SUPREME COURT OF INDIA

V.S. ACHUTHANANDAN

Vs.

P.J. FRANCIS & ANR.

31/01/2001

(R.C.Lahoti, S.V.Patil)

Appeal (civil) 4681 of 2000

JUDGMENT

R.C. Lahoti, J.

The general election to the Legislative Assembly of the State of Kerala was held on 27th April, 1996. The appellant, the respondent No.1 and the respondent No.2, contested election from No.99 Mararikulam Legislative Assembly Constituency (Alappuzha District). Counting took place on 8.5.1996 and continued upto the wee hours of 9.5.1996. The respondent No.1 was declared elected defeating his nearest rival candidate, the petitioner, by a margin of 1965 votes. The distribution of votes was as under:- Total number of electors 1,68,873 Total number of valid votes polled 1,38,452 Total number of rejected votes 2,107 Total number of tendered votes 14

Votes secured by candidates :- 1. V.S. Achuthanandan (appellant) 66337 2. Peter Markose (respondent No.2) 3813 3. P.J. Francis (respondent No.1) 68302

On 22.6.1996 the appellant filed an election petition before the High Court of Kerala putting in issue the election of the respondent No.1 mainly on three grounds, namely, (i) corrupt practice committed in the interest of returned candidate by his agents, election agents or the returned candidate himself; (ii) the improper reception of votes which were void, and (iii) non compliance with the provisions of the Constitution and the provisions of the Representation of the People Act, 1951. It was also alleged that the result of the election, in so far as it concerns the returned candidate, was materially affected on account of the grounds alleged in the petition, as abovesaid. The reliefs sought for were __ declaring the election of respondent No.1 as void and declaring the appellant as elected.

All the material averments made in the petition were denied in the written statement filed by respondent No.1 wherein preliminary objections to the maintainability of the petition were also raised. The learned designated election Judge heard the parties on the preliminary objections. Vide order dated 8.1.1997, the High Court directed the election petition to be dismissed on the ground that the allegations in the petition did not disclose a cause of action warranting trial of the election petition and also that the averments made in the petition were not sufficient to grant the relief of recount of ballots. This order was put in issue by the appellant in Civil Appeal No.1808 of 1997 filed before this court which was allowed on 22nd March, 1999. The order of the High Court dated

8.1.1997 was set aside and the case was remitted back to the High Court for trial of the same on merits and affording the parties an opportunity of leading evidence. In its order, reported as V.S. Achuthanandan Vs. P.J. Francis & Anr., (1999) 3 SCC 737, this court held that the election petition was not liable to be rejected under Section 83 of the Representation of the People Act, 1951 read with Order 7 Rule 11(a) of the Code of Civil Procedure. This court further held:- Similarly, the learned trial Judge was not justified in rejecting the election petition without affording the appellant opportunity to place on record the circumstances justifying the re-count as prayed for by him. It is true that on vague and ambiguous evidence no court can direct re-count. But it is equally true that the doors of justice cannot be shut for a person seeking re-count without affording him an opportunity of proving the circumstances justifying a re-count. In his petition the appellant had given details of the alleged illegalities and irregularities committed by Respondent 1 which according to him justified the holding of a re-count. The learned trial Judge relied upon some judgments where re-count was not allowed after trial and wrongly dismissed the election petition filed by the appellant without affording him the opportunity to substantiate the allegations made in the petition or to bring on record the evidences justifying a re-count. It is a settled position of law that the court trying an election petition can direct inspection and re-count of votes if the material facts and particulars are pleaded and proved for directing such re-count in the interest of justice. In doing so, the provisions of Section 94 of the Act have to be kept in mind and given due weight before directing inspection and re-count.

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Without commenting upon the merits of the case, lest it may prejudice the rights of the parties, we feel that the trial Judge was not justified in rejecting the election petition at the initial stage without affording the appellant an opportunity to prove the existence of circumstances prima facie justifying the existence of grounds requiring re- count.

[underlining by us]

On remand, the issues framed by the learned designated election Judge were put up for trial. The petitioner examined 13 witnesses including himself and exhibited 35 documents. The respondent No.1 examined 2 witnesses including himself and exhibited 6 documents. After hearing the learned counsel for the parties once again the learned designated election Judge has directed the election petition to be dismissed forming an opinion that no case for re-count of the ballot papers was made out. The aggrieved petitioner has filed this appeal under Section 116A of the Representation of the People Act, 1951 (hereinafter RPA, for short).

