent No.4, refuting the submission of counsel for the petitioner, has contended that provisions of Instruction 4(1)(b) of Schedule-II of the 1994 Rules are fully inconsonance with the provisions of the [Constitution of India](#) as well as the provisions of the 1961 Act. He has submitted that the election of Pramukh is held on the basis of proportional representation. In counting the result of election in a system of proportional representation, the result is arrived by applying the principle of exclusion and the Instruction 4(1)(b) provides a method of exclusion of a candidate to declare a result, hence the respondent No.4 has rightly been declared elected and there is

no infirmity in the provision. It has further been submitted that petitioner has already filed an election petition challenging the election, hence he can not be permitted to challenge the election indirectly by means of this writ petition. In support of his submission, Sri C.K. Parekh has also placed reliance on various judgments of the Apex Court which shall be referred to while considering the submission in detail.

6. Sri M.C. Chaturvedi, Chief Standing Counsel, appearing for the State-respondents, has submitted that the provisions of Instruction 4(1)(b) are fully intra vires. He has further submitted that no foundation has been laid down in the writ petition for challenging the vires of statutory provision contained in Instruction 4(1)(b). He has submitted that respondent No.4 has rightly been declared elected and there is no merit in this writ petition.

7. We have considered the submissions of learned counsel for⁵ the parties and have perused the record.

8. From the facts as noticed above, it is clear that there being equality of votes between the petitioner and respondent No.4, the result was declared by draw of lots. The lots for both the petitioner as well as respondent No.4 were drawn in which petitioner was excluded and respondent No.4 was declared elected. The provision, which has been challenged in the writ petition is Instruction 4(1)(b) of Schedule-II of the 1994 Rules. It is relevant to quote Instruction 4(1) of Schedule-II of the 1994 Rules, which is as under:-

4. (1) If there are only two contesting candidates then-

(a) if one candidate gets larger number of first preference votes than the other, declare the former as elected; or

(b) if both the candidates get equal number of first preference votes, determine the result by drawing of lots. Exclude the candidate on whom lot falls and declare the other candidate as elected.

9. The 1994 Rules have been framed in exercise of power under Sections 237 and 264-B of the 1961 Act. Section 237 provides of power of the State Government to

make rules. Section 264-B provides for manner and conduct of election. Section 264-B is quoted below:-

264-B. Manner and conduct of election.-(1) The election to the office of an Adhyaksha, Upadhyaksha or a member of a Zila Panchayat and⁶ a Pramukh, Up-Pramukh or a member of a Kshettra Panchayat shall be held by secret ballot in the manner provided by rules which shall also provide for resolution of doubts and disputes relating to the election of such Adhyaksha, Upadhyaksha, Pramukh and Up-Pramukh.

(2) The superintendence, direction and control of the conduct of election of the office of an Adhyaksha, Upadhyaksha or a member of a Zila Panchayat and of a Pramukh, Up-Pramukh or a member of a Kshettra Panchayat shall vest in the State Election Commission.

(3) Except as provided in sub-section (4), the State Government shall, in consultation with the State Election Commission, by notification, appoint the date or dates for general election of the Adhyaksha, Upadhyaksha or members of a Zila Panchayat or the Pramukh, the Senior Up-Pramukh, the Junior Up-Pramukh or members of a Kshettra Panchayat. (4) The State Election Commission shall, in consultation with the State Government, by notification, appoint date or dates for bye election of the Adhyaksha, Upadhyaksha or members of a Zila Panchayat or Pramukh, Senior Up-Pramukh, Junior Up-Pramukh or members of a Kshettra Panchayat.

10. Section 264-B of the 1961 Act provides that election of the⁷ office of a Pramukh and Up-Pramukh of a Kshettra Panchayat shall be held by secret ballot in the manner provided by rules. For the election of Pramukh and Up-Pramukh, the rules have been framed, namely, the U.P. Kshettra Panchayat (Election of Pramukhs and Up-Pramukhs and Settlement of Election Disputes) Rules, 1994. Rule 17 of the 1994 Rules provides for manner of voting which is in accordance with the system of proportional representation by means of the single transferable vote. Rule 26 provides for procedure at the counting. Rule 27 provides for determination of result. Rule 27 of the 1994 Rules is quoted below:-

27. Determination of result After all the valid ballot papers have been arranged in parcels according to the first preference recorded for each candidate, the Returning Officer shall proceed to determine the result of the voting in accordance with the instructions contained in Schedule II of those rules.

