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*Before Swatanter Kumar & Rajive Bhalla, JJ.*

KAILASH BAI @ KAILASH RANI,—Petitioner

versus

ADDL. CIVIL JUDGE (S.D.), TOHANA AND  
OTHERS,—Respondents

C.W.P. NO. 4794 OF 2004

19th August, 2004

*Haryana Panchayati Raj Election Rules, 1994—Rls. 41, 49 and 65—Constitution of India, 1950—Art. 226—Election to the post of Sarpanch—Petitioner declared elected—Challenge by respondent 2—Trial Court after re-examination of votes declaring respondent elected—Rl. 41 requires the polling staff to fill up the stamp appearing on the reverse side of the ballot papers—Non-filling up of the stamp by the Polling Staff—Trial Court rejecting such votes as invalid—Whether failure on the part of polling staff to fill up the stamps renders the ballot papers liable to be rejected as invalid—Held, no—No allegation of booth capturing or rigging—Non-filling of the stamps by staff is bona fide mistake—Neither any provision of the 1994 Rules nor the instructions/directions issued by the Commission mandate rejection of ballot papers on the ground of errors committed by the polling staff—Order of trial Court declaring respondent to be elected Sarpanch liable to be set aside.*

*Held*, that Rule 41 requires the polling staff to fill up the stamp appearing on the reverse side of the ballot paper. However, neither Rule 41 nor Rule 65 nor any other provision of the Rules mandate that a ballot cast can be rejected for the failure of the polling staff to fill up the stamp. In the absence of any statutory mandate for the proposition that the non-filling up of the stamp would entail rejection of the ballot cast, a ballot paper cannot be rejected on the ground that the stamp appearing on the reverse side has not been filled up. It is not the case of the respondent that there were any *mala fides* or rigging or that spurious ballots were cast. It is, thus, apparent that the error in non-filling of the stamp appearing on the reverse of the ballot papers, was a *bona fide* error made by the polling staff and the said error cannot be used to reject the votes and to nullify the votes cast.

(Para 24)

*Further held*, that a ballot paper, once cast, can only be rejected in accordance with the provisions of rule 65(1). In case of any defect/mistake in the ballot paper attributable to the polling party or any defect, as envisaged in the proviso to Rule 65(1), such defects would be condoned in terms of the two provisos to Rule 65(1), provided such mistakes/defects are *bona fide* and there are no allegations of booth capturing, casting, of spurious ballots etc.

(Para 25)

*Further held*, that the non-filling up of the stamp by the polling staff, in the absence of any allegations of *mala fides*, rigging of booths etc. would be an error liable to be condoned in terms of the first proviso to Rule 65(1). A voter cannot be deprived of his democratic legal right, nor a candidate of his legitimate result on account of an error or on account of the negligence of the polling staff. In case the default of a polling officer were to visit a voter/candidate with adverse consequence, it would clothe incompetency with legitimacy. No law can operate to deprive a person of a legal right on account of the default or negligence of another. The errors of the polling party cannot be dignified by elevating them to the status of a statutory lapse that would render a vote invalid. Consequently, we hold that a vote cannot be declared to be invalid for failure of the polling staff to fill the stamp appearing on the reverse side of ballot paper in the absence of any serious allegations, to be substantiated, that there was booth rigging or the votes were spurious etc.

(Para 26)

S. K. Garg Narwana, Advocate, *for the petitioner.*

Vijay Dahiya, Assistant Advocate General, Haryana.

Ms. Rupinder Kaur Thind, Advocate, *for the respondents.*

## JUDGMENT

**RAJIVE BHALLA, J,**

(1) The petitioner, by way of this writ petition, filed under Articles 226/227 of the Constitution of India, seeks the issuance of a writ of certiorari for quashing the order of the Additional Civil Judge (Senior Division), Tohana, dated 13th March, 2004 (Annexure P-1).