At the hearing, Dr. A.M. Singhvi, the learned senior counsel for the appellant submitted, while attacking the judgment of the High Court, that in order to make out a case for re-count a prima facie case was required to be shown leaving the issue as to material affect on the result of the election to be determined when the result of the re-count was available but the High Court has committed a grave error of law in insisting on the election petitioner making out a good case for re-count. In other words, the High Court has insisted on demanding a higher degree of proof for claiming a re-count, which error has resulted in vitiating the judgment of the High Court. In the submission of the learned senior counsel for the appellant the following three circumstances were shown to exist prima facie by the election petitioner on the evidence adduced by him:- (i) that 2100 excess ballot papers were got printed and retained by Shri Ayyappan Pillai, the Taluk Tehsildar, who was also the Election Registration Officer and was shown to have an affiliation or intimacy with the political party to which the respondent No.1 belongs, raising a high degree of probability of such excess

ballot papers having been misutilised to the advantage of the respondent No.1; (ii) that on opening the ballot boxes it was found that the number of ballots polled were in excess of the ballot papers issued to different polling stations __ a strong pointer to the fact of gross irregularity having been committed at the polling; and (iii) that a number of ballot papers issued and used for election of parliamentary candidates were found to have been mixed up with legislative assembly ballot papers. In the submission of the learned senior counsel for the election petitioner/appellant, the abovesaid facts made out a sufficient ground for directing a re-count of ballot papers and if only a re-count would have been directed the election petitioner/appellant would have been found to have secured the highest number of votes and should have been declared elected. The learned counsel for the respondent No.1 has disputed the correctness of the submissions so made and submitted, supporting the judgment under appeal, that the appellant was not entitled to any relief and the appeal was liable to be dismissed. We will examine the worth of the contention so advanced by testing if any of the three circumstances have been shown to the satisfaction of court to so exist as to enable a finding of prima facie case for ordering re-count being recorded.

Circumstance (i) :- It is not disputed that the total number of voters in the constituency was 1,68,873. There were in all 194 polling stations. The actual number of ballot papers distributed was 1,69,900, though the total number of ballot papers got printed was 1,73,000. It was also not disputed before this court that on the evidence adduced by the parties it was proved that the ballot papers were got printed under the instructions of the Chief Electoral Officer who was the District Collector and Shri Ayyappan Pillai, P.W.11 had no role to play either in the printing of the ballot papers or in appointing the total number of ballot papers to be printed. Any rules or instructions relevant to fixing the number of ballot papers to be printed for any constituency were neither brought to the notice of the learned designated election Judge nor placed before this court. We have, therefore, no reason to disbelieve the statement of Ayyappan Pillai, P.W.11, as has been done by the learned designated election Judge that some number of excess ballot papers are required to be printed as some ballot papers may be defective and may have to be rejected and provision has to be made for unforeseen myriad contingencies by keeping a few ballot papers in reserve. In fact, the learned senior counsel for the appellant did not raise any serious grievance about printing of marginally excessive ballot papers than required. The evidence adduced by the parties goes to show that 2100 excess ballot papers were kept in the custody of the Taluk Tehsildar. 1,69,900 ballot papers were issued to different polling station officers by rounding up the odd number of exact requirement of any polling station to the next higher ten. 1000 ballot papers issued earlier to P.W.2 Mini Antony, who was Deputy Collector (Revenue Recovery), Alappuzha and Returning Officer for Mararikulam Legislative Assembly Election Constituency for being used as postal ballots, were found to be deficient and therefore another 200 ballot papers were issued to her. Ayyappan Pillai, P.W.11 was transferred after the elections were over and subsequently he has retired also. At the time of transfer he handed over the envelope containing 1900 unused ballot papers to his successor R.D. Subrahmanyam, R.W.1, while handing over charge of Tehsil. The envelope then remained in his custody and he produced the same in the High Court. He deposed that the envelope which was being produced by him before the High Court was sealed and was in the same position as it was when he had received the envelope in his charge. The envelope bore a superscription certifying the contents of the envelope to be ballot papers 2100 in number bearing serial numbers 169901 to 172000. Just below, it was noted that ballot papers serial numbers 171801 to 172000 were issued to the Returning Officer, Mararikulam and the balance in the envelope was 1900.

The envelope of unused ballot papers having been produced in the court, the opportunity should have been utilised by the election petitioner in making a request to the learned designated election Judge to open the envelope in the presence of the witness producing the same in the Court or at any

time thereafter so as to verify if the envelope did contain the ballot papers in conformity with the superscribed endorsement appearing on the envelope and the cat would have been out of the bag if that be so. The learned designated election Judge has noted in the impugned judgment that the election- petitioner did not seek for opening and examining the contents of the envelope marked Exhibit-XI. After the hearing was concluded, the respondent No.1 moved an application praying for opening of the envelope and examining the contents thereof. This application filed by the respondent No.1 was objected to by the election-petitioner submitting that the envelope was not produced from proper custody and therefore it was not to be opened. We fail to appreciate the stand taken by the election petitioner. The conduct of the parties in the High Court clearly suggests that the election petitioner himself entertained a doubt about the contents of the envelope Exhibit-XI and apprehended that the envelope, if opened, the contents thereof would falsify his own plea. There was no substance in the plea of the election petitioner that the envelope was not produced from a proper custody. In our opinion, on the evidence adduced, seen in the light of conduct of the election petitioner and the respondent No.1, no fault can be found with the finding arrived at by the learned designated election Judge that neither the printing of the ballot papers in excess of the number of registered voters was contrary to any statutory provisions, nor the excess ballot papers were misused as alleged in the election petition. It is true that during cross-examination Ayyappan Pillai, P.W.11, candidly admitted that he was a member of Kerala Gazetted Officers Union, which was a union sponsored by Congress(I), the political party which had set up respondent No.1 as candidate. Merely from this admission, we cannot infer that the officer was helping the respondent No.1 by misutilising excess ballot papers to the advantage of respondent No.1. Thus no case of any illegality or irregularity much less the provisions of the RPA or Rules made thereunder having been breached was made out by reference to circumstance (i).

