O. Bharathan vs K. Sudhakaran And Another on 6 February, 1996

Equivalent citations: 1996 AIR 1140, JT 1996 (2) 384, AIR 1996 SUPREME COURT 1140, 1996 (2) SCC 704, 1996 AIR SCW 685, (1996) 2 JT 384 (SC), 1996 ( ) ALL CJ 634, 1996 (1) UJ (SC) 307, 1996 (2) JT 384, (1996) SC CR R 432, (1996) 64 ECR 6, (1996) 1 KER LT 466, (1996) 1 ORISSA LR 290, (1996) 1 RRR 692, (1996) 2 CIVLJ 587

Author: K Venkataswami

Bench: K Venkataswami, Jagdish Saran Verma

PETITIONER:
O. BHARATHAN

Vs.

RESPONDENT:
K. SUDHAKARAN AND ANOTHER

DATE OF JUDGMENT: 06/02/1996

BENCH:
VENKATASWAMI K. (J)
BENCH:
VENKATASWAMI K. (J)
VERMA, JAGDISH SARAN (J)

CITATION:
1996 AIR 1140 JT 1996 (2) 384
1996 SCALE (1)688

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T K.Venkataswami, J.

This appeal under Section 116A of the Representation of the People Act 1951 (hereinafter referred to as "the Act") is preferred against the judgment and order in Election Petition No. 4 of 1991 of the Kerala High Court. The appellant was the elected candidate to Kerala legislative assembly from No 11, Edakkad constituency. The election was held on 12th June, 1991. There were only three candidates in the field. The appellant was polled 54965 votes and the first respondent was polled 54746 votes and the appellant having secured 219 votes more than the first respondent was declared as successful candidate. That declaration was challenged by the first respondent by filing an Election Petition as mentioned above.

The election of the appellant was challenged by the first respondent on a single ground at the trial on which alone evidence was let in and which found favour with the High court could be stated by setting out ground (B) as given in the Election Petition :

> "B. Similarly large number of other void votes have also been illegally cast and received at the time of the polling which took place on the 12th June, 1991 to the Edakkad Assembly Constituency. In the voters' list, the names of some persons who are one and the same but whose names have been entered more than once in the voters' list with intentional slight difference in the House No. with variation in the description of their names, in their father's/husband's names etc. Taking into advantage that position more than one vote has been cast in the names of such persons. Under section 62 of the Representation of the People Act, 1951, no person shall at any election vote in the same constituency more than once and, if he does so vote, all his votes in that constituency shall be void. The petitioner respectfully submits that persons whose names and other details are mentioned in the list, produced along with as Annexure-B to the petition, have exercised more than one votes in the election aforesaid to the Edakkad No.11 Assembly Constituency. Since the names and other details of such persons are far too numerous, the petitioner is producing along with the petition a list containing the names and details as Annexure-B to this petition. The reception of the aforesaid votes from the aforesaid persons, was improper and amounted to receiving votes improperly and reception of void votes. More than 1114 votes have been received from the aforesaid persons. Thus about 1114 void votes have been received Edakkad Assembly Constituency. Those votes have been counted and taken into account in declaring the first respondent as elected. The petitioner submits that the reception of such void votes has materially affected the results of the elections. The petitioner has reasons to believe that votes that have been cast in the name of those persons whose names appear in Annexure-B have all gone in favour of the first respondent. If those votes are scrutinized, inspected and excluded, undoubtedly it will be revealed that the result of the election in so far as it concerns the first respondent, the returned candidate, has been materially affected by reception of void votes. If those votes are excluded undoubtedly the petitioner would be found to have obtained a majority of the valid votes. But for the reception of the aforesaid void votes the first respondent would never have been declared elected, and instead the petitioner would have been declared elected."

In support of this ground the first respondent (Election Petitioner) has examined as many as 322 witnesses and filed Exhibits numbering about 1293. In the light of the oral and documentary evidence, the learned Judge initially rendered an interim judgment on 10.8.1992 giving a finding as follows:

> "I find that 269 votes are void under Section 62(4) of the Representation of the People Act, 1951 and I have also found 39 votes have been cast by persons whose names were not included in the electoral roll. These votes were cast by impersonation under Section 62(1) of the Act. These votes must have been accepted as valid votes by the returning officer at the time of counting. This amounts to improper reception of votes as envisaged under Section 100(1) (d)
>
> (iii) of the Act. As the first respondent was declared elected by by a margin of 219 votes, the declaration of these votes as void and invalid may materially affect the result of the returned candidate. These votes have to be searched out and excluded from the total number of votes."