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(2) A brief narrative of the facts would be appropriate ;—

(3) Election for the post of Sarpanch of Village Mussa Khera, Tehsil Tohana, District Fatehabad, was held on 12th March, 2000. Kailash Bai alias Kailash Rani (petitioner), Bhagan Bai, Malkiat Kaur and Krishna Devi (respondents Nos. 2 to 4) contested the election. Total votes cast were 844. The petitioner, having secured 317 votes, was declared elected. Respondents Nos. 2, 3 and 4 had secured 306, 152 and 48 votes, respectively, and 21 votes were declared rejected.

(4) Bhagan Bai (respondent No. 2) impunged the said election by way of Election Petition No. 64 dated 28th March, 2000, before the Additional Civil Judge (Senior Division), Tohana (respondent No. 1)

(5) *Vide* order dated 19th July, 2003, the Additional Civil Judge (Senior Division), Tohana, ordered recount of votes. Pursuant to the recounting and *vide* order dated 20th August, 2003, respondent no. 2 Bhagan Bai was declared elected as she secured 277 valid votes as compared to 273 valid votes secured by the petitioner. Consequently, the petitioner's election was set aside and respondent no. 2 was declared the elected Sarpanch of the Gram Panchayat.

(6) The aforementioned order was impunged by way of Civil Writ Petition No. 1342 of 2003.

(7) A Division Bench of this Court *vide* judgement dated 19th February, 2004 (Annexure P-2) set aside the order dated 20th August, 2003, (Annexure P-2) and remanded the case to respondent no. 1 for adjudication afresh. The presiding officer was directing to underake a fresh scrutiny of the votes and decide the matter afresh.

(8) The learned Additional Civil Judge (Senior Division), Tohana examined the ballot papers afresh and arrived at a conclusion that the petitioner had secured 301 votes whereas respondent no. 2 had secured 303 votes and therefore declared respondent no. 2 as the elected Sarpanch.

(9) While deciding the election petition, the trial Court arrived at a finding that in all 44 votes were liable to be rejected. As the present election petition is confined to the dispute between the petitioner and respondent no. 2 and as the rejected votes polled by other candidates

would make no difference to the votes polled by them or to the final result, the particulars reproduced herein are confined to the petitioner and respondent No. 2.

**Booth No. 86**

No. of votes	Reason for being declared invalid	Kailash Bai	Bhagan Bai
32	Stamp appearing on the reverse side unfilled	11	6
2	Voter affixed thumb impression	2	
4	Mark not clear	4	
3	Ink allegedly spilled over into other columns, However, trial Court has not specified as to which candidate these votes had been initially cast.		

**Booth No. 87**

3	Ink spilled over into other columns	2	
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(10) Learned counsel for the petitioner confines challenge to the impugned order to the votes held to be invalid/rejected by the trial Court. It is vehemently argued that the Returning Officer wrongly rejected 32 votes, on the ground that on the reverse side of these ballot papers, the stamp showing the Block, Gram Panchayat name and Booth Number were left vacant. Learned trial Court, while rejecting these ballot papers relied upon the provisions of Rules 49 and 65 (1) (e) of the Haryana Panchayati Raj Election Rules, 1994 (hereinafter referred to as 'the Rules') but lost sight of the first proviso to Rules 65 (1) which clearly stipulates that in case a mistake or failure has been caused by the Presiding Officer/Polling Officer concerned, this

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defect should be overlooked and the ballot paper should not be rejected. In case the trial Court had perused the aforementioned proviso, it would not have rejected the ballot papers.

(11) Learned counsel for the petitioner further points out that out of the 32 ballot papers which were rejected for failure to fill in the stamp, 11 had been polled in favour of the petitioner and 6 in favour of respondent no. 2 and the balance in favour of other candidates. The petitioner has also placed reliance upon the judgment of the Hon'ble Supreme Court in a case reported as **Jibontara Ghatowar Vs. Sarbanada Sonowal and others (1)**, where, in a similar controversy, arising under the Representation of the People Act, 1951, it was held that as the responsibility to stamp, fill and sign and the ballot paper on the reverse side rests with the polling staff, a ballot paper cannot be rejected on the ground that the stamp has been left blank.

