Supreme Court of India
A. Neelalohithadasan Nadar vs George Mascrene on 11 April, 1994
Equivalent citations: 1994 SCC, Supl. (2) 619 JT 1994 (3) 181
Author: M Punchhi
Bench: Punchhi, M.M.

PETITIONER:
A. NEELALOHITHADASAN NADAR

Vs.

RESPONDENT:
GEORGE MASCRENE

DATE OF JUDGMENT11/04/1994

BENCH:
PUNCHHI, M.M.
BENCH:
PUNCHHI, M.M.
AHMADI, A.M. (J)
RAMASWAMY, K.

CITATION:
1994 SCC Supl. (2) 619 JT 1994 (3) 181
1994 SCALE (2)522

ACT:

HEADNOTE:

JUDGMENT:

ORDER

28. For the reasons given by the majority (R.M. Sahai, J. dissenting and S.P. Bharucha, J. with whom N. Venkatachala, J. has agreed) the appeal is allowed and the judgment and order under appeal is set aside. The writ petition filed by the respondent is allowed only to the extent that it is declared the instruments executed by them in Form VI of the Distillery and Warehouse Rules made under the provisions of the Kerala Abkari Act shall be liable to stamp duty under Article 32 of the Schedule to the Kerala Stamp Act. There shall be no order as to costs.

29. We are informed that the respondent in pursuance of the interim order passed by the High Court had paid duty on the document to the State Government as one payable under Article 13 of the Schedule to the Kerala Stamp Act. Since we have held that the document was only indemnity

bond, the amount of duty payable by the respondent was much less than what was paid by it. In the circumstances, the appellant is directed to refund the excess amount, if any, paid by the respondent. The amount shall be refunded, as requested by the learned counsel for the State, within three months from today.

A. NEELALOHITHADSAN NADAR V. GEORGE MASCRENE (Punchhi, J.) The Judgment of the Court was delivered by PUNCHHI, J.- Two principles of election law stand, as always, in competition; one being "purity of elections" and the other being "secrecy of ballot". On the basis of the former, the Kerala High Court has upset the election of the appellant herein. Challenge to the order of the High Court is on the anvil of the latter principle.

2. The appellant and the first respondent were contesting candidates for the Kovalam Assembly Seat No. 138 in the State of Kerala. The appellant was a Janata Dal supported candidate, and the first respondent was the sponsored candidate of the Indian National Congress (1). Candidates of other political parties though being in the fray get no significance insofar as the present matter is concerned. Polling took place on 12-6-1991. Counting took place on 16- 61991. The Assistant Returning Officer who supervised the counting announced the number of votes polled by the appellant as 49,516 and the first respondent as 49,500. There was a demand of recount which was conceded to by the Assistant Returning Officer. The final result thereafter showed that the appellant had received 49,515 votes and the first respondent 49,494 votes. Since the appellant had obtained 21 votes in excess of the first respondent he was declared elected from the Constituency. The requisite declaration under Section 66 of the Representation of the People Act, 1951 (hereafter referred to as the 'Act') was made on 17-6-1991.

3. An election petition was moved by the first respondent. The claim of the election petitioner was that he had obtained more valid votes than the appellant and was therefore entitled to be declared elected instead of the appellant for reasons stated in the election petition. In paragraph 5-A of the election petition, it was asserted that several voters, whose names had wrongly and accidentally been included in the electoral rolls of more than one polling stations in the Constituency had dishonestly voted in the election in both the polling stations taking undue advantage of the double inclusion of their names. It was suggested that this had obviously been done by erasing the ink-mark on the little finger of the voters in order that at the polling station where they voted the second time, neither the polling staff nor the polling agents could become aware of the fraud. The election petitioner further asserted that he had ascertained the names, roll numbers and other details of 19 voters and the polling stations in which they had voted, necessary details of which were furnished in Annexures 1 and 1-A to the election petition. It was pleaded that all the 19 persons had voted twice and, according to Section 62(4) of the Act, both the votes polled were void. Further, those 19 persons had voted for the appellant. He therefore suggested that it was necessary to pick out the votes cast by those persons and eliminate them from consideration, ejectable as they were under Section 62(4) of the Act. It was also asserted that if any one or more of these voters claim and prove that their votes at one of the polling stations had been validly cast, it would then be obvious that the vote in 'the other polling station was cast by an impersonator and hence void and would be liable to be rejected. The petition is supported by an affidavit in accordance with Rule 94-A of the Statutory Election Rules. Annexures 1 and 1-A are part and parcel of the petition.

4. The allegations in the election petition on this score were obviously denied by the appellant. Rather a recrimination petition was filed by the appellant to suggest similar void voting pertaining to other votes, which votes were alleged to have gone to the election petitioner. Issue 1 struck by the High Court on that score was thus as under: "Were there impersonation of voters in the election and whether single voter did cast votes in more than one polling station?"

The High Court on examining the evidence led by the parties on the issue found that ballot papers enumerated in paragraph 67 of its judgment deserved being picked out from the respective ballot boxes to be rejected as void. The ministerial work for the purpose was assigned to the Joint Registrar of the High Court. It was ordered that the above votes be deducted from the total votes polled by the respective candidates. Time allotted for the purpose was five days. Inspection was to be done in the presence of counsel representing the election petitioner and the elected candidate. Issue 1 was to be found in the above terms.

5. As directed by the High Court the Joint Registrar picked out 52 ballot papers which were declared as void. Out of those 48 were cast in favour of the elected candidate and 4 in favour of the election petitioner. Since the Returning Officer had announced the elected candidate to have secured 49,515 votes, 48 void votes therefrom had to be deducted and as a consequence the appellant was found to have secured a total of 49,467 votes. Correspondingly in case of the election petitioner, the total votes polled, as announced, being 49,494, subtracting 4 void votes therefrom brought the figure down to 49,490. So the result recorded was that the first respondent, had secured 49,490 votes. On such result the election petitioner entitled himself to be declared elected instead of the appellant.

6. Now the understanding of the High Court has been that in accordance with Section 17 of the Act, no person is entitled to be registered in the electoral roll for more than one constituency. Section 18 further mandates that no person shall be entitled to be registered in the electoral roll in any constituency more than once. Subject to the exercise of correction in the electoral rolls by the procedure prescribed, once the final electoral roll is published and the elections held on the basis thereof, it is not open to anyone to challenge the election from any constituency on the ground of defect in electoral rolls. If an elector has been registered in the electoral rolls of the constituency for more than once, this may enable him to exercise his votes in more than one polling stations. He is capable of presenting himself in the two respective polling stations without his identity being questioned. Possibility however, though remote, cannot be ruled out that he may be challenged when exercising his vote at the second polling station if someone thereat, be he the election agent or any other person, could successfully point out that he had voted in another polling station. Normally, such an incidence would be rare because of the gigantic task involved in an election. That such a situation of double registration is possible and capable of misuse was pertinently conceived of by the legislature. Therefore Section 62 of the Act was made specifically to provide that every person who is for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency. Sub-section (3) of that section provided that no person shall vote at a general election in more than one constituency of the same class and if he votes in more than one such constituency, his vote in all such constituencies shall be void. Further sub-section (4) of Section 62 also provided that no person shall at any election vote in the same constituency more than once, notwithstanding that his name stood registered in the electoral roll of that constituency for more

than once. And if he does vote more than once, all his votes in the constituency shall be void. It is on the strength of Section 62(4) of the Act that the High Court allowed the election petition on the principle of "purity of elections" by undertaking the exercise to cull out void votes irrespective of the choice of voting. The evident thrust thus has been to put such purity in a dominating position even if the secrecy of ballot got some bruises incidentally. The approach of the High Court on that score was under a major attack by Mr Prashant Bhushan, learned counsel for the appellant.