Circumstance (ii) :- The petitioner had counting agents appointed when the ballot boxes were opened and subjected to counting. At the end of the counting the result of voting at polling stations, as specified in Rule 56 of the Conduct of Election Rules, 1951 (hereinafter Rules, for short) was recorded polling station wise in Form 16 and the final result sheet was prepared in Form 20 in accordance with Rule 56(7). Copies of such Form 16 and final result sheets in Form 20 were made available to the counting agents for the contesting candidates. Based on such Forms 16 and Form 20 the petitioner compiled the statement of the ballot papers issued by Presiding Officers at various polling stations and the total votes found in the ballot boxes and set out the compilation in a tabular form in sub-para (c) of Para 11 of the election petition. The table compiled by the petitioner shows that in almost all the polling stations (excepting 5) the number of total votes found in the ballot boxes fell short by 1 or 2 than the number of ballots issued. In polling station Nos.2 and 30, the shortage was of 6 and 10 votes respectively. In polling station Nos.119 and 120, 2 votes each were found in excess. On these facts, the learned senior counsel for the appellant very fairly submitted that nothing much turned out in as much as the possibility of a voter or two not casting the ballot paper issued to them and taking it away or having wasted the same could not be ruled out. The excess of 2 ballot papers each in polling station Nos. 119 and 120 also was not very material. However, according to the learned senior counsel, it was the excess of 99 ballot papers found in the ballot box referable to polling station No.79 which was material and was a positive indicator of unauthentic ballot papers having been used and cast in the election.

We have very minutely examined this plea of the learned senior counsel for the appellant and we find that the submission is based on factually wrong premises. In the final result sheet (Form 20) figures referable to polling station No.79 appear at page 118 of the Paper Book (Vol.II). It appears that the number of total votes found in the ballot boxes of polling station No.79 was typed as 828 + 1 tendered vote. However, this figure 828 contained a typing error and therefore the first digit of 8

was corrected by hand to read as 7 making the figure 728. The correction so made was initialled by the Returning Officer. This final result sheet (Form-20) runs into 13 pages, each page containing the number of ballots relating to 10 to 13 polling stations approximately and totalled up at the bottom of every page. The total of preceding page has been carried forward to the next page and then added to the total of that page. The figure of 728 being the total number of votes found in the ballot box referable to polling station No.79 tallies with and fits in with the total of that page and the grand total at the end. It is pertinent to note that the figures of total on individual pages or the grand total at the end does not bear any correction. It is, therefore, very clear that the total votes found in the ballot box of polling station No.79 was 728 and not 828. In the table contained in para 11(c) of the election petition the petitioner has taken the figures of the votes issued and the votes found in the ballot box referable to polling station No.79 as 729 and 828 respectively. The latter figure is incorrect. The very foundation of the plea that the number of votes found in that ballot box exceeded the number of votes issued at the polling station falls to ground. The factum of two votes found in excess each in the ballot boxes of polling station Nos. 119 and 120 is immaterial. The variation is so marginal as not to have any material effect on the result of the election.

Circumstance (iii) :- The record of ballot paper account kept in Form 16 [referable to Rules 45, 56(7) and 56A(7)] of the Conduct of Election Rules was summoned by the election petitioner and produced in the court by P.W.2, Mini Antony, the Returning Officer. It is an admitted fact that the elections of the legislative assembly and parliamentary constituency in Alappuzha District were held on the same day. Voting of the two was conducted simultaneously. The same ballot box was used for casting ballots referable to legislative assembly and parliament both. However, at the time of counting, on opening the ballot boxes, the ballot papers were separated and separate bundles of ballot papers relating to legislative assembly and parliament were made and then counted. Before the High Court when the bundle of Forms 16 of legislative assembly election was opened, it was found to contain a few Form 16 (about four in number) referable to parliamentary election placed in the bundle amidst Forms 16 referable to legislative assembly elections. Such forms have been produced at pages 102, 104, 107 and 109 of the Paper Book (Vol.II). The High Court has found that when the election process was over and the records were being sorted out, arranged and consigned to safe custody, some Forms 16 referable to parliamentary election got mixed up with the Forms 16 referable to legislative assembly election and that it was a bonafide mistake. Such mistake could have been positively identified by summoning the record of Form 16 referable to parliamentary election. However, the record of election papers referable to parliamentary constituency of Alappuzha District was weeded out and destroyed after the lapse of 6 months from the date of election as no election petition was filed challenging the election of parliamentary seat and the election petitioner did not make a prayer for summoning that record before the expiