

Supreme Court of India

Era Sezhiyan vs T.R. Balu And Ors on 1 March, 1990

Equivalent citations: 1990 AIR 838, 1990 SCR (1) 767

Author: M Kania

Bench: Kania, M.H.

PETITIONER:

ERA SEZHIYAN

Vs.

RESPONDENT:

T.R. BALU AND ORS.

DATE OF JUDGMENT 01/03/1990

BENCH:

KANIA, M.H.

BENCH:

KANIA, M.H.

KULDIP SINGH (J)

CITATION:

1990 AIR 838                      1990 SCR (1) 767

1990 SCC Supl. 322              JT 1990 (1) 392

1990 SCALE (1) 377

ACT:

Representation of the People Act, 1951/Conduct of Election Rules 1961: Sections 60 and 100/Rules 30, 31 37A, 39A, 56 & 70--Rajya Sabha election--Ballot paper marked with green ink while blue ball point pen kept in voting booth for use by voter--Voting in violation of election rules--Hence ballot paper rightly rejected: mark not place in the column earmarked for marking the preference but placed opposite the name of the candidate: intention of the voter clearly indicated--Hence ballotpapers rightly accepted.

HEADNOTE:

Election of six Members to the Rajya Sabha by the elected Members of the Tamil Nadu Legislature Assembly was held in June 1986. The appellant and respondent nos. 1 to 7 were the eight candidates in the field. Respondent Nos. 1 to 6 were declared duly elected and the appellant was declared as having lost the election. The appellant thereupon filed an election petition which was dismissed by the High Court.

Before this Court it was contended on behalf of the appellant that: (1) the first preference vote in his favour in which the first preference was marked on the ballot paper in green ink had been wrongly rejected on the ground that it

was marked otherwise than with the article supplied for the purpose, i.e., the ball-point pen with blue ink which had been kept in the voting booth; and (2) the three ballot papers indicating the first preference in favour of the first respondent, which did not contain the figure 'I' in the space intended for marking the said figure, had been wrongly accepted. In support of the first contention it was argued that: (1) the expression "article supplied for the purpose" used in Rule 39A(2)(b) and Rule 73(2)(e) of the Conduct of Election Rules, 1961, was misconstrued by the High Court; (2) in the context of the election law, the instructions contained in the hand-books, and the procedure followed in respect of the election to Lok Sabha and State Assemblies, the expression "article supplied for the purpose" should be interpreted as meaning "actually given" or "handed over", and as such the ball-point pen for marking the preference should have been personally handed over to the voter with instructions to use it for marking his preference; (3) the mistake in the present case, namely, marking

768  
of the preference with green ink on the ballot paper, had occurred because no ball-point pen was handed over to the voter concerned; and (4) the fundamental rule of election law is that effect should be given to the intention of the voter and this could be done only by treating the vote as valid.

Dismissing the appeal, this Court,

HELD: (1) There is a material difference between an election to Lok Sabha or a Legislative Assembly which is a direct election with one constituency for each seat and only the vote is to be cast, and an election to Rajya Sabha which is an indirect election with the preferential system of voting. This difference has to be taken into account in interpreting the relevant words used in the Rules relating to an election. [779D-E]

(2) Rule 39A(2)(b) read with Rule 37A(2)(a) of the Conduct of Election Rules 1961 prescribes that at an election in a council an elector in giving his vote shall place on his ballot paper the figure 'I' in the space opposite the name of the candidate for whom he wishes to vote in the first instance with the article supplied for the purpose. Further, Rule 73 which is directly applicable to the counting of votes at elections by Assembly Members, prescribes that if on the ballot paper there is any figure marked otherwise than with the article supplied for the purpose, the ballot paper shall be invalid. [777H; 778A; D]

(3) The High Court was right in interpreting the expression "article supplied for the purpose" in Rule 39A(2)(b) and Rule 73(2)(e) of the Election Rules as meaning "made available for the purpose" or "provided for the purpose." [778E]

Ram Utar Singh Bhaduria v. Ram Gaopal Singh & Ors ., [1976] 1 SCR 191 distinguished.

(4) The difference in the case of an election to the Rajya Sabha makes it wholly unnecessary that the Presiding Officer or the Polling Officer should hand over to every voter individually a ball-point pen to mark his vote and it is enough if the article for marking the preference, namely, ball-point pen, is provided to the voter to use the same for marking his preference or if the pen is placed in such a way as to make it clear that the marking of the preference is to be done with that pen and instructions given to use that pen for marking the preference. [779H; 780A-B]

(5) It is not enough for the vote to be valid that it is possible

769

to gather the intention of the voter to vote for a particular candidate. When the law prescribes that the intention should be expressed in a particular manner, it can be taken into account only if it is so expressed. [777E-G]

Hari Vishnu Kamath v. Syed Ahmad Ishaque & Ors., [1955] 1 SCR 1104, referred to.

(6) Assuming that the voter in this case had expressed his intention clearly by marking the figure 1 in green ink, he did so in violation of the express provisions of the Rules which have a statutory force and hence no effect can be given to that intention. [778D]

(7) Clause (a) of sub-rule (2) of Rule 37A only provides that the voter shall place on his ballot paper the figure 1 in the space opposite the name of the candidate for whom he wishes to vote in the first instance. It is significant that this rule does not specifically say that the figure 1 must be placed in the column earmarked for marking the preference but only requires that the figure 1 should be placed opposite the name of the candidate. [781D-E]

(8) In the case of the three first preference votes cast in favour of respondent No. 1 the figure 1 was clearly marked opposite the name of respondent no. 1, being the candidate concerned, as required by the express provision of the said Rule 37A, and the intention of the voter was clearly to cast the first preference in favour of respondent No. 1. [782E]

S. Sivaswami v. V. Malaikannan & Ors., [1984] 1 SCR 104, referred to.

#### JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1577 (NCE) of 1987.

From the Judgment and Order dated 24.4. 1987 of the Madras High Court in Election Petition No. 1 of 1986. Ram Jethmalani, Ms. Rani Jethmalani and M.G. Ramachandran for the Appellant.

R.K. Garg, S. Padmanabhan, K. Raj. Choudhary, R. Mohan, K. Chandrashekharan, R. Ayyam Perumal, V. Krishnamurthy, S. Thananjayan, K.V. Vijaya Kumar, A.V. Rangam and V.R. Kari- thi- kayan for the Respondents.

The Judgment of the Court was delivered by KANIA, J. This is an appeal from a judgment and order delivered by a learned Single Judge of the Madras High Court on April 24, 1987 dismissing an election petition filed by the appellant. The appellant herein was the petitioner before the High Court and the respondents nos. 1 to 8 herein were arraigned as respondents in the same order in the election petition. The dispute pertains to the election of six Members to the Rajya Sabha by the elected Members of the Tamil Nadu Legislative Assembly. The election was held, as scheduled, on June 28, 1986. The appellant and respondents nos. 1 to 7 were the eight candidates in the field, all the nominations having been found valid. The 8th respondent was the Returning Officer. The polling took place, as scheduled, on June 28, 1986 and, immediately thereafter, the ballot box was opened and the votes were sorted out. The election was under the preferential system of voting and the particulars of the first preferences votes cast and secured by the candidates are as follows:

Candidates	First	Preference
Votes		
1. Appellant	33	
2. 1st Respondent	35	
3. 2nd Respondent	31	
4. 3rd Respondent	33	
5. 4th Respondent	32	
6. 5th Respondent	34	
7. 6th Respondent	34	
8. 7th Respondent	nil	

Out of the 33 first preference votes cast in favour of the appellant, one ballot paper was rejected by the 8th respondent, the Returning Officer, on the ground that the said ballot paper was marked by the voter otherwise than with the article supplied for that purpose. It may be mentioned here that the first preference was indicated on the said ballot paper by a ball-point pen with green ink whereas in the ball point pen kept along with the ballot box had blue ink. The working result sheets of the counting were prepared and announced by the 8th respondent. The particulars of the said working result sheets are as follows:

1. Appellant	3219
2. 1st Respondent	3301
3. 2nd Respondent	3270
4. 3rd Respondent	3300
5. 4th Respondent	3301
6. 5th Respondent	3301
7. 6th Respondent	3301

In consequence, respondents nos. 1 to 6 were declared as duly elected and the appellant was declared as having lost the election.