(12) It is further contended by the counsel for the petitioner, that the learned trial Court has erroneously rejected some ballot papers, on the finding that ink had spilled over into other columns, thereby rendering the votes invalid. If the trial Court had perused the second proviso to Rule 65(1) of the Rules, these ballots could not have been rejected. The said proviso stipulates that in case the ink of the mark affixed by a voter spills over to other columns of the ballot paper, the vote shall be counted in favour of the candidate in whose column the major portion of the mark falls. This proviso has been ignored by the learned trial Court.

(13) Learned counsel for the petitioner has also brought to our notice instructions/directions issued by the State Election Commission. These instructions are titled as 'Counting'. Chapter 6.1 Para 17(4) (6) of these instructions envisage the possibility of the polling officials, leaving the stamp required to be filled blank. In such an eventuality, the instructions direct that the ballot papers shall not be rejected. Para 17(4) of the afore-mentioned instructions clearly directs that if, as a result of the wrong folding of a ballot paper the ink spills over to other columns, thereby causing a mark to appear in those columns, the true intention of the voter can be deciphered by perusing the direction of the arrow.

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(1) (2003) 6 S.C.C. 452

(14) Learned counsel for the respondent, on the other hand, vehemently contends that 32 votes in which the stamp was blank had been rightly rejected by the trial Court. It is contended that the non-filling up of the stamp appearing on the reverse side of the ballot paper is a violation of Rule 41 and not Rule 49 of the Rules and therefore the first proviso to Rule 65 (1) is inapplicable. It is further argued that while exercising jurisdiction under Article 226 of the Constitution of India, this Court should not examine question of facts already determined by the trial Court and therefore the present writ petition should be dismissed.

(15) Vide orders of this Court dated March 25, 2004 and April 20, 2004, entire record was summoned including the votes polled, counted in favour of these candidates as also the rejected votes. The sealed cover containing the votes was also opened and the rejected votes were examined one by one.

(16) Before we proceed to examine the matter on merits, it would be appropriate to reproduce the relevant Rules :

“41. Form of ballot paper—Every ballot paper shall be of such design as may be approved by the State Election Commissioner. However, the ballot papers for election of Panches, Sarpanches, members of Panchayat Samitis and members of Zila Parishads shall be in four different colours throughout the State of Haryana. The name of the concerned candidate shall be written in Devnagari Script in the ballot paper against his symbol in the same order as it appears in the list of contesting candidates. On the backside top of the ballot paper the number of ward and the number of polling station in case of election of panch, the name of village and number of polling station in case of election of member of Panchayat Samiti and the number of ward and the number of polling station in case of election of member of Zila Parishad, as the case may be, shall be written.

49. Issue of ballot paper.—(1) No ballot paper shall be issued to any voter before the hour fixed for the commencement of the poll.

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- (2) No ballot paper shall be issued to any voter after the hour fixed for the closing of the poll except to those voters who are present at the polling station at the time of the closing of the poll. Such voters shall be allowed to cast their votes even after the time for the poll is over.
- (3) Every ballot paper shall, before issue to a voter, be marked with such distinguishing mark as the district Election Officer (Panchayat) may direct.
- (4) In a polling station where polling for more than one office-bearer is to be taken, each voter shall be provided with ballot papers meant for such different offices.
- (5) At the time of issuing a ballot paper to a voter, the Polling Officer shall record the serial number thereof against the entry relating to voter in the copy of the voters list set apart for the purpose.
- (6) Save as provided in sub-rule (5), no person in the polling station shall note down the serial number of the ballot paper issued to a particular voter.
65. Scrutiny and rejection of ballot papers.—(1) A ballot paper contained in a ballot box shall be rejected, if—
- (a) it bears any mark or writing by which the voter can be identified;
- (b) it is a spurious ballot paper ;
- (c) it has been so damaged or mutilated that its identity as a genuine ballot paper cannot be established ;
- (d) it bears a serial number, or is of a design, different from the serial numbers of, as the case may be, or design of the ballot paper authorised for use at the particular polling station;
- (e) it does not bear any mark which it should have borne under the provisions of sub-rule(3) of Rule 49 ;
- (f) it has not been marked ;
- (g) it has been marked in the column of more than one candidates; or