11. Instruction No.4 of Schedule-II of the 1994 Rules which governs a case where only two contesting candidates are there provides for two circumstances. Firstly, if one candidate gets larger number of first preference votes than the other, he is to be declared as elected and secondly if both the candidates get equal number of first preference votes, the result shall be declared by draw of lots and the rules specifically exclude the candidate on whom lots fall and declare the other candidate elected. A perusal of Schedule-II of the 1994 Rules indicates that result is to be determined by exclusion of the candidates the voting being preferential voting under the system of proportional representation.

12. Now the grounds of challenge as raised by the petitioner, are to be examined. The first submission, which the petitioner has pressed, is that Section 65 of the Representation of the Peoples Act, 1951, Rule 54 of the U.P. Panchayat Raj (Election of Members, Pradhans and Up-Pradhans) Rules, 1994 and Rule 55 of the U.P. Kshettra Panchayat and Zila Panchayats (Election of Members) Rules, 1994 provide otherwise.

Section 65 of the Representation of the Peoples Act, 1951, Rule 54 of the U.P. Panchayat Raj (Election of Members, Pradhans and Up-Pradhans) Rules, 1994 and Rule 55 of the U.P. Kshettra Panchayat and Zila Panchayats (Election of Members) Rules, 1994 are quoted below:-

Section 65 of Representation of Peoples Act, 1951:- Equality of votes If, after the counting of votes is completed, an equality of votes is found to exist between any candidates, and the addition of one vote will any of those candidates to be declared elected, the returning officer shall forthwith decide between those candidates by lot, and proceed as if the candidate on whom the lot falls had received an additional vote. Rule 54 of the U.P. Panchayat Raj (Election of Members, Pradhans and Up-Pradhans) Rules, 1994:- Equality of Votes If after the counting of votes is completed, an equality of votes is found to exist between any

candidates and the addition of one vote will entitle any of those candidates to be declared elected, the Nirvachan Adhikari shall⁹ forthwith decide between those candidates by lot and proceed as if the candidate on whom the lot falls had an additional vote.

Rule 55 of the U.P. Kshettra Panchayat and Zila Panchayats (Election of Members) Rules, 1994:- Equality of votes If after the counting of the votes is completed, an equality of votes is found to exist between any candidates and the addition of one vote will entitle any of those candidates to be declared elected, the Nirvachan Adhikari shall forthwith decide between these candidates by lot and proceed as if the candidate on whom the lot falls had an additional vote.

13. The provisions, which have been relied by the petitioner, are the provisions of different statutes which provide for manner and procedure of declaring the result by draw of lots. It is relevant to note that the Conduct of Elections Rules, 1961 has been framed under the Representation of Peoples Act, 1951 and various provisions are there under the 1961 Rules which provide exclusion of the candidates by draw of lot. In this context, it is relevant to refer to Rules 75(4) and Rule 81(3) of the Conduct of Election Rules, 1961. Thus under the Conduct of Elections Rules, 1961 there are rules akin to Instruction 4(1)(b) of the 1994 Rules and the procedure of declaration as contained in Instruction 4(1)(b) of the 1994 Rules cannot be said to be alien to election law.

14. There are various other rules regulating different elections where provisions to the similar effect have been made as has been made in Instruction 4(1)(b) of Schedule-II. It is relevant to refer¹⁰ Instruction 6 of the Presidential and Vice-Presidential Elections Rules, 1974. Instruction 6 of the said Rules is quoted below:-

6. If at the end of any count, no candidate can be declared elected,-

(a) exclude the candidate who up to that stage has been credited with the lowest number of votes.

(b) examine all the ballot papers in his parcel and sub-parcels, arrange the unexhausted papers in sub-parcels according to the next available preferences recorded thereon for the continuing candidates, count the number of votes in each such sub-paragraph and credit it to the candidate for whom such preference is recorded, transfer the sub-paragraph to that candidate, and make as separate subparcel of all the exhausted papers; and

(c) see whether any of the continuing candidates has, after such transfer and credit, secure the quota.

If, when a candidate has to be excluded under clause(a) above, two or more candidates have been credited with the same number of votes and stand lowest on the poll, exclude that candidate who had secured the lowest number of first preference votes, and if that number also was the same in the case of two or more or more candidates, decide by lot which of them shall be excluded.

15. All the sub-parcels of exhausted papers referred to in clause (b) above shall be set apart as finally dealt with and the votes recorded thereon shall not thereafter be taken into account.