It is submitted by learned counsel for the appellant, that (1) the first preference vote in his favour in which first preference was indicated on the ballot paper in green ink was wrongly rejected. The rejection of the said ballot paper by the Returning Officer was duly objected to by the appellant at the time of counting. The said ballot paper is hereinafter referred to as "the said rejected ballot paper". If the said rejected ballot paper had been received as valid, the appellant would have the proportionate number of preference votes and would have been declared elected. The second contention raised by the appellant was that three ballot papers which did not contain the figure 1 in the space intended for marking the said figure should have been rejected and the same were wrongly accepted. These ballot papers had been used for casting first preference votes in favour of the first respondent and if the same had been rejected, first respondent would not have been elected and in his place the appellant would have been elected. Both the mistakes according to the appellant materially affected the result of the election.

Before going into the controversy raised before us, we may note the relevant provisions of the Election Law. The election petition was filed under Chapter-II of the Representation of the People Act, 1951 (hereinafter referred to as "the said Act"). Section 59 of the said Act provides that at every election where a poll is taken votes shall be given by ballot in such manner as may be prescribed. We are not concerned here with the special procedure for voting provided in certain cases provided for under section 60 said Act. Section 100 of the said Act deals with the grounds for declaring elections to be void. The relevant portion of the said section reads thus:

"100(1) Subject to the provisions of sub-section (2) if the High Court is of opinion--

(a)	x	x	x
(b)	x	x	x

(c) That any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected--

(i) by the improper acceptance or any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void".

Conduct of Election Rules, 1961 (referred to hereinafter as "the Election Rules") came into force on 25th of April, 1961. Rule 30 of the Election Rules prescribes the form of the ballot papers. Rule 31 of

the Election Rules provides for arrangements at polling stations. Sub-rule (3) of Rule 31 runs as under:

"(3) the returning officer shall provide at each polling station a sufficient number of ballot boxes, copies of the relevant part of the electoral roll, ballot papers, instruments for stamping the distinguishing mark on ballot papers and articles, necessary for electors to mark the ballot papers."

Rule 39 of the Election Rules deals with the maintenance of secrecy of voting by electors within polling stations and the voting procedure. The material portion of sub-rule (2) of that rule runs as follows:

"(2) The elector on receiving the ballot paper shall forth- with--

(a) proceed to one of the voting compartments:

(b) there make a mark on the ballot paper with the instrument supplied for the purpose on or near the symbol of the candidate for whom he intends to vote."

Rule 70 lays down rules for the conduct of polls. The portion of Rule 70 material for the purposes of the case runs as follows:

"(a) x x x x

(b) to every election in a council unless voting by postal ballot has been directed in the whole of that constituency under clause (b) of rule 68, subject to the following modifications, namely:

(i) clause (a) of sub-rule (1) of rule 31 shall not apply to an election by assembly members;

(ii) in lieu of rules 37 to 40, the following rules shall apply:

37A. Method of voting. (1) Every elector has only one vote at an election irrespective of the number of seats to be filled.

(2) An elector in giving his vote--

(a) shall place on his ballot paper the figure 1 in the space opposite the name of the candidate for whom he wishes to vote in the first instance; and

(b) may, in addition, place on his ballot paper the figure 2 or the figures 2 and 3 or the figures 2, 3 and 4 and so on, in the space opposite the names of the other candidates in the order of his preference.

38A. x x x x 39A. Maintenance of secrecy of voting by electors within polling station and voting procedure--(1) Every elector, to whom a ballot paper has been issued under rule 38A or under any

other provision of these rules, shall maintain secrecy of voting within the polling station and for that purpose observe the voting procedure hereinafter laid down. (2) The elector on receiving the ballot paper shall forth- with-

- (a) proceed to one of the voting compartments;
- (b) record his vote in accordance with sub-rule (2) of rule 37A with the article supplied for the purpose.
- (c) fold the ballot paper so as to conceal his vote;
- (d) insert the folded paper in the ballot box; and
- (e) quit the polling station:

(It is not necessary to quote the rest of Rule 39A for the purposes of this Judgment) It was submitted by learned counsel for the appellant that the express on "article supplied for the purpose" used in Rule 39A(2)(b) and Rule 73(2)(e) of the Election Rules was misconstrued by the High Court. It was submitted by him that in the context of the election law and the instructions contained in the hand-books to which reference will be made that expression should be interpreted as meaning "actually given" or "handed over". In this regard, reference was made to instructions given to the Presiding Officer in respect of elections to Lok Sabha and State Assemblies. The relevant instructions in the said hand-book provide that the procedure followed in respect of the election to Lok Sabha and State Assemblies is that the Polling Officer or Polling Assistant must give the rubber stamp properly inked to the voter before he proceeds into the voting booth for marking his choice and the Polling Officer or Polling Assistant must take back the said rubber stamp from the voter after he comes out from the voting booth having cast his vote and then hand it over to the next voter and so on. It was urged that the same procedure should have been followed *mutatis matandis* in the case of an election to the Legislative Council like the one in question before us, and if this were done, it would imply that the ball-point pen for marking the preference should have been personally handed over to the voter with instructions to use it for marking his preference. This argument is not worthy of acceptance. As pointed out by the High Court, the nature of the elections to the Lok Sabha and the State Assemblies is different from that of elections to a Legislative Council or Rajya Sabha and this difference has to be taken into account in interpreting the relevant words used in the rules relating to an election. The election to Lok Sabha and the State Assemblies is a direct election on the basis of a single member constituency where the voter has only one choice whereas in the case of an election to the Rajya Sabha, the said election is by members of the Legislative Assemblies of the States and the election is an indirect election conducted on the principle of proportional representation by means of a single transferable vote. In the case of elections to the Lok Sabha and State Assemblies, a rubber stamp with arrow cross-mark is provided with which the voter has to make a mark on the symbol of the candidate of his choice in the ballot paper. Many of the voters are not familiar with the election procedure and it is in these circumstances that the requirement has been provided that a rubber stamp containing the cross-mark properly inked should be handed over to each voter with instructions to use the same for marking his vote or

choice. In the case of the election to the Rajya Sabha or a Legislative Council, the situation is entirely different. The number of voters is limited. One could assume that they are reasonably familiar with the procedure of voting; and the article supplied for marking the preference is a fountain pen or ball-point pen. In these circumstances, there is hardly any warrant for requiring that the procedure of handing over personally to each voter the article for marking his preference should be followed and it is quite/adequate if the article for marking the preference, namely, the fountain pen or ball-point pen is made available in the voting booth with clear instructions that the same should be used in marking the preference. It must also be borne in mind that there is no express rule or instruction in connection with the elections to the Rajya Sabha by Members of the State Assemblies or elections to the Legislative Councils of States which specifically requires that the arti-

cle for marking the preference should be handed over to each voter personally. In these circumstances, in our view, the High Court was right in interpreting the expression "article supplied for the purpose" in Rule 39A(2)(b) and Rule 73(2)(e) of the Election Rules as meaning "made available for the purpose" or "provided for the purpose". Reliance was placed by learned counsel for the appellant on the decision of this Court in *Ram Utar Singh Bhaduria v. Ram Gopal Singh & Ors.*, [1976] 1 SCR 191 and particularly, the observations at page 200 of the said report. We are of the view that that decision as well as the other decisions in this connection cited before us are in connection with the elections to the Lok Sabha or the State Assemblies and have no application to an indirect election like the election to the Rajya Sabha by Members of State Assemblies.

Rule 56 of the Election Rules deals with counting of votes. The material portion of sub-rule (2) of Rule 56 of the Election Rules runs as follows:

"56. Counting of Votes. (1) The ballot papers taken out of each ballot box shall be arranged in convenient bundles and scrutinized.

(2) The returning officers shall reject a ballot paper--

(a) x x

(b) If it bears no mark at all or, to indicate the vote it bears a mark elsewhere than on or near the symbol of one of the candidates on the face of the ballot paper or, it bears a mark made otherwise than with the instrument supplied for the purpose, or .... "

Rule 73 deals with the scrutiny of opening of ballot boxes and packets of postal ballot papers. The material portion of sub-rule (2) of Rule 73 runs as follows: "(2) a ballot paper shall be invalid on which--

(a) the figure 1 is not marked; or

(b) the figure 1 is set opposite the name or more than one candidate or is so placed as to render it doubtful to which candidate it is intended to apply; or



(c) x x x

(d) x x x

(e) there is any figure marked otherwise than with the article supplied for the purpose."