7. Significantly, as hinted earlier, the appellant had filed a recriminatory petition making inter alia similar allegations of double voting of other instances. This was the reason why the High Court proceeded on the footing, as is reflective from paragraph 9 of the judgment under appeal, that both contesting parties had come forward with the common allegation that in various sectors of the constituency, some voters had exercised votes more than once and those votes had to be traced and rejected as void votes. It had then to be seen whether the total had gone to materially affect the result of the election. The result of the election as aforenarrated had provided sufficient ground to declare it void. The High Court then made a common observation, "so it is to be examined whether the electors mentioned by the petitioner and the first respondent have exercised votes more than once in the last General Elections to the Kerala Legislative Assembly". It would, in these circumstances, be legitimate to assume that both the contestants had bowed to the principle embodied in Section 64(4) of the Act for the sake of "purity of elections" principle and were willing partners to have the void element identified and extricated from the voted lot.

8. It is therefore unnecessary to burden this judgment with the details of oral evidence of each and every witness on the point examined by the respective parties. Discussion thereon in detail is available in paragraphs 10 to 67 of the judgment under appeal. Three broad features however are evident as emerging from the appreciation of evidence by the High Court:

> (i) In cases of double registration of votes the exercise by one and the same person of both votes at two different polling stations, led the High Court to reject both votes;
>
> (ii) In cases of double registration of votes, in which one vote was validly cast by one and the same person in some polling station and the other by some impersonator, the High Court declared void the vote cast by the impersonator; and
>
> (iii) The Court exercised its powers under Section 73 of the Evidence Act in comparing the admitted and proved handwriting of the voter with the disputed ones to come to the conclusion whether a particular voter had voted twice or just once. The signatures on the counterfoils of the ballot papers obtained at one. polling station were compared with the signatures on the counterfoils of ballot papers obtained at the other; the Court holding whether they did or did not tally.

9. Pursuant to such approach the High Court located the void votes in order to throw them away tracing them to the contents of the related voting, which according to Mr Prashant Bhushan, was breach of the "secrecy of ballot" principle. He pressed for the primacy of the principle into service by citing some precedents.

10. The existence of the principle of "secrecy of ballot" cannot be denied. It undoubtedly is an indispensable adjunct of free and fair elections. The Act statutorily assures a voter that he would not be compelled by any authority to disclose as to for whom he has voted, so that he may vote without fear or favour and free from any apprehension of its disclosure against his will from his own lips. See in this connection Raghbir Singh Gill v. Gurcharan Singh Tohral. But this right of the voter is not absolute. It must yield to the principle of "purity of election" in larger public interest. The exercise of extrication of void votes under Section 62(4) of the Act would not in any manner impinge on the secrecy of ballot especially when void votes are those which have to be treated as no votes at all. "Secrecy of ballot" principle presupposes a validly cast vote, the sanctity and sacrosanctity of which must in all events be preserved. When it is talked of ensuring free and fair elections it is meant elections held on the fundamental foundation of purity and the "secrecy of ballot" as an allied vital principle. It was observed by this Court in Raghbir Singh case' as follows (SCR p. 1320: SCC p. 68, para 23) "Secrecy of ballot though undoubtedly a vital principle for ensuring free and fair elections, it was enshrined in law to subserve the larger public interest, namely, purity of election for ensuring free and fair election. The principle of secrecy of ballot cannot stand aloof or in isolation and in confrontation to the foundation of free and fair elections, viz., purity of election. They can coexist but as stated earlier, where one is used to destroy the other, the first one must yield to principle of purity of election in larger public interest. In fact secrecy of ballot, a privilege of the voter, is not inviolable and may be waived by him as a responsible citizen of this country to ensure free and fair election and to unravel foul play."

11. In view of the above it is the settled position that out of the two competing principles, the purity of election principle must have its way. Section 94 of the Act cannot be pressed into service to suppress a wrong coming to light and to protect a fraud on the election process.