In order to find out the candidate in whose favour those votes have been cast, the learned Judge overruling the objection raised by the learned counsel for the appellant/elected candidate that the suggestion to open the ballot boxes to examine the ballot papers would violate the secrecy of the ballot, ordered for opening of the ballot boxes to examine the ballot papers for the purpose mentioned above. This job was entrusted to the joint Registrar of the High Court who after verification found out of 308 vold/ invalid votes, (namely 269+39) 306 of such votes have been polled in favour of the appellant/elected candidate. In view of the said report given by the joint Registrar, the learned Judge found that those 306 votes counted in favour of the elected candidate must be deducted and after so doing, the Appellant/Elected candidate was found to have secured only 54659 which is less than 8/ votes secured by the Election Petitioner (first respondent herein). As a consequence of this finding while setting aside the election of the appellant as void, the learned judge further declared the first respondent as duly elected to the said constitutuency.

Aggrieved by the above judgment and order of the Kerala High Court, the present appeal has been filed by the appellant. Though several arguments concerning procedural irregularities and legal infirmities in the order were pointed out, we do not consider it necessary to go into all those points in the view we propose to take which in our opinion will be sufficient for the disposal of this case.

From the facts narrated above, it will be seen that the learned judge has found on the basis of appreciation of evidence let in before him that 306 votes polled in favour of the appellant were either void or invalid and as such they should be deducted from the votes polled in his favour. For coming to the conclusion that 269 votes polled were void, the learned Judge found on appreciation of oral evidence that witnesses examined on the side of the Election Petitioner (respondent No.1) have either admitted that they have voted two times or they must be deemed to have voted two times in view of the similarity of the signatures in two counter-foils alleged to be related to those witnesses.

Learned Senior counsel appearing for the appellant vehemently attacked the conclusion of the learned judge that the witnesses have admitted their signatures and also the fact of voting twice. According to the learned counsel such finding being perverse cannot be sustained in respect of at least 65 witnesses corresponding to 130 votes. To support his contention, learned counsel as samples pointed out certain portions from the evidence of the witnesses and also certain portions from the Judgment of the learned Judge himself.

As a sample of oral evidence, he invited our attention to the evidence of P.W.53 P.W. 53 in the Chief Examination has stated as follows :

> "I cast my vote in Mavllayi polling station. The polling station was in Cherumavilayi U.P. school. (Ext.711 Marked) Ext. P.711 counterfoil contronted to the witness and the witness denies the signature. (Ext.P.712 marked) Ext.P.712 counterfoil shown to the witness. The signature in that also is denied by the witness. Ext.P.391 Declaration shown to the witness. Witness admits the signature. Voter No.142 Othenanchalil K.K.Chandri w/o Chandran of polling station no.69 is myself. I have still doubt whether Ext.P. 712 is signed by me. I am certain that the signature found in Ext.P. 711 is not my signature."

On the above evidence the conclusion of the learned judge is as follows :

> "According to PW53 she had cast only one vote No.142. The corresponding counterfoil is marked as Ext. P 711. When this was confirmed to the witness she denied the signature therein. Ext. P 712 is the counterfoil corresponding to voter No.239. The signature in Ext. P 711 and Ext. P 712 are almost similar. There is slight variation. But that does not affect the petitioner's case, as the signature in Ext. P 712 is exactly similar to the signature put by the witness in the deposition. Therefore, it is clear that voter No. 142 and 239 in Ext.P60 is one and the same person and that voter has cast more than one vote. In the result. I declare that vote cast against counterfoil No. 070975 (Ext.P. 711) of polling station No. 69 and the vote case against counterfoil No. 070258 (Ext.P.712) and polling station No.69 are void."