It would now be convenient to deal with the first contention of the learned counsel for the appellant. As we have already pointed out, the said rejected ballot paper was rejected on the ground that it was marked otherwise than with an article supplied for the purpose. As we have already pointed out, the figure 1 indicating the first preference in the said ballot paper was marked in green ink whereas in the ball-point pen kept in the voting booth with the ballot box, the ink used was blue. The returning officer took the view that the said marking of preference in green ink clearly established that it was done with a ball-point pen other than the one which was supplied for marking the preference and hence the vote was invalid. It was urged by Shri Jethmalani in this connection that although the marking of preference was done in green ink, there was no doubt that the intention of the voter concerned was to give the first preference vote to the appellant. It was submitted by him that the fundamental rule of election law is that effect should be given to the intention of the voter and this could be done only by treating the vote as valid, as the intention of the voter was quite clear. Mr. Jethmalani may be right when he contends that the intention of the voter could be clearly gathered and it was to cast the first preference vote for the appellant. However, it is not enough for the vote to be valid that it is possible to gather the intention of the voter to vote for a particular candidate as pointed out by the Constitution Bench of this Court in the leading case of *Hari Vishnu Kamath v. Syed Ahmad Ishaque and Others*, [1955] 1 SCR 1104 at page 1132. This Court held that ( 1132):

"But when the law prescribes that the intention should be expressed in a particular manner, it can be taken into account only if it is so expressed. An intention not duly expressed is, in a court of law, in the same position as an intention not expressed at all."

In the present case Rule 39(2)(b) which is applicable to the election petition before us clearly prescribes that the vote must be cast by the voter in accordance with the said sub-rule (2) of Rule 39 of the Election Rules, with the article supplied for the purpose. Rule 39A(2)(b) read with Rule 37A(2)(a) prescribes that an elector in giv-

ing his vote shall place on his ballot paper the figure 1 in the space opposite the name of the candidate for whom he wishes to vote in the first instance with the article supplied for the purpose. Hence, unless the ball-point pen kept with the ballot box is not to be regarded as the article supplied for marking the preference, the intention of the elector in the present case cannot be given effect to as it was expressed in a manner inconsistent with the provisions in the rules. Clause (b) of sub-rule (2) of Rule 56 of the Election Rules provides inter alia that if a ballot paper contains a mark made on it otherwise than with the instrument supplied for the purpose, the returning officer shall reject the said ballot paper. Rule 73 is included in Part VII of the Election Rules and that Part applies to the counting of votes at elections by Assembly members. Clause