12. That both the election petition and recrimination petition were dealt with on the principle of "purity of election" is not in dispute. The approach of the High Court on the subject on the commonality of the attack also cannot be questioned. But what was questioned by Mr Prashant Bhushan, as reiterated in his written submissions of 14-9- 1993, was that the High Court was not correct in allowing examination of marked copies of electoral rolls and counterfoils without any evidence or material in support of the plea for inspection and that the High Court allowed the inspection casually without inviting a written application or even by a written order. It was submitted that except for pleadings in the election petition regarding void voting, there was no cause pleaded to permit the election papers to be thrown open for inspection and this exercise was termed by learned counsel as 'fishing or roving'. Rule 93 of the Conduct of Election Rules, 1961, provides for documents which shall not be 1 1980 Supp SCC 53 :(1980) 3 SCR 1302 opened and their Contents inspected by, or produced before, any person or authority except under the orders of a competent court. On the basis thereof it was maintained that by a string of judgments of this Court it has been ruled that inspection could only be allowed when two conditions are satisfied:

> 1. The material facts on the basis of which inspection of documents is sought, must be clearly and specifically pleaded; and

2. The Court must be satisfied on evidence, even if in the form of Support for these principles was sought from Ram Sewak Yadav v. Hussain Kamil Kidwai2, Hariram v. Hira Singh3, R. Narayanan v. S. Semmalai4, Jagjit Singh v. Giani Kartar Singh5, Jitendra Bahadur Singh v. Krishna Behari6 and other decisions of the like.

13. But by and large these are cases where there was a claim for recount. In contrast the instant case is of double voting which has specifically been pleaded in the election petition filed on 29-7-1991 supported by affidavit and the names of the voters have been supplied in the lists annexed thereto. The appellant had filed recrimination petition pleading that there were several other cases of double voting and reception of invalid votes in favour of the election petitioner. This written statement-cum- recrimination petition was filed on 10-9-1991. Issues were framed on 20-9-1991. The election petitioner on 26-9-1991 was allowed to amend the Election Petition so as to include 10 more cases of double voting. The corresponding amendment application filed by the appellant for taking into account details of double voting having taken place in another neighbouring constituency was rejected by the High Court for it was based on a new charge. The second amendment application of the election petitioner was allowed on 7-10- 1991 so as to include 23 more cases of alleged double voting. It is at that stage that is on 7-10-1991 that the Court permitted inspection of the counterfoils since several double voters had been summoned for the following day to appear on 8-10-1991 and subsequent days, on the oral prayer/application of both the election petitioner and the appellant. The court apparently took into account that since witnesses were to be examined on the question of their double voting and were expected to take a positive stand, it would become necessary to corroborate or confront them with the counterfoils of the ballot papers issued to them which purported to have been signed or not by them, in order to save time lest examination of the witnesses be time consuming. The Court allowed inspection of the roll and counterfoils in order to facilitate evidence of the witnesses on the date of their appearance, which was the following day. The suggestion no doubt was oral but the Court seemed to agree with the suggestion and inspection was permitted to both parties in the presence of the Registrar. The commonality of the approach of the parties on the question of double voting must have clearly goaded the Court to adopt such measure to facilitate quick trial. It is the case of the election petitioner that the counsel for both the parties inspected the counterfoils on 7-10-1991 in the 2 (1964) 6 SCR 238, 247-50: AIR 1964 SC 1249 : 26 ELR 14 3 (1984) 2 SCC 36: (1984) 1 SCR 932, 937 4 (1980) 2 SCC 537 5 AIR 1966 SC 773, 783 (para 31): 28 ELR 81 6 (1969) 2 SCC 433, 436 (para 7) : (1970) 1 SCR 852, 856-