In another instance the learned Judge held as follows :

> "The signature of the witness in the deposition does not tally with the signature found in these two counterfoils. On a comparison of the signature in Ext.P 713 and P 714 I have little doubt that the same witness has cast two votes. Therefore, I declare that vote cast against counterfoil No. 070653 (Ext,P 713) of polling station No. 69 and the vote cast against counterfoil No.070309 (Ext.P 714) of polling station No.69 are void."

While appreciating the evidence of P.W.69 the Court held as follows :

"P.W. 69 admits that he is voter No. 1392 in Ext. P 53 electoral roll. The witness also admits that voter No.563 in Ext.p 47 refers to him. According to this witness he had cast vote in polling station No. 53. The two counterfoils were shown to the witness and he denied both. In the cross-examination, however, he stated that he has no connection with kadampeth house and that voter No. 1392 in Ext. P 53 is not himself. The signatures in the two counterfoils are not closely similar. So it cannot be said that both votes were cast by P.W. 69. The signature in Ext.P.762 has got similarity with the signature of the witness in the deposition, So the vote against Ext.P.761 must have been cast by some other person. Therefore, I hold that the vote cast against counterfoil No. 062682 (Ext.P 761) in polling station No. 61 is invalid vote."

The evidence of P.W. 146 reads as follows :

"My father's name is Chathukutty. My house is Challivalappil. My mother's name is Lakshmi and I am a driver by profession. Ext. P 50.

Sl.No. 1192 Balakrishnan Chathukutty aged 30 is myself, Sl.No. 47 in Ext P 103 Balakrishnan Chathukutty Nambiar is not myself. My father is not Chathukutty Nambiar, (Counterfoil Nos. 120847 and 056691 are marked as Ext.P 936 and 937). Witness denies both the signatures. I have cast only one vote."

Cross-examination by Ist respondent's counsel:

"In Ext. P.50 against Sl.no.642 the house No, shown is 245, it is not my house number. I have no connection with the house by name krishnalayam. Sl.No.642 is on krishnan Nambiar. I am a member or Thiyya community, (Witness says that he is in possession of driving licence and shows the same before court and his name has been written there as C.V.Balakrishana. The driving licence also contains a photograph of the witness."

On the above evidence, the High Court found as follows:

"P.W.146 Balakrishnan admits that his father's name is Chathukutty and his mother's name is Lakshmi. He also admits that he is voter No. 1192 in Ext. P 50 electoral roll, but he denies that he is voter No.47 in one Balakrishnan Chathukutty Nambiar and according to this witness his father is not Chathukutty Nambiar and that he belongs to Thiyya community. But it is pertinent to note that in Ext.P.50 voter No.1192 is shown as resident of house No.245. In the original voters' list of polling station No.50, house No. 245 is described as krishnalayam and voter No. 642 is one L. Krishnan Nambiar. P.W.146 is not in a position to explain as to how his name happened to be included as a resident of the house of krishnan Nambiar. So even in the admitted entry there is voter No. 1192 in Ext.P 50. The corresponding counterfoil is marked as Ext. P 937. Even though the witness denies his signature therein, that is to be taken as his admitted signature as it corresponds with his admitted entry. The

> signature in Ext. P 937 is strikingly similar to the signature in Ext. P 36 counterfoil. So, it is clear that the person who put the signature in Ext. P 937 must have put the signature in Ext. P 936 also. Therefore, it is proved that there is not only similarity in the name but there is close similarity between the two signatures also. So, I hold that P.W. 146 had cast two votes. In the result, I declare that the vote cast against counterfoil No. 120847 (Ext.P936) in polling station No.115 and the vote cast against counterfoil No.056691 (Ext. p 937) in polling station No.56 are void."

Likewise while commenting on P.W. 149 the Court held as follows :

> "According to the witness she had cast vote in polling station No.91 as voter No.683. The corresponding counterfoil, marked as Ext. P 942, was shown to the witness. She denied the signature therein. Ext. P 943, the counterfoil of voter No.1143 in Ext, P 78 was shown to the witness. She denied that signature also. But on a bare perusal of these two signatures it can be seen that there is close resemblance between the two. The similarity in name and the close resemblance of the two signatures in the counterfoils would clearly establish that P.W. 149 had cast two votes. In the signature in Ext. P 942 and 943 the first letter 'K` is so conspicuous and the style of writing and the figure of the signatures are exactly similar. Under the above circumstances, I hold that P.W. 149 had cast two votes. Therefore, the vote case against counterfoil No. 093440 (Ext.P 942) in polling station No.91 and the vote cast against counterfoil No. 091398 (Ext.P 943) in polling station No.89 are declared void."