(e) of sub-rule (2) of Rule 73 of the Election Rules set out earlier that a ballot paper shall be invalid on which there is any figure marked otherwise than with the article supplied for the purpose. Rule 73 is directly applicable to the case of the election in question and as aforesaid it prescribes that if on the ballot paper there is any figure marked otherwise than with the article supplied for the purpose, the ballot paper shall be invalid. Assuming that the voter in this case had expressed his intention clearly by marking the figure 1 in green ink, he did so in violation of the express provisions of the Rules which have a statutory force and hence no effect can be given to that intention. It was next argued in this connection that the expression "article supplied for the purpose" as used in the said Rules 39A(2)(b) and 73(2)(e) was misconstrued by the Presiding Officer and the High Court in the present case. It was submitted by learned counsel for the appellant that Rule 56(2)(b) was not complied with by making a ball-point pen available in the polling compartment near the ballot box for the use of the electors in marking their preference as law required that the Polling Officer should personally hand over the ball-point pen to the voter before he proceeds to the voting booth with instructions to mark his preference with that ball-point pen. He referred to the hand-book dealing with the procedure prescribed in elections to the Lok Sabha and to the Legislative Assemblies and submitted that the said procedure was applicable mutatis mutandis to elections to the Rajya Sabha and the Legislative Councils. It was urged by him that the second proviso to clause (e) of sub-rule (2) of Rule 73 of the Election Rules provides that if the returning officer is satisfied that any such defect as is mentioned in the said clause has been caused by any mistake or fault on the part of the Presiding Officer or Polling Officer, the ballot paper shall not be rejected merely on the ground of the said defect. It was contended by him that the Polling Officer was bound to hand over to each voter individually the ball-point pen to be used for marking his preference on the ballot paper. He submitted that the duty of the Polling Officer was to hand over the ball-point pen to the voter to use the same for marking his preference and it was also his duty to take back the said pen from the voter after he has cast his vote and given the same to the next voter. He urged that merely providing a ball-point pen for voting did not constitute substantial compliance with Rule 39A(2)(b) or Rule 73(2)(e). He urged that the mistake in the present case, namely, marking of the preference with green ink on the ballot paper, had occurred because no ball-point pen was handed over as aforesaid to the voter concerned. We are unable to accept this submission. The procedure followed in an election to the Lok Sabha or the State Assembly is to give to the voter a rubber stamp for voting with an arrow mark properly inked with instructions to use the same for voting before the voter enters the voting compartment to put his mark against the name of the candidate for whom he desires to vote and to take the rubber stamp back from the voter when he comes out of the voting compartment and to repeat this process for every voter. In the first place, it must be noticed that there is no rule or standing order requiring the Presiding Officer or to follow this procedure in the case of an election to the Rajya Sabha or Legislative Council of a State. There is a material difference between an election to Lok Sabha or a Legislative Assembly which is a direct election with one constituency for each seat and only vote is to be cast and an election to Rajya Sabha which is an indirect election with the preferential system of voting. Sub-rule (2) of Rule 39 which is applicable to such an election to a Legislative Assembly provide that the elector on receiving the ballot paper has to make a mark on the ballot paper with the instrument supplied for the purpose on or near the symbol of the candidate for whom he intends to vote. It is only in the case of an election like this that it becomes necessary to provide a rubber stamp properly inked to the voter to mark his preference. It must be remembered that in such an election case, the number of voters or electors is

extremely large and many of them might be unfamiliar with the voting procedure. An election to the Rajya Sabha, on the other hand, is an indirect election with multiple candidates' constituency and the system of voting followed is the preferential system of voting. Rule 37A of the Election Rules which is applicable to such an indirect election by virtue of the provisions of Rule 70 provides that an elector in giving his vote shall place on his ballot paper figure 1 in the space opposite the name of the candidate for whom he wishes to vote in the first instance. This difference in the case of an election to the Rajya Sabha makes it wholly unnecessary that the Presiding Officer or the Polling Officer should hand over to every voter individually a ball-point pen to mark his vote and it would quite wholly be adequate if the article for marking the preference, namely, a ball-point pen, is provided to the voter to use the same for marking his preference or if the pen is placed in such a way as to make it clear that the marking of the preference is to be done with that pen and instructions given to use that pen for marking the preference. The evidence of the returning officer, which has been accepted by the High Court is to the effect that there were two voting compartments in the polling booth and in each of them a ball-point pen with blue ink was kept as soon as an elector went into the polling booth, one Polling Assistant gave him his identity slip and another Polling Assistant gave to the elector printed copies of Rules 37A and 39A of the Election Rules and a copy of the guidelines. Then the elector went to the first Polling Officer who obtained his signature in the counter-foil of the ballot paper and instructed the elector that he should mark his preference on the ballot paper with the article kept for the purpose inside the voting compartment. Another Polling Officer gave the ballot paper to the voter and again instructed him to go into the voting compartment and mark the ballot paper with the article kept there for that purpose, fold the ballot paper before coming out and put in into the ballot box in front of the Polling Officer. In the light of this evidence, we are of the view that the ball-point pen with blue ink kept in the voting compartment for marking the preference must be regarded as the article supplied for that purpose, namely, the purpose of the voter marking his preference on the ballot paper. It was submitted by learned counsel for the appellant that it was possible that a voter might have used his own pen if the pen kept in the voting compartment was not working and such a vote cannot be regarded as invalid. We are not concerned with a case of that kind here as there is no evidence that in any voting compartment the ball-point pen kept there was not working. It was next urged that if a voter had used another ball-point pen, that is, other than the one kept in the voting compartment containing the blue ink, it would not have been possible to find out that the preference marked with such a ball-point pen had been used for marking the preference and not the pen supplied. This is of no relevance here. The possibility that in a given case a breach of the rules may be difficult to detect cannot lead to the conclusion that the mandatory requirement that preference on the ballot paper must be marked with the article supplied for the purpose should be regarded as not binding in law. We are, therefore, of the view that the said ballot paper was rightly rejected by the returning officer and the arguments urged by learned counsel for the appellant in that contention must be rejected.