Registrar's room as also on subsequent days, even though there was no written application made and there was no formal written order of the Court. Yet the inspection was open to both the parties without any objection having ever been raised by the appellant. In the facts and circumstances, we fail to see how the principle of secrecy of ballot can be imported to question the power of the Court to orally allow inspection in its endeavour to eliminate the impurity in elections, the opportunity provided having been availed of without demur by both parties. In this situation, it is difficult for us to digest the argument that here the High Court proceeded to allow inspection without being satisfied on evidence, even in the form of affidavit, that it was necessary to allow inspection in the interest of justice. Since the names of the voters who were alleged to have double voted, had specifically been pleaded in the election petition (as amended from time to time) and the recrimination petition, it was necessary to correlate their names with the electoral rolls and the

counterfoils of the ballot papers so that in case of double voting or impersonated voting, the impure element in the election process could be identified and retrieved from the election package. The primary purpose thus was to purify the electoral process and not to hunt or hound the voter's choice, when exercised validly and freely. It is for that purpose that the Court, in the interest of justice, to facilitate a quick trial permitted the parties to inspect beforehand the records but after the framing of the requisite issues arising from the pleadings of the parties and not earlier. This approach could not be termed as permitting a 'roving or fishing' enquiry, as it is sometimes described in cases of a claim for re-count. We are thus of the view that the High Court committed no error in permitting such inspection in the facts and circumstances. We must, however, hasten to clarify that we should not be understood to approve of the High Court giving oral directions in such serious matters without insisting on a formal application setting out how a prima facie foundation was laid for the grant of such relief.

14. Another argument put forth by Mr Prashant Bhushan was that the pleadings in the election petition were insufficient to justify inspection inasmuch as except for mentioning that there had been double voting by 19 persons nothing else was stated about the basis on which the election petitioner came to the conclusion that these names, which apparently had appeared twice in the electoral roll, belonged to one and the same person and that those persons had in fact voted twice. It was also commented that no material facts, in the form of affidavits by single persons or polling agents alleging that they had seen and heard about those persons having voted twice. was filed in support of the petition. It is maintained that in the absence of evidence of these particulars being pleaded as to the source of knowledge of double voting it was dangerous to allow enquiring into such an allegation on the bare allegation of double registration of votes and possible double voting. We have pondered over this matter but regretfully do not accept the argument of the learned counsel. If a name has been registered twice enabling a person to take the advantage of voting in two different polling stations, Section 62 mandates that if he polls both these votes then both votes are void. A void vote cast is a vote void ab initio. In the nature of things the void taint in the election would have to be traced to the election papers for without that bare oral evidence would be of no use, and at best would be word against word, making application of Section 62(4) welling impossible. If the election petitioner on some information, material or otherwise is able to entertain the belief that a particular voter, double registered, is known to have voted twice, he can certainly plead to that fact on his own entertained belief and need not ordinarily resort to giving details of the sources of his information or knowledge or the entertainment of his belief because registration of double vote is by itself the starting point; the exercise of both votes being the second. The election petitioner had specifically mentioned and in clear-cut terms that 19 persons had double voted. The question was not resoluble merely on oral evidence, whether they had or had not, except to put those persons into the witness box, hear their version and confront them with the election papers. The sphere of enquiry at that stage is to the voting and not for discovering the name of the person to whom the vote was cast. That inevitably has to be found out after double voting or impersonated voting has been found out leading to the new step to trace them and nullify them. On the pleading of the parties as such, on both sides, a case for inspection at the stage when it was done had been made out. We thus find no error committed in the approach of the High Court.

15. In the matter of correlation and employment of Section 73 of the Evidence Act, the High Court took support from a decision of this Court in Fakhruddin v. State of Mp.7 The High Court justified its step of comparison in paragraph 13 of the judgment under appeal as follows:

> "Learned counsel representing the first respondent raised a contention that this Court should not take the part of an expert in handwriting to compare the signatures of witnesses to find out whether they were signatures of the same person. According to counsel, the disputed signatures should be sent to experts for their opinion. In the alternative it is contended that petitioner should examine persons familiar with the signature of the witnesses to establish the identity of signatures. Handwriting may be proved on admission of the writer or by the evidence of some witness in whose presence it was written. This is direct evidence. In the absence of such direct evidence, opinion of handwriting expert or of some who is familiar with the writing of the person is relevant. Thus besides direct evidence which of course is the best method of proof, the law makes two other modes also as relevant, i.e., a writing may be proved to be the handwriting of a particular individual by the evidence of a person familiar with the handwriting of that individual or by the testimony of an expert competent to compare the handwritings on a scientific basis. A third method is also provided by the Evidence Act in Section 73. It is comparison by the court with the writing made in the presence of the court or admitted or proved to be the writing of the person. The Court can apply its own observation to the admitted or proved writings and to compare them with the disputed one. This comparison depends on an analysis of the characteristics in the admitted or proved writings and of the same characteristics in large measure in the disputed writing. Even if there is the opinion of the expert on the handwriting, it is subjected to the scrutiny by court. The expert's opinion is not the final word. The court must see for itself whether it can safely be held that the two writings are of the same person. To this extent, court may play the role of an expert. The court can accept the disputed signature to be that of the witness when it is satisfied on its observation that it is safe to accept the same. In this view, I do not think it necessary to have the admitted signature of the witness to be compared with the signature in the 7 AIR 1967 SC 1326: 1967 Cri LJ 1197 disputed counterfoils of the ballot paper by any expert. This Court can scrutinise the characteristics of the signatures. If it finds that the disputed signature has the same characteristics in large measure with the admitted signature, it can safely come to the conclusion that both are of the same person."

The High Court finally recorded its satisfaction or otherwise in the case of signatures resulting in double voting and impersonation, and signatures and thumb impression not tallying at all. No meaningful argument on facts in regard thereto was addressed before us except to the approach of employing Section 73 of the Evidence Act. It was urged that the High Court should not have become an expert. We, however, are of the view that when larger public interest is served by expeditious disposal of an election petition, then the course adopted by the High Court, as suggested from the afore-extraction, is in conformity therewith. Although courts should be slow in resorting to this method, we do not find it faulted, more so when the courts resort to exercise of such power is

approved in two other cases of this Court in State (Delhi Administration) v. Pali Ram8 and Murari Lal v. State of M.P.9 As a sequitur the finding recorded by the High Court on issue 1 is perfectly sound.

16.The affirmed finding on issue 1 alone is enough to dismiss the appeal. The related issues 6 and 7 also go in favour of the election petitioner. These issues were to the effect that "Is the election of the first respondent (appellant herein) liable to be declared void for all or any of the reasons mentioned in the petition." Further "Is the petitioner entitled to a declaration that he is duly elected from No. 138, Kovalam Legislative Assembly." Since the final result approved by the High Court on this particular point is that 48 void votes had to be deducted, as found on issue 1, holding that the appellant secured 49,467 votes only, and the election petitioner 49,490. There is thus a margin of 23 votes materially affecting the result of the election. This finding alone is enough to reject the appeal, though the High Court has not based its decision alone on the basis thereon.

17.On issues 2 and 3 which were to the effect as to whether there was any illegality in the issue and counting of postal ballot papers and further was any valid vote rejected as invalid and invalid vote accepted as valid, the ultimate finding of the High Court was that 20 votes had invalidly been rejected and out of those 10 had been cast in favour of the election petitioner and 10 in favour of the appellant. So that made them even. The result thus came to be finally resting on issue 1 whereunder 23 votes were found to have been polled in favour of the election petitioner more than the appellant. With this result the High Court rightly allowed the election petition declaring the election petitioner-first respondent as the duly elected member of Kerala Legislative Assembly instead of the appellant, setting aside the election of the latter.

18. As a result of the above discussion, this appeal fails and is hereby dismissed. No costs.

8 (1979) 2 SCC 158 : 1979 SCC (Cri) 389: (1979) 1 SCR 931 9 (1980) 1 SCC 704: 1980 SCC (Cri) 330: (1980) 2 SCR 249