CASE NO.:
Appeal (civil) 2475 of 2006

PETITIONER:
Nayani Narasimha Reddy

RESPONDENT:
Dr. K. Laxman & Others

DATE OF JUDGMENT: 05/05/2006

BENCH:
P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T
(Arising out of SLP(C) No.6785 of 2005)

P.K. BALASUBRAMANYAN, J.

1. I respectfully agree with the reasoning and conclusion in the judgment just pronounced by my learned brother.

2. Section 94 of the Representation of the People Act, 1951 (for short, the Act) provides that a voter in an election, when summoned as a witness in an election petition, cannot be compelled to disclose for whom he has voted. The words, "shall be required" place a bar on any such compulsion. The Court, as of right or by authority, cannot compel the voter summoned as a witness, to disclose his preference. The sub-heading to Section 94 of the Act indicates that the bar is intended to preserve the secrecy of the ballot.

3. The rule against testimonial compulsion, in a case governed by Section 94 of the Act, will have to be approached from two angles. The initial question is whether the witness would have to incriminate himself while giving evidence. The privilege against self-incrimination in the words of Lord Goddard L.J. is that:
"No one is bound to answer any question in civil or criminal proceedings if the answer thereto would in the opinion of the judge have a tendency to expose the deponent to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for"

(See Blunt v. Park Lane Hotel (1942) 2 K.B. 253 at page 257)

4. The privilege against self-incrimination is to be claimed by the witness. The right becomes available only after the witness has taken the stand and a question that offends the privilege is put to him. A prospective witness or some other person (as in the present case) cannot raise such an issue in anticipation of an apprehended breach of privilege against self-incrimination. Phipson referring to a number of authorities on the point states:

"It may be taken by the witness in refusing to answer a question; the witness cannot refuse to go into the witness box: he can only claim privilege after he has gone into the witness box and been sworn and the question put. The court must determine from the circumstances of the case and the nature of the evidence the witness is called to give whether there are grounds for the privilege being invoked and grounds to "apprehend danger." The mere fact that a party swears that his answer would tend to criminate him is not conclusive. Once the danger is made apparent great latitude should be allowed to a witness asked questions in giving evidence in judging for himself of the effect of any particular question.

The privilege must, unlike other forms of privilege, be claimed on oath by the person asserting it on his own behalf, not his solicitor. Nevertheless, it might be necessary for evidence to be led from others to support the claim. It is not necessary to explain precisely why the evidence would incriminate, as that might undermine the privilege."

[Phipson on Evidence, 15th Edn., page 564]

It is clear that Section 94 of the Act only confers a privilege on the witness and that he would be at liberty to waive it and give evidence on his electoral preference. The argument based on Section 94, at the instance of the appellant, on the ground of a perceived threat of self-incrimination of the prospective witness, is misconceived. The appellant cannot thrust the privilege under Section 94 of the Act on the prospective witness. The appellant cannot deprive the witness of the right to take his own decision in the matter as and when he takes the witness stand and a question on his electoral preference is put to him.

5. The second question is whether, the evidence of the witness would breach the secrecy of the election process. It has been held by this Court in S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra and others [(1980) Supp. SCC 53] and A. Neelalohithadasan Nadar v. George Mascrene and others [(1994) Supp. (2) SCC 619] that the purity of the election process is more important than the privilege conferred by Section 94 of the Act. This Court has recognized that the secrecy of voting could be breached to subserve a larger public good, namely, to prevent a fraud on the election process. My learned brother has dealt with this aspect and I am in agreement with him.

6. In the present case, we must also note two incidental aspects that stand in the way of accepting the plea of the appellant. The arguments based on Section 94 of the Act are not being raised by the prospective witness but by a third person. The stage at which the

plea is raised i.e. even before the witness has actually taken the witness stand is also significant. The appellant cannot seek to prevent the witness from taking the stand. He cannot also seek to curb the power of the Court to summon the witness.

7. In the above situation, neither the privilege against self-incrimination nor the secrecy of the election process stand in the way of a voter being summoned as a witness in an election petition. The power of the Court under Order XIV of the Code of Civil Procedure, 1908, on application by the parties or suo moto to summon any person for his attendance in Court and its power to summon any person to produce any document remains unaffected by Section 94 of the Act. The power of the Court to summon a witness is one thing, the privilege of a witness not to answer a question put to him is another. The witness would be free to claim privilege under Section 94 of the Act and can refuse to reveal for whom he has voted. However, if he is willing to disclose his electoral preference he is entitled to do so.

8. Hence, I too would dismiss the appeal.

JUDIS