The next point is regarding the three first preference votes cast in favour of respondent no. 1 which were accepted by the returning officer as stated earlier. In respect of these three votes, the figure 1 is marked, not in the right-hand column opposite the name of respondent no. 1, but in the left-hand column containing the name of candidate and opposite the name of respondent no. 1. The appellant unsuccessfully objected to the validity of these three ballot papers on the ground that the first preference had not been marked in the space provided for that purpose opposite the name of the

candidate concerned, namely, respondent no. 1, as required by Rule 37A(2). It was submitted by learned counsel for the appellant that the returning officer as well as the High Court were in error in holding that the said three ballot papers were valid. We propose to discuss this controversy very shortly because we are in full agreement with the reasoning and conclusions given by the High Court in its impugned judgment in coming to the conclusion that the returning officer was justified in rejecting the objections preferred by the appellant to the said three votes and holding that the same were valid. The relevant portion of Rule 37A(2) of the Election Rules has already been quoted earlier. Clause (a) of sub-rule (2) of that Rule only provides that the voter shall place on his ballot paper the figure 1 in the space opposite the name of the candidate for whom he wishes to vote in the first instance. It is significant that this rule does not specifically say that the figure 1 must be placed in the column earmarked for marking the preference but only requires that the figure 1 should be placed opposite the name of the candidate. Sub-rule (4) of Rule 71 which is a definition runs as follows: "71(4): 'first preference' means the figure 1 set opposite the name of a candidate; 'second preference' means the figure 2 set opposite the name of a candidate; 'third preference' means the figure 3 set opposite the name of a candidate, and so on;"

It is significant that in this sub-rule also there is nothing to indicate that the preference must be indicated in the column reserved for that purpose, the only requirement being that the figure 1 should be written opposite the name of the candidate. Similarly, sub-rule (2)(b) of Rule 73 only lays down that if the figure 1 is set opposite the name of more than one candidate or is so placed as to render it doubtful to which candidate it applied, the ballot paper would be invalid. Sub-rule 12) of Rule 73 deals with the invalidity of ballot papers and that subrule nowhere states that merely by reason of the preference being marked in the wrong column, if the marking is opposite the name of the candidate concerned, the ballot paper shall be rendered invalid. It is true that the column in which the preference should have been marked and intended for that purpose was the column on the righthand side of the first column where the name of the candidate was to be put; but there is no express provision to the effect that unless the preference is marked in the correct column, the ballot paper would be invalid. In such a situation, the principle enunciated by this Court in several judgments and reiterated in *S. Sivaswami v. V. Malaikannan & Ors.*, [1984] 1 SCR 104 that the primary task of the Court in a case where the question is whether the ballot paper is invalid is to ascertain the intention of the voter, must be applied. In that case, the Court held that the ballot paper shall not be rejected as invalid if it is reasonably possible to gather a definite indication from the marking so as to identify the candidate in favour of whom the vote had been intended to be given. This, of course, is subject to the rule that before a ballot paper is accepted as valid the ballot paper must not be invalid under any other express provision and the intention of the voter must not be expressed in a manner which is contrary to or totally inconsistent with the manner prescribed under the said Act or the Election Rules for expressing the same. In the case of the said, three votes in question, the figure 1 was clearly marked opposite the name of respondent no. 1, being the candidate concerned, as required by the express provision of the said Rule 37A and the intention of the voter was clearly to cast the first preference in favour of respondent no. 1. In these circumstances, the ballot papers were rightly accepted by the returning officer as valid and the High Court was justified in coming to the conclusion to which it has arrived. In the result, the appeal fails and is dismissed. However, considering the facts and circumstances of the case, there will be no order as to costs.

R.S.S.  
missed.

Appeal dis-