- (h) it has been marked by an equipment and in the manner other than the equipment and the manner prescribed for that purpose ;

Provided that where Returning Officer, (Panchayat) or any other officer authorised by him, on being satisfied that any such defect as is mentioned in clause (d) or clause (e) has, in respect of all or any ballot papers used at a polling station, been caused by the mistake or failure on the part of the Presiding Officer or Polling Officer concerned, or has directed that the defect should be overlooked a ballot paper shall not be rejected only on the ground of such defect under clause (d) or clause (e) ;

Provided further that if the mark put by a voter has read over two columns of the ballot paper the vote shall be counted in favour of the candidate in which column the major portion of the mark falls.

- (2) Before rejecting any ballot paper under sub-rule (1) the Returning Officer (Panchayat) or such other officer authorised by him shall allow each counting agent present a reasonable opportunity to inspect the ballot paper but shall not allow him to handle it or any other ballot paper.
- (3) The Returning Officer (Panchayat) or such other officer authorised by him, shall record on every ballot paper which he rejects the letter 'R' and the grounds of rejection in abbreviated form whether in his own hand or by means of a rubber stamp.
- (4) All ballot papers rejected under this rule shall be bundled together."

(17) At this stage, it would also be appropriate to refer to **Jobontara Ghatowar's case (supra)** with respect to rejection of ballot paper on the ground of errors committed by the polling staff, wherein the Hon'ble Supreme Court held as follows ;

"14. A bare reading of the rules shows that the obligation is cast on the polling officer to stamps with such distinguishing marks as the Election Commission may



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direct and to sign in full on the back of the ballot papers. The candidate has no role to play in the performance of such duty by the polling officer. Absence of mark and the signatures renders the ballot paper liable to be rejected. However, still, where the Returning Officer feels satisfied that such defect has been caused by any mistake or failure on the part of the Presiding Officer or polling officer. The ballot paper shall not be rejected merely on the ground of such defect. An analysis of this rule and the legal implication thereof may not detain us any longer inasmuch as we find these rules having been dealt with in **Arun Kumar Bose v. Mohd. Furkan Ansari**, (1984) 1 SCC 91, wherein this Court found that the absence of signature and distinguishing mark on seventy-four ballot papers was attributable to failure on the part of the Presiding Officer. Having found so, the Court held (SCC p. 101 para 14) :

“It was the obligation of the Presiding Officer to put his signatures on the ballot papers before they were issued to the voters. Every voter has the right to vote and in the democratic set up prevailing in the country no person entitled to share the franchise can be denied the privilege. Nor can the candidate be made to suffer. Keeping this position in view, we are of the definite view that the present case is one of failure on the part of the Presiding Officer to put his signatures on those ballot papers so as to satisfy the requirement of law. The proviso, once it is applicable, has also a mandate that the ballot paper is not to be rejected. We, therefore, hold that the ballot papers were not liable to be rejected as the proviso applied and the High Court, in our opinion, came to the correct conclusion in counting these ballot papers and giving credit thereof to Respondent 1.”

It is pertinent to note that it is nobody's case that 824 ballot papers were spurious. The present one is not a case of booth-capturing or rigging. In an election dispute, there are not candidates alone who are the persons interested. In a democratic set-up, as is ours, in an election, the fate

of the whole constituency is at stake and every voter and every citizen has, therefore, an interest in that candidate being returned to assembly who has secured the majority of the valid votes. An election dispute cannot be decided on concessions contrary to law. A defect in the ballot papers in the light of Rule 38(1) read with Rule 56(2)(h) having been detected, the issue had to be decided by the satisfaction of the Returning Officer. The concession given by candidates or their election agents submitting to a decision arrived at by the Returning Officer in accordance with law may come in the way of that candidate turning around and disputing a doubtful position of law taken as resolved and conceded or accepted. In an election dispute, a consensus contrary to law or a failure to discharge statutory obligation cast on an election officer which has resulted in prejudicing the result of the election, cannot ipso facto claim immunity from challenge. In the present case the Returning Officer has clearly failed in discharging his obligation cast by the first proviso below clauses (g) and (h) sub-rule (2) of Rule 56. Disagreeing with the High Court, therefore, we hold that these 824 ballot papers should have been included for the purpose of counting.”

(18) Rule 41 of the Rules requires the polling staff to set down the number of the Ward and the number of the Polling Station, on the reverse side of the ballot paper. Rule 41, however, does not render a ballot paper invalid for failure on the part of the polling staff to fill in the afore-mentioned particulars.

(19) Rule 49(3) requires every ballot paper, prior to its issue to a voter, to be marked by such a distinguishing mark as the District Election Officer (Panchayat) may direct.

(20) The grounds upon which a ballot, once cast, can be rejected, as detailed in Rule 65(1), are as follows :—

- (a) it bears any mark or writing by which the voter can be identified;
- (b) it is a spurious ballot paper ;
- (c) it has been so damaged or mutilated that its identity as a genuine ballot paper cannot be established ;

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- (d) it bears a serial number, or is of a design, different from the serial number of, as the case may be, or design of the ballot paper authorised for use at the particular polling station ;

(21) The first proviso to Rule 65(1) envisages an error by the polling staff whereas the second proviso envisages the eventuality of the ink of the mark affixed by the voter spilling into another column. In both these eventualities, the two provisos state that such defects can be condoned.

(22) The Rules are further supplemented by the instructions issued by the Haryana State Election Commission. These instructions are titled as “**Counting**” and issue detailed instructions to the Polling Staff as to the manner in which the votes are to be counted, rejected etc. Sub-para 6 of Paragraph 17 of Chapter VI of these instructions provides that in case the reverse side of the ballot paper does not bear any distinguishing mark or signatures and it is apparent that the mistake has been caused by a Polling Officer, the ballot paper shall not be rejected.

(23) It is, thus, apparent that a ballot, once cast, can only be rejected if it suffers from defects enumerated in Rule 65(1) of the Rules and only such defects can be condoned as are detailed in the two provisos that follow Rule 65(1). No other provisions of the Act or the Rules prescribes the eventualities in which a ballot paper can be rejected.

(24) The contention of the learned counsel for the respondents that the stamp has to be filled up under Rule 41 of the Rules and the non-filling of the stamp cannot be condoned under the first proviso to Rule 65(1) of the Rules, is erroneous. It is no doubt true that Rule 41 requires the polling staff to fill up the stamp appearing on the reverse side of the ballot paper. However, neither Rule 41 nor Rule 65 nor any other provision of the Rules mandate that a ballot cast can be rejected for the failure of the polling staff to fill up the stamp. In the absence of any statutory mandate for the proposition that the non-filling up of the stamp would entail rejection of the ballot cast, a ballot paper cannot be rejected on the ground that the stamp appearing on the reverse side has not been filled up. It is not the case of the respondents-whether in the election petition or before this Court, that

there were any mala fides or rigging or that spurious ballots were cast. It is, thus, apparent that the error in non-filling of the stamp appearing on the reverse of the ballot papers, was a bona fide error made by the polling staff and the said error cannot be used to reject the votes and to nullify the votes cast.

(25) A combined reading of the Rules, instructions and the above-reproduced judgment of the Hon'ble Supreme Court leads us to the conclusion that a ballot paper, once cast, can only be rejected in accordance with the provisions of Rule 65(1). In case of any defect/mistake in the ballot paper attributable to the polling party or any defect, as envisaged in the provisos to Rule 65(1), such defects would be condoned in terms of the two provisos to Rule 65(1), provided such mistakes/defects are bona fides and there are no allegations of booth capturing, casting of spurious ballots etc.

(26) A further perusal of the provisions of Rules 41, 49(3) and 65 reveals that the tenor of the statutory provisions is that, in case a defect in the ballot paper is attributable to a bona fide error committed by the polling staff, the same should be condoned. Rule 49(3) requires the polling staff to affix a distinguishing mark, as directed by the District Election Officer (Panchayat). Rule 65(1) (e) renders a ballot paper liable for rejection on account of the absence of such a mark. However, the first proviso to Rule 65(1) condones such default. The non-filling up of the stamp by the polling staff, in the absence of any allegations of mala fides, rigging of booths etc., would be an error liable to be condoned in terms of the first proviso to Rule 65(1). A voter cannot be deprived of his democratic legal right, nor a candidate of his legitimate result on account of an error or on account of the negligence of the polling staff. In case the default of a polling officer were to visit a voter/candidate with adverse consequence, it would clothe incompetency with legitimacy. No law can operate to deprive a person of a legal right on account of the default or negligence of another. The errors of the polling party cannot be dignified by the elevating them to the status of a statutory lapse that would render a vote invalid. Consequently, we hold that a vote cannot be declared to be invalid for failure of the polling staff to fill the stamp appearing on the reverse side of a ballot paper in the absence of any serious allegations, to be substantiated, that there was booth rigging or the votes were spurious etc.

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(27) In **Jibontara Ghatowar's case (supra)**, the dispute before the Hon'ble Supreme Court was under the Representation of the People Act, 1951. The dispute arose as 824 votes were rejected on the ground that the votes did not bear stamp of any distinguishing mark. The Hon'ble Supreme Court while relying upon an earlier Judgement reported as **Arun Kumar Bose vs. Mohd. Furkan Ansari (2)**, held that in a democratic set up, as is ours, in an election, the future of an entire constituency is at stake and therefore, every voter and every citizen has an interest in their candidate, being returned to assembly, who has secured the majority of the valid votes. Therefore, the votes cannot be rejected on the ground of an error committed by a polling officer/a member of the polling staff.

(28) We have examined the 32 ballot papers and in the absence of any allegation of fraud, *mala fide*, booth capturing etc., are of the considered opinion that these 32 votes could not have been rejected and that the Returning Officer had rightly counted these votes in favour of the candidates for whom they had been cast. The learned trial Court failed to correctly appreciate the Rules and rejected these votes in a mechanical manner.

(29) Insofar as the other votes rejected by the learned trial Court, we do not deem it appropriate to enter into the factual controversy-to determine the true intention of the voter. In the facts and circumstances of the present case, it would not be appropriate, for us, in the exercise of our writ jurisdiction, to examine the complicated questions of fact which have already been examined by the trial Court. In our opinion, it would not be appropriate for this Court, to embark upon an enquiry, by examining each ballot paper, in order to determine the true intention of the voter i.e. whether the ink had spilled from one column into another, whether the voter mark had been correctly affixed. In our opinion, adjudication of this factual dispute, in the facts and circumstances of the present case, has been rightly carried out by the trial Court and we find no reason to differ therefrom.

(30) Before we proceed to tabulate the respective votes cast in favour of the parties, it would be appropriate to reiterate that the dispute in the present writ petition has been confined to the rejected

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votes alone, i.e. votes of three classes—(a) for non-filling of seal, (b) for ink spilling into other columns and (c) the mark being faint. As referred to in the preceding paragraphs, thirty two votes were wrongly rejected as the stamp appearing on the reverse side had not been filled. Out of these votes, eleven were cast in favour of the petitioner and six in favour of respondent No. 2. In case the afore-mentioned votes are added to the tally of the petitioner and respondent No. 2 the petitioner would secure 312 votes and respondent No. 2 would secure 309 votes and, therefore, the petitioner would obviously have to be declared as the elected Sarpanch having secured a majority of the votes. The new tally would be 312 votes in favour of the petitioner and 309 votes in favour of respondent No. 2.

(31) In the light of what has been stated above and after a careful perusal of the statutory provisions as also the examination of the ballot papers, we are convinced that the learned trial Court had wrongly set aside the election of the petitioner. In this view of the matter, the judgement of the trial Court is set aside, the election petition dismissed and the petitioner is declared to have been elected having secured 312 votes.

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**R.N.R.**