Similar are the cases regarding 65 witnesses at least. This is not seriously disputed by the learned counsel for the first respondent. Though the signatures are challenged, the learned judge overruling the objection raised by the learned counsel for the appellant herein that unless the disputed signatures are compared with the admitted signatures, the same cannot be taken into account proceeded to compare the signatures by himself and found that they are either similar or slightly varying.

It appears that the learned Judge has decided the question of void and invalid votes on insufficient materials and evidence in the case. Majority of the witnesses denied that they have voted more than once and they have also denied their signatures in the counterfoils. Under such circumstances, the learned judge could have summoned documents containing admitted signatures for comparison by an expert and also by comparing them himself. Instead the learned judge understood the hazardous task of comparing hundreds of disputed signatures which are not having individual characteristics to set aside the election of a candidate, the appellant herein.

The learned Judge in the course of the judgment has observed as follows :

> "Most of the witnesses either denied their signatures or expressed their inability to indentify their signatures. In the case of some well-educated persons when counterfoils containing the signature were shown to them, they stated that they could not identify the signatures. Every reasonable prudent person would be able to

identify his signature whenever the signature is shown to him."

Notwithstanding the above fact, namely, the learned Judge while doubting the testimony of the witnesses, instead of confronting them in a legal way to get the truth, jumped to his own conclusion. The learned judge in the course of appreciating the scope of Section 73 of the Evidence Act and having given a finding that under Section 73 of the Evidence Act a disputed signature could be compared only with the admitted signatures, proceeded to compare the signatures found in the counterfoils to find out whether both the signatures were to be by the same person.

On the peculiar facts of this case, the learned Judge erred in taking upon himself the task of comparing the disputed signatures on the counterfoils without the aid of an expert or the evidence of persons conversant with the disputed signatures. Therefore, the approach made by the learned judge is not in conformity with the spirit of Section 73 of the Evidence Act. Though the rulings of this Court in State vs. Pali Ram (AIR 1979 SC 14) and Fakhruddin vs. State of Madhya Pradesh (AIR 1967 SC 326) were brought to his notice, the learned judge proceeded to compare the disputed signatures by himself and decided the issue. While doing so, the learned judge observed as follows :

> "So all these witnesses are in the habit of occasionally putting their signature. Strangely enough most of the witnesses either denied their signature or expressed their inability to identify their signature. Even in the case of some well-educated persons when counterfoils containing the signatures were shown to them, they stated that they could not identify the signatures. Every reasonable prudent person would be able to identify his signature whenever the signature is shown to him. It is clear that these witnesses denied their signatures or failed to identify the signature with a definite purpose that at least one signature should not be taken as the admitted signature so as to make a comparison with the denied signature. It is also possible that the witnesses who had cast more than one vote pretended that they could not identify any of the signatures to make believe that they had not cast more than one vote. The denial of the signatures and the failure of these witnesses to identify their own signatures is to be viewed in the background of similarity of the signatures found in the various counterfoils."

Again the learned Judge observed as follows :

> "It is true that under Section 73 of the Evidence Act a disputed signature could be compared only with the admitted signature or signature proved to the satisfaction of the court to have been written or made by that person. Reliance was placed on the decision reported in State (Delhi Admn.) vs. Pali Ram (AIR 1979 SC
>
> 14) and contended that it is not advisable that a judge should take up the task of comparing the admitted handwriting with the disputed one to find out whether the two agree with each other and the prudent course is to obtain the opinion and assistance of an expert. This opinion was expressed by the Supreme Court in a criminal case while considering the question whether the accused had committed the

offence of forgery and chearing. In Fakhruddin vs. State of Madhya Pradesh (AIR 1967 SC 1326), the Supreme Court observed that comparison of the handwriting by the court with the other documents not challenged as fabricated, upon its own initiative and without the guidance of an expert is hazardous and inconclusive. These observations were made in the facts and circumstances of such case. But, in the instant case, comparison of the signature found in the counterfoil are made to ascertain whether both signatures were put by the same person."