16. Now comes the U.P. Panchayat Raj (Election of Members, Pradhans and Up-Pradhans) Rules, 1994. It is relevant to note that the elections of Members, Pradhans and Up-Pradhans are not held by proportional representation and it is held by secret voting by 11 members of Gram Panchayat and there is no preferential voting. Next comes the Rule 55 of the U.P. Kshettra Panchayats and Zila Panchayats (Election of Members) Rules, 1994. It is relevant to note that election of the members is provided in Rule 25 of the said Rules which is not the method of proportional voting. Rule 25 of the said Rules is quoted below:-

25. Procedure for voting.- At every election under these rules the method of voting by marking the ballot paper shall be followed and no votes shall be received by proxy.

17. Thus the rules on which petitioner has placed reliance are the rules governing the different elections and the mere fact that for regulating different elections there

are different rules providing for declaration of result by draw of lots, it cannot be said that Instruction No.4(1)(b) of Schedule-II of the 1994 Rules is discriminatory.

19. It is well established that to contest an election or to get declared in an election elected is neither a fundamental right nor a common law right and it is only a statutory right which is regulated by statute. The Apex Court in the case of *Jyoti Basu vs. Debi Ghosal* reported in (1982)1 SCC 691 has laid down following:-

"A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election.

Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, court is put in a straitjacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act, 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the¹³ Representation of the People Act has been held to be a complete and self-contained code within which must be found any rights claimed in relation to an election or an election dispute."

20. A Constitution Bench of the Apex Court in the case of Kuldip Nayar vs. Union of India reported in A.I.R. 2006 S.C. 3127 again has laid down the same proposition in paragraph 296 which is quoted below:-

296. Even without going into the debate as to whether right to vote is a statutory or Constitutional right, the right to be elected is indisputably a statutory right, i.e., the right to stand for elections can be regulated by law made by Parliament. It is pure and simple a statutory right that can be created and taken away by Parliament and, therefore, must always be subject to statutory limitations.

21. The petitioner has also taken a ground that the provisions of Instruction 4(1)(b) of Schedule-II of the 1994 Rules are violative of Section 264-B of the 1961 Act. Section 264-B has already been quoted above which provides that election of Pramukh shall be held in a manner provided by the Rules. We do not see that Instruction 4(1)(b) in any manner is contrary to the provisions of Section 264-B and the said submission is without any basis.

22. Learned counsel for the petitioner has also submitted that the provisions of Instruction 4(1)(b) are violative of Part-IX of the [Constitution of India](#). The petitioner has referred to Articles 243K and 243N of the [Constitution of India](#), which are quoted below:-

243K. (1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.

(2) Subject to the provisions of any law made by the Legislature of a State, the conditions of service and tenure of office of the State Election Commissioner shall be such as the Governor may by rule determine:

23. Provided that the State Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of a High Court and the conditions of service of the State Election Commissioner shall not be varied to his disadvantage after his appointment.

(3) The Governor of a State shall, when so requested by the State Election Commission, make available to the State Election Commission such staff as may be necessary for the discharge of the functions conferred on the State Election Commission by clause (1).

(4) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Panchayats.

243N. Notwithstanding anything in this Part, any provision of any law relating to Panchayats in force in a State immediately before the commencement of the Constitution (Seventy-third Amendment) Act, 1992, which is inconsistent with the provisions of this Part, shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from such commencement, whichever is earlier:

Provided that all the Panchayats existing immediately before such commencement shall continue till the expiration of their duration, unless sooner dissolved by a resolution passed to that effect by the Legislative Assembly of that State or, in the case of a State having a Legislative Council, by each House of the Legislature of that State.

24. Learned counsel for the petitioner has placed strong reliance on the judgment of the Madras High Court in S.P.

25. Shanmughasundarams case (supra). It is relevant to refer to the said case in detail. In the said case election of the office of the Chairman of Panchayat Union Council was held. There were two candidates both secured six votes. Lots were drawn to decide the tie. The chit containing the name of the first respondent was drawn. The Revenue Divisional Officer, however, declared the appellant as elected. The election was challenged. The Election Commissioner took the view that it was upon the Returning Officer to adopt any method he liked for ascertaining the result by casting 16 lots and the election was held to be valid. The order, however, was quashed by the learned Single Judge. An appeal was filed before the Division Bench. The learned Single Judge had relied on Rule 17 of the

Rules framed under the Madras Panchayat Act, 1958. In paragraphs 2 and 3 of the said judgment following was laid down by the Division Bench of Madras High Court:-

2. The election was challenged by the first respondent who further prayed that as his name was drawn he should be declared as duly elected as Chairman of the Union Council. The Election Commissioner (District Munsif), Coimbatore, took the view that it was open to the Returning Officer who presided over the meeting convened for the purpose of election, to adopt any method he liked for ascertaining the result by casting lots; he held that the election was valid. This order was, however, quashed by Jagadisan, J., under Article 226 of the Constitution. The learned Judge gave a further direction to the Election Commissioner to restore the election petition to his file and dispose of it in accordance with law. The main point for consideration in this appeal is whether it will be open to the Returning Officer to adopt any procedure different from the accredited or prescribed one for ascertaining the result of the election where there is equality of votes between the rival candidates. Jagadisan, J., has explained the background of the procedure that is generally adopted in deciding the election in the case of equality of votes in the following words:

26. A tie between the candidates caused by equality of votes results in a stalemate. Neither of them can be declared elected. A fresh election would involve time, labour and money and there is no certainty that there will not be a tie again. Some device has to be adopted to declare one of them as elected.

27. Invariably a special rule is prescribed to govern such a situation. The Returning Officer must forthwith decide between the tied candidates by lot and proceed as if the candidate on whom the lot falls had received an additional vote. In England under Section 2 of the Ballot Act, 1872 (now repealed) the Returning Officer could give a casting vote either orally or in writing when an equality of votes is found. But now under the present law, the decision has to be by lot. The candidate on whom the lot falls should be deemed to have received the additional votes.

28. To put it briefly, the decision of the result by mere count of votes having proved ineffectual to ascertain the verdict of the electorate, a law prescribes another mode, a decision by chance to resolve the tangle. Casting of lots is a favourite device adopted in elections to secure the chance decision. Normally the person in whose favour the lot is drawn is given an additional vote which secures him thereby a superiority in the number of votes secured and enables him to win the election. In Parker's Election Agent and Returning Officer¹⁸ (5th edition) it was stated at page 214 thus:

29. Where an equality of votes is found to exist between any candidates and the addition of vote would entitle any of the candidates to be declared elected, the Returning Officer shall forthwith decide between the candidates by lot and proceed as if the candidate on whom the lot fell had received an additional vote. No particular method of deciding "by lot" is prescribed and the Returning Officer may adopt any method of doing so that he considers suitable. The provision is mandatory and binding alike on the Returning Officer and the candidates.

30. It will be seen that under the principle set out above it is obligatory on the Returning Officer to declare the person who wins the lot as duly elected, though as to how the lot has to be drawn is a matter left to his discretion. That is to say it will be open to him to cast lots either by means of chits, or even by toss of the coin or by employing other objects or devices. The Returning Officer's discretion therefore exists only as regards the method of deciding the choice. So far as the choice is concerned the rule has always been that the person who wins the lot has to be declared as elected; it is not the other way about. In Simond's Halsbury's Laws of England (3rd Edition) (Vol. 14, page 142, paragraph 245) dealing with the case it is stated:

31. When, after the counting of the votes (including any recount) is completed an equality of votes is found to exist between any candidates, and the addition of a vote would entitle any of those candidates to be declared elected, the Returning Officer must forthwith decide between those candidates by lot and proceed as if the candidate on whom the lot falls had received an additional vote.

32. The footnote to this passage refers to case, *Fryer v. Harris* (1955) Times, 30th July where the Returning Officer spun a coin to decide when the votes were equally divided between the candidates, the successful candidate. It was held that the method of deciding by lot was good. All that is consistent with what we have stated. It will be undesirable for any Returning Officer to inverse the usual procedure and eliminate the person who secures the lot in his favour. In our opinion, the rules regulating the election of the Chairman of the Panchayat Union Council are specific in the matter.

33. An election is a creature of the statute; the process of election will have to conform strictly to rules in that behalf. Where there are specific rules in regard to any matter, there will be no room for any discretion being exercised or a new method being adopted by the Returning Officer. The Rules framed by the Government in the instant case prescribe how the decision by drawing lots has got to be arrived at. Rule 17 of the Rules under the Madras Panchayat Act, 1958 states:

(1) If the number of candidates is two, the candidate who obtains the largest number of votes shall be declared to have been duly elected. If there be an equality of votes between the two candidates and the addition of one vote to any one of such candidates will entitle him to be declared duly elected, the President of the meeting shall decide by drawing lots in the presence of the members to which one of such candidates such additional vote shall be deemed to have been given.

(2) If the number of candidates is three and if any one of them secures more than one-half of the number of votes he shall be declared to have been duly elected. If none of them secures more than one-half of the number of votes, the candidate who obtains the smallest number of votes shall be eliminated and a second ballot taken. If there is an equality of votes among all the candidates, the President of the meeting shall ascertain by casting lots in the presence of the members present which, of such candidates shall be eliminated. The second ballot shall be conducted and the result declared in accordance with the provisions of the said Sub-rule (1).

(3) If the number of candidates is more than three and if any of the candidates secures more than one-half of the number of votes, he shall be²¹ declared to have been duly elected. If none of the candidates secures more than one-half of the number of votes the first candidate who secures the largest number of votes and the second candidate who secures the next largest number shall be retained and the others eliminated and the second ballot taken. In the event of there being an equality of votes between more than one candidate affecting the determination of which one of them secures the second largest number of votes the President of the meeting shall draw lots in the presence of the members present and the candidate whose name is first drawn shall be deemed to have secured the second largest number of votes. The second ballot shall be conducted and the results declared in accordance with the provisions of the said Sub-rule (1).

34. Shortly stated the rule provides for three contingencies in the election for a single office: (1) where there are two rival candidates and they secure an equal number of votes, the result of the election has got to be decided by drawing lots and the person in whose favour the lot is drawn will be entitled to an additional vote;

(2) where there are three candidates and none of them secures more than fifty per cent of the total votes recorded, then one person will have to be eliminated (the person with the minimum number²² of votes so as to confine the contest between the remaining two). There will then be a second ballot the result of which will have to be decided in accordance with the provisions of Sub-rule (1). How that person has to be ascertained where there is an equality of votes between the three persons is specified in the Sub-rule. Lots are drawn and he in whose favour it is drawn is eliminated. It will be seen that this is not really the inverse of the rule set out in Sub-rule (1). Sub-rule (1) is enacted for the purpose of selecting the candidate and it prescribes that the person in whose favour the lot is drawn will be declared elected In Sub-rule (2) where there is an equality of votes the duty of the Returning Officer is first to eliminate one of the three; how to achieve that result Elimination is left to chance by casting lots and he who wins the toss or the lot is-eliminated.

(3) Where the number of candidates is more than three and none of them gets more than fifty per cent of the votes, the first two are retained for decision by a second ballot and the rest are eliminated. But if there is an equality of votes between the candidates for the second place the rule prescribed in Sub-rule (1) is followed. Rule 17 of the Rules, therefore, contemplates the decision of the result only in favour of the person who draws the lot, Sub-rule (2) being designed for the purpose of elimination of one candidate, applies the same process for deciding the matter outstanding,²³ namely who is to be eliminated. There is, therefore, no scope for the Returning Officer to prescribe his own procedure for determining the decision by lots. Rule 17 prescribes a procedure which it will not be open to any Returning Officer to abandon. There is, thus, no rule by which in case of equality of votes between two candidates the additional vote can be given to the candidate who fails to win the lot. The procedure adopted in the present case by the Returning Officer is opposed alike to the rule which we have stated above and to the ordinary concept of deciding the dispute by the drawing of lots.

3. Mr. Mohan Kumaramangalam, however, contends that although the procedure adopted by the Returning Officer was the reverse of the normal one as it was done bona fide after duly apprising the candidates of his intention to declare that candidate as elected who fails in the lot, it should not be open to the first respondent who has acquiesced in the procedure to dispute the election afterwards. We are unable to regard the conduct of the Returning Officer as bona fide in that he did not act with due care and caution. Presumably he misread the Rules and tried to adopt the procedure prescribed by Rule 17(2) for a case coming under Sub-rule (1) and for a totally different purpose. Indifference to and imperfect understanding of statutory provisions can hardly be regarded as consistent with due discharge of the duties cast on a Returning Officer. The responsibility of the²⁴ Returning Officer is all the greater where the electorate consists mainly of illiterate and half-literate persons and where there will be few who will be bold enough to correct him when he goes wrong. Evidently the two candidates in the present case were not themselves conversant with the Rules and, therefore, they accepted the Returning Officer's interpretation thereof. But that cannot regularise an election held in contravention of the Rules. There is also the fact that the result of the election has been affected by the irregularity. It cannot be accepted that the

Returning Officer has any power to prescribe his own procedure contrary to Rules to ascertain the result of an election. For example he cannot say that in the event of a tie, he will select one who runs faster than the other. A declaration of result on that basis, will be no election in the eye of law. We, therefore, agree with Jagadisan, J. that the declaration of the result of the election by the Revenue Divisional Officer was wrong and has therefore to be set aside.

35. The Division Bench thus held that since the rules provide a particular manner of draw of lot, the Returning Officer had no power to prescribe his own procedure contrary to the rules to ascertain the result of an election. The present is a case where, in fact, the petitioner contends that Returning Officer ought to have declared the petitioner elected by adopting a procedure contrary to the Instruction 4(1)(b) since the declaration of the result by the Returning Officer has been in accordance with Instruction No.4(1) (b), the petitioner has chosen to challenge the Instruction 4(1)(b) in this writ petition. The Division Bench judgment of the Madras High Court was based on Rule 17(1) of the Rules framed under the Madras Panchayat Act, 1958 which provided that if the number of candidates is two and if there is equality of votes then by draw of lots it shall be decided that who gets an additional vote shall be declared elected. The procedure provided in Rule 17 was entirely different to one which has been provided in Instruction 4(1)(b). Thus the judgment of the Madras High Court was based on its own facts and it does not help the petitioner in the present case, rather it lays down a procedure that Returning Officer has to draw a lot and declare the result in accordance with the procedure and manner as prescribed in the rules.

36. It is relevant to refer to the judgment of the Apex Court in the case of University of Poona and others vs. Shankar Narhar Ageshe and others reported in A.I.R. 1971 SC 1783. In the said case the election of the Vice Chancellor of the University of Poona was held on the principles of proportional representation.

37. There were three candidates in the contest and after elimination of the lowest number of first preference votes only two were remained. Remaining two candidates secured equal number of votes by counting the second preference votes. One Dr. Apte was declared elected because in the first count Dr. Apte had

maximum number of first preference votes. The election of Dr. Apte was challenged. The High Court set-aside the election taking the view that only two continuing candidates remained to fill up only one vacancy and both of them had the same number of votes, hence the tie of votes between the two continuing candidates was to be solved by the principle of decision of lot. The judgment of the High Court was reversed by the Apex Court and it was laid down that determination by lot in case of equality of votes is neither a principle of universal application nor is a common law principle and it is permissible when there is specific statutory provision. Following was laid down in paragraph 21 of the said judgment:-

21. Determination by lot in case of equality of votes in neither a principle of universal application nor is it a common law principle. It is only permissible when there is a specific statutory provision to that effect. In the absence of a statutory provision the method of decision by lot is not resorted to when there is other rational method. The principle of decision by lot is dependent on chance and accident whereas the principle of exclusion with reference to difference of votes on the original count is based on reason and legislative principles. In the present case the Statute imposed a duty of election by the system of proportional representation by means of a single transferable vote. The principles of exclusion are not to be found in any statutory enactment in the present case. On the one hand there is the support of legislative measures embodying the principle of exclusion by reference to original count. The principle of exclusion by lot on the other hand is adhered to only if the Statute has a compelling force to that effect. In the present case there is no such statutory compulsion of deciding by lot in the eventuality which happened. If there are two principles of exclusion and the authority has a discretion in the mode of performing the duty, the authority cannot be commanded to a duty in a specific way (See Halsbury's Laws of England, Third Edition, Vol. II, Para.

38. Sri Vijendra Singh, learned counsel for the petitioner, has submitted that in fact in the voting for office of Pramukh no second preference votes were cast by the voters and both the candidates received 33 votes each. The petitioner himself has filed Form-XXIX in which declaration was made of the result. The 1994 Rules, which govern the election, clearly provides in Rule 17 that election be held in

accordance with the system of proportional representation and further Annexure-2 to the writ petition, i.e. Form-VIII mentions different columns which provide for counting at different stages, i.e. after first, second, third and forth exclusion. Thus the format in which result was declared also clearly mentions that election was to be held by the proportional representation and the mere fact that voters did not mark other preferences apart from casting only one preference shall not detract the applicability of Schedule-II of the 1994 Rules for determining the result of election.

39. In view of the foregoing discussions, we are of the view that no ground is made out to declare Instruction 4(1)(b) of Schedule-II of the 1994 Rules as ultra vires.

40. The writ petition lacks merit and is dismissed.

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