

Suresh Prasad Yadav

Vs

Jai Prakash Mishra and Others

Civil Appeal No. 208 of 1974

(A. Iyengar, R. S. Sarkaria, V. R. Krishna Iyer JJ)

13.12.1974

JUDGMENT

SARKARIA, J. -

1. Election From 168-Katoria Bihar Legislative Assembly Constituency took place in March, 1972. The poll was held on March 11, 1972 and the votes were counted on March 12, 1972. Respondent No. 1 herein, an independent candidate, was declared elected having secured 16,649 votes as against 16,074 polled by the appellant, a nominee of Indian National Congress (R). There were three other candidates (respondents Nos. 2 to 4) who secured 2347, 8001 and 1542 votes respectively. The votes rejected as invalid were 1219.

2. On April 14, 1972, the appellant filed an election petition under the Representation of the People Act, 1951 challenging the election of the returned candidate on the ground that several irregularities and illegalities were committed in the counting of votes.

3. The petition was resisted by the returned candidate. The High Court framed issues, recorded the evidence produced by the parties and held that the allegations had not been substantiated. It declined the request for a recount and dismissed the petition. Hence this appeal by the petitioner.

4. Mr. Prasad, learned Counsel for the appellant contends that the following irregularities/illegalities in the counting had been established :

(1) Four unauthorised persons, viz., Ajudhya Prasad Singh, Q. M. Zaman, Parvez Ahmed and Radhey Sham Sah were allowed to work as Counting Supervisors at tables Nos. 4, 5, 7 and 9 in breach of the rules and this had vitiated the counting.

(2) In the first round of counting at table No. 4 in the box relating to polling station No. 74, Madhopur U.P. School, 50 unsigned ballot papers were found in excess of those actually polled. When this was detected and brought to the notice of the Assistant Returning Officer, he, in violation of Rule 93(1) of the Conduct of Elections Rules (for short, called the Rules) and to cover up the irregularity opened that packet and inspected those unused ballot papers.

(3) The detailed result-sheet which was inter alia prepared tablewise, in accordance with the instructions of the Election Commission, has been deliberately suppressed to prevent detection of mistakes and manipulations made in the counting.

(4) About 600-700 uncounted ballot papers in bundles were kept below his table by the Assistant Returning Officer. In the final round of counting, despite protest, 600 votes were counted twice, in favour of respondent No. 1. That was why the petitioner who at the end of the third round was leading by a margin of 2205 votes, was shown having lost by 575 votes to respondent No. 1, notwithstanding the fact that in the last round there were only 3800 ballot papers to be counted.

5. Before dealing with these contentions, we may recall, what this Court has repeatedly said, that an order for inspection and recount of the ballot papers cannot be made as a matter of the course. The reason is two-fold. Firstly such an order affects the secrecy of the ballot which under the law is not to be lightly disturbed. Secondly, the Rules provide an elaborate procedure for counting of ballot papers. This procedure contains so many statutory checks and effective safeguards against mistakes and fraud in counting, that it can be called almost trickery foolproof. Although no hard and fast rule can be laid down, yet the broad guidelines, as discernible from the decisions of this Court, may be indicated thus.

6. The Court would be justified in ordering a recount of the ballot papers only where :

(1) the election-petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded;

(2) on the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting; and

(3) the court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties.

7. The contentions advanced in this case are to be tested in the light of these principals.

8. Since, on the whole, we agree with the findings and the conclusion of the court below, we will confine the discussion to the broad features of the case and the legal aspects of the contentions canvassed before us.

9. The first contention is that four unauthorised persons were allowed to act as Counting Supervisors at tables Nos. 4, 5, 7 and 9. The argument proceeds that the list of all the persons who were appointed as Counting Supervisors/Counting Assistants, was summoned from the office of the District Election Officer, and in response thereto, the list Ex. 6, has been produced. It is argued that since the names of Ajudhya Prasad Singh, Q. M. Zaman, Parvez Ahmed and Radhey Sham Sah do not find mention in Ex. 6, they were never appointed to act as Counting Supervisors. In this connection, reference has been made to the application filed on April 14, 1972, by the petitioner for summoning documents, the list Ex. 6 and the check memos (Ex. C/3, Ex. C/4, Ex. C/6 and Ex. C/8). The check memos show that the aforesaid persons actually supervised the counting at tables Nos. 4, 5, 7 and 9.

10. It may be noted that there is not even an oblique hint in the election petition that any unauthorised person was allowed to act as Counting Supervisors or Counting Assistant. Such an allegation was made for the first time in the application dated July 3, 1973. This application seeking a recount was made at the stage of final arguments, after the parties had closed their evidence. It is true that in cross-examination, the Returning Officer and the Assistant Returning Officer were

questioned by the Counsel for the petitioner with regard to the authorisation of these persons to act as Counting Supervisors. But that could hardly constitute an adequate notice to the respondent of this new plea which was sought to be smuggled into the case in a questionable manner at the belated stage. The respondent could be justified in assuming that the evidence on this plea which was not even faintly adumbrated in the petition or put in issue would not be looked into by the Court. In any case at that stage the respondent had no opportunity or right to produce evidence to show that apart from the list, Ex. 6, there was other record showing that the aforesaid persons were duly appointed by the Returning Officer to act as Counting Supervisors.

11. Be that as it may, it has not been shown that these four persons who took part in the counting, were unauthorised persons. It is not disputed that they are all government officials. The mere fact that their names do not appear in Ex. 6 does not exclude the probability of their having been appointed and kept in reserve by a separate order or orders to act as Counting Supervisors in case of need.

12. That such appointments were made and a waiting list of such appointees in reserve was prepared, is clear from the answer that the Returning Officer (RW 14), Mr. Sinha, gave to a court question :

If an officer of this list did not turn up in time to participate in the counting then in his place another officer had to be appointed from the waiting list that was maintained in my office regarding this matter. That waiting list contained the names of officers reserved whose services were to be utilised in case any of the appointed officers did not turn up or was subsequently exempted from working as such inside the counting hall.

13. In reply to a further question put by the petitioner's Counsel, the Returning Officer reiterated :

There was a reserved list like this in my office regarding this matter which had been prepared under my orders.

14. The fact that such a list of officials in reserve was prepared and exists receives further support from the evidence of RW 18 and RW 19 who had worked as Counting Supervisors at tables Nos. 6 and 3, respectively.

15. The petitioner appeared in the witness-box as PW 19 on May 7, 1973. Even then he did not make any allegation that any unauthorised persons had been admitted into the Counting Hall. His Chief Counting Agent who appeared as PW 13, also did not allege anything of this kind. The circumstances of this case fully attract the maxim omnia praesumuntur rite esse acta, and it would be presumed that the aforesaid four persons were rightly and regularly appointed and admitted into the Counting Hall to act as Counting Supervisors by the Returning Officer. On this score no violation of Rule 53 or any other statutory provision has been shown.

16. Now we turn to the second contention of Mr. Prasad. The argument is that at the first round of counting in the box of Polling Station No. 74 (Madhopur), fifty unsigned ballot papers were found in excess of those polled. This irregularity, it is submitted, was brought to the notice of the Returning Officer by Prof. Yadav, the Chief Counting Agent of the appellant, but to no avail.

17. Part I of Ex. 4 is the Ballot Paper Account sent by the Presiding Officer of Polling Station No. 74. Its Part II contains the result of the initial counting of those ballot-papers at table 4. In Part I, in column No. 2(a), the number of unused ballot papers is shown as 397, and in column No. 3, the

number of the ballot papers issued to voters is given as 323. In Part II, column No. 1, the total number of ballot papers found in the ballot box used at the polling station, is entered as 373, and in column No. 2, captioned 'Discrepancy, if any etc.', it is written "Found fifty excess including one ballot paper unsigned". The entries in columns Nos. 1 and 2 of Part II purport to bear the signature of the Counting Supervisor, R. Sham Sah who was not examined by either side.

18. It is common ground that when this discrepancy was brought to the notice of the Assistant Returning Officer and the Returning Officer, the sealed packet of the unused ballot papers was opened and the papers were counted. The result of that count is to be found noted on the back of Ex. 4 by the Assistant Returning Officer, thus :

On verification by counting the actual number of unused ballot-papers by opening the statutory packet in presence of the Returning Officer and the candidates/agents, it was found that only 347 (unused ?) ballot papers have been returned. This settles the discrepancy in the ballot paper account.

19. Under it is the endorsement of the Returning Officer to the effect :

This was done by (A.R.O. ?) in my presence.

20. The Assistant Returning Officer stated in the witness-stand as RW 13, that in the Ballot Paper Account, the total number of unused ballot-papers was wrongly shows as 397, while it should have been 347, which was the actual number of ballot-papers found in the packet. Thus, the physical verification revealed that this apparent discrepancy did not actually exist.

21. The court below has accepted the genuineness of the endorsements of the Assistant Returning Officer (RW 13) and the Returning Officer (RW 14) on Ex. 4 and the evidence of those officers in preference to the interested statements of the Counting Agent (PW 9) and the Chief Counting Agent (PW 13) of the petitioner. It has also found that only one unused ballot-paper was found unsigned, and not fifty. We have no good reason to differ from those findings.

22. Indeed the main burden of the arguments of Mr. Prasad, is that the Assistant Returning Officer/Returning Officer was not competent to open the packet of unused ballot-papers and inspect the same as such a course was expressly forbidden by Rule 93(1) of the Rules. It is stressed that this illegality vitiating the counting, was itself a good ground for ordering a recount.

23. Rule 93 reads :

Production and inspection of election papers. - (1) While in the custody of the District Election Officer or, as the case may be, the Returning Officer -

- (a) the packets of unused ballot papers with counterfoils attached thereto;
- (b) the packets of used ballot papers whether valid, tendered or rejected;
- (c) the packets of the counterfoils of used ballot-papers;
- (d) the packets of the marked copy of the electoral roll, or, as the case may be, the list maintained under sub-section (1) or sub-section (2) of Section 152; and
- (e) the packets of the declaration by electors and the attestation of their signatures;

shall not be opened and their contents shall not be inspected by, or produced before, any person or authority except under the order of a competent court.

(2) Subject to such conditions and to the payment of such fee as the Election Commission may direct, -

(a) all other papers relating to the election shall be open to public inspection; and

(b) copies thereof shall on application be furnished.

(3) Copies of the returns by the Returning Officer forwarded under Rule 64, or as the case may be, under clause (b) of sub-rule (1) of Rule 84 shall be furnished by the Returning Officer, District Election Officer, Chief Electoral Officer or the Election Commission on payment of a fee of two rupees for each copy.

24. For understanding the import and object of Rule 93, it would be appropriate to have a short and swift glance at the scheme of the Rules.

25. Part V of the Rules makes provision with regard to "Counting of Votes in Parliamentary and Assembly Constituencies". It covers Rules 50 to 66. Part VI relates to "Voting at Elections by Assembly Members and in Council Constituencies". It includes Rules 67 to 70. Part VII provides for "Counting of votes at Elections by Assembly Members or in Council Constituencies". It contains Rules 71 to 85.

26. It will be seen that Rule 93 has not been placed in any of the parts relating to counting of votes. It seems to have been advisedly placed in Part IX captioned "Miscellaneous", which in the serial order comes after the parts dealing with voting and counting of votes.

27. Viewed in the light of the scheme of the Rules, and its setting, the language of Rule 93 seems to us clear enough to indicate that the custody of the District Election Officer or the Returning Officer spoken of in the rule is a post-election custody. Such an indication is available in the words "unused ballot papers" which repeatedly occur in this rule. The words "unused" in the context means that which "was made available for use in the election but remained unused in the election". Sub-rule (3) of the rule enables the authorities mentioned therein to issue copies of the returns forwarded by the Returning Officer under Rule 64 or Rule 84(1)(b). The supply of such copies will obviously be a post-election function.

28. Any other interpretation of Rule 93 and its scope would make it difficult, if not altogether impossible, for the Returning Officer to perform the various functions and duties enjoined by the rules at the stage of counting. This will be clear from a reference to the other rules. Take for instance Rule 56 which requires that the ballot papers shall first be taken out from the boxes used in a constituency and mixed together and then arranged in convenient bundles and scrutinised. Sub-rule (2) of Rule 56 further requires inter alia that if a ballot paper does not bear any mark at all or does not bear both the marks or the signature which it should have borne under the provisions of sub-rules (1) of Rule 38, it shall be rejected by the Returning Officer. To perform this duty it would be absolutely necessary for the Returning Officer to inspect such ballot papers. Indeed, in the present case, an objection was raised that fifty unused ballot papers in the packet did not bear the mark or signature required by Rule 38(1). The Returning Officer was therefore, fully competent to open the packet and inspect and count the ballot papers found therein.

29. Instruction 23 in the Hand Book issued by the Election Commission, also indicates that Rule 93(1) operates at a post-election stage. Under this instruction, the Returning Officer is required to seal the packets of all the papers relating to the election, specified in clauses (a), (b), (c), (d) and (e) of Rule 93(1) immediately after the counting of the votes is over, with his own seal and also with that of the Commission. After the sealing, the packets are to be put in a separate steel box which shall be locked with two locks and each lock shall be sealed. Immediately after the declaration of the election result the sealed box is to be despatched to the District Election officer who on receipt of the same shall forthright deposit it in safe custody in the Treasury under double-lock. The key of one of the locks is entrusted to the Treasury Officer. In Union Territories such as deposit is to be made by the Returning Officer. The secret seals of the Commission are returned immediately after their required use. Thus, it is clear that the custody contemplated by Rule 93(1) is the post-election custody.

30. In the light of the above discussion, the conclusion is inescapable that the act of the Returning Officer in opening the packet, and in inspecting and counting the unused ballot-papers found therein, far from amounting to an illegality, was necessary for the due performance of the duty enjoined on him by Rules.

31. Accordingly, we overrule this contention.

32. It is urged that the detailed result-sheet, prepared candidatewise, table-wise and roundwise, from which figures mentioned in the final result-sheet (Ex. 7) were extracted, has been deliberately withheld to prevent detection of the hanky panky done in the counting. Such a detailed result-sheet, it is mentioned, was required to be prepared and was admittedly prepared under instruction No. 17(q) in the "Hand Book for Returning Officers (1970)" issued by the Election Commission.

33. The contention appears to be attractive but does not stand a close examination.

34. Instruction No. 17(q) in the Hand-Book runs thus :

Side by side, the work of tabulating the result of counting shall be done. The Check Memos duly signed by the Returning Officer shall be passed on to an officer seated at a separate table near the Returning Officer/Assistant Returning Officer. This officer shall fill in the result of counting of each round of each table in Form 20. It is desirable that a separate sheet for each round is used for the purpose. Copies of Form 20 may be printed, cyclostyled or typewritten. The entries in the form should be made on loose sheets prepared for the purpose. A copy of Form 20 is at Annexure XIII.

35. A perusal of Form 20 prescribed under Rule 56(7) of the Rules would show that it does not require that the final result-sheet should be prepared tablewise, also. It is sufficient if the final result-sheet is candidate-wise and round-wise. The final result-sheet (Ex. 7) exactly conforms to the prescribed Form 20.

36. The Assistant Returning Officer (RW 13) in cross-examination said :

"On the above table where the entries used to be made in the result-sheets from the check-memos, those entries were made candidate-wise, table-wise and round-wise. The figures of total votes the different rounds of counting, as mentioned in this abstract result sheet, Ex. 7, (the witness looks into it) were not directly taken from the figures as they found mention in the different check memos of the different tables of the different rounds of counting, but from those check memos the figures were

first extracted on the detailed result sheet giving their numbers round-wise, candidate-wise and table-wise and thereafter those figures were totalled round-wise and extracted in this Ex. 7."

37. From the statement of RW 13 extracted above, it would appear that at first a detailed result sheet in which figures were tabulated candidate-wise, table-wise and round-wise was prepared, and then, therefrom, all the figures, excepting those showing table-wise break-up, were carried over to the final result sheet, Ex. 7, drawn up in the prescribed Form 20. This detailed result-sheet, though summoned, is not forthcoming from the District Election Officer. Might be, it has been misplaced. Might be, it was destroyed by the counting staff after the preparation of the final result-sheet in the prescribed form. Whatever be the case, the absence of that document, does not make the checking and verification of the figures entered in the final result sheet, Ex. 7 impossible or event difficult. Its preparation is not a requirement of any statutory provision. It is prepared only as a matter of convenience in view of the instructions of the Election Commission, by carrying over, collating and totalling the figures from the check memos containing table-wise figures of each round of counting. It is a sort of rough intermediary tabulation intended to facilitate the compilation of the final result-sheet in the prescribed form. The basic figures from which the final result-sheet, whether detailed or abstracted, are worked out are given in the check memos pertaining to the various counting tables. Such check memos are available and indeed reference to some of them namely, Ex. C/3, C/4, C/6 and C/8 was specifically made before us. The correctness or otherwise of the figures has been advanced before us that the figures given in the final result sheet Ex. 7 would not agree with the figures taken and totalled from the check memos.

38. We therefore, repel this contention.

39. This brings us to the last contention. The argument advanced by Mr. Prasad is that during the fourth round of counting 600 to 700 unused and uncounted ballot papers in bundles of 25 each were detected by the petitioner's counting agent, Jagannath Sah, lying under the table of the Assistant Returning Officer. Jagannath Sah protested. The Assistant Returning Officer, however, put those uncounted ballot papers in the lot of counted votes. PW 13 also, on coming to know about it, protested against that mixing. In support of this contention, Counsel was referred to the circumstance that at the end of the third round of counting, the appellant was leading by a margin of 2205 votes. It is urged, this lead of 2205 votes could not thereafter be turned into a deficit of 575 votes when the total number of ballot papers that remained to be counted in the last round, was 3800 only.

40. Like the elusive cloud, this ground of objection, also has been ever changing its hue and shape. In the application Ex. 3, for a recount which was submitted by the petitioner to the Returning Officer at 7 p.m. towards the close of the final round of counting all that was stated was :

It is respectfully submitted that recounting of 168-Katoria Assembly Constituency be done. Because one bundle of 600 votes have been recounted again. All the votes be recounted.

41. It was not alleged therein, even in an embryonic form that 600 uncounted votes, in bundles, were detected lying underneath the table of the Assistant Returning Officer. Such an allegation appeared for the first time in the election petition which was filed about 33 days after the election. What was earlier said to have been "counted-twice over", had now become completely 'uncounted'. What was then alleged in Ex. 3 to have been counted on the table, has now gone underneath the table.

42. The original allegation in Ex. 3 (which was repeated in the second application, Ex. 3a, presented at 7-40 p.m.) was manifestly untenable, because if there was double counting of any ballot papers, the total of the votes polled should have exceeded by the number doubly counted. No such excess was reflected in the grand total of the final result-sheet. The total was correct. The petitioner had no explanation as to why the grand-total of the final result sheet did not show an excess of 600 or any other number of ballot papers. It was mainly for this reason that the Returning Officer had rejected the applications of the petitioner for a recount. That is why the petitioner has now come forward with a changed version, invented as an afterthought.

43. The final result-sheet, Ex. 7 falsifies his present contention also. It shows that at the end of the third round, the appellant was leading by a margin of 424 votes only. There is no good reason to doubt the authenticity of the figures given in Ex. 7. As against it, the notes, Ex. 2 series, on which the petitioner relies for his contention that at the end of the third round he was leading by 2205 votes, was a self-serving and wholly unreliable piece of evidence. These notes (Ex. 2 series) were not mentioned in the list of reliance filed along with the petition. There is no reference to any such notes or their contents in the applications Exs. 3 and 3a. These notes are said to have been made by the counting agents of the petitioner at the time of counting. But in the initial list submitted by the petitioner on August 30, 1972 for summoning among others, his counting agents as witness, it was not mentioned that they would produce any such notes. Subsequently on March 28, 1973, he moved the Court requesting that these witnesses be required to bring their notes.

44. In these circumstances, the High Court was right in holding that these notes had been subsequently brought into existence for the purpose of this petition.

45. For the foregoing reasons, we are of the opinion that the appellant has been unable to make out a good case for a recount of the ballot papers. We dismiss his appeal. He shall pay the costs of respondent No. 1.

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