********** "In the instant case, several witnesses who are alleged to have exercised their franchise more than once admitted that their names have been included in the electoral roll. They would say that they cast only one vote. In cases where their names are entered more than once in the electoral roll these witnesses admitted one entry and denied the other. The counterfoil corresponding to the admitted entry in the electoral roll must contain the signature of the voter. Even though this signature has also been denied by the witness or rather failed to be identified by the witness, it can safely be taken as the admitted signature of the witness. That signature could be very well compared with the signature appearing in the disputed counterfoil."

********** "So the standard of strict proof can be insisted only in the election petition wherein the election is sought to be set aside on the ground of corrupt practice.

In the instant case it can only be said that standard of proof should be of high nature, as an election petition is not liable to be set aside on vague or inaccurate evidence, and the court must uphold an election when two different views are reasonably possible, from the evidence adduced in the case."

********** "As already pointed out by me the close similarity in the signature in the counterfoils is also a strong proof to show that the entry related to the same person. It is also important to note that most of the witnesses denied their signatures in both the counterfoils. They could not identify their own signature and it is also clear that many of these witnesses changed their signatures and put different signatures in the deposition. In some cases the witnesses were asked to give specimen signatures and these specimen signatures were taken in open court and they are marked as exhibits in the case. The specimen signatures in many cases do not tally with the signatures found in the counterfoil of the voter, who admittedly cast his vote as voter against a particular serial number.

With this broad outline in the evidence I propose to consider the evidence of each witness who allegedly cast vote more than once."

It is on the basis of such conclusion the learned Judge arrived at the finding that 269 votes were void as one voter has voted twice. As pointed out earlier at least in the cases of 65 such witnesses (that means 130 votes) where the signatures are not admitted the findings of the learned judge cannot be supported for the reasons given earlier. It those 130 votes which were declared void and found polled in favour of the appellant herein are taken into account in his favour, certainly the appellant must be found to have secured more votes than the first respondent herein.

The learned Judge in our view was not right either in brushing aside the principles laid down by this Court in AIR 1979 SC 14 (supra) on the ground that it was not a criminal case or taking upon himself the hazardous task of adjudicating upon the genuineness and authenticity of the signatures in question even without the assistance of a skilled and trained person whose services could have been easily availed of. Annulling the verdict of popular will is as much a serious matter of grave concern to the society as enforcement of laws pertaining to criminal offences, if not more. Though it is the province of the expert to act as judge or jury after a scientific comparison of the disputed signatures with admitted signatures, the caution administered by this Court is to the course to be adopted in such situations could not have been ignored unmindful of the serious repercussions arising out of the decision to be ultimately rendered. To quote it has been held in AIR 1979 SC 14 (supra) ;

> "The matter can be viewed from another angle also. Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identify of a handwriting which forms the sheet- anchor of the prosecution case against a person accused of an offence, solely on comparison made by himself. It is therefore, not advisable that a judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other: and the prudent course is to obtain the opinion and assistance of an expert."

The necessity for adhering to the said sound advise and guidance is all the more necessary in a case where hundreds of signatures are disputed and the striking dissimilarities noticed by the Court at the time of trial of the Election Petition.

The learned counsel appearing for the first respondent was not able to convince us that the learned Judge was right in comparing the signatures himself at any rate in the peculiar facts and circumstances of the case and rendering the findings against the appellant herein. As we are satisfied on the peculiar facts of this case also that the learned Judge was not right in deciding hundreds of the disputed signatures by comparing the counterfoils by himself to declare the votes as void, we need not go into other arguments advanced before us.

As we find that at least 130 votes are validly polled in favour of the appellant for the reasons given earlier then he must be held to have secured 43 votes more then the first respondent herein.

In the result, we hold that the learned Judge was not right in declaring the election of the appellant as void and declaring the first respondent as duly elected. Accordingly, the appeal is allowed and the Election petition is dismissed with costs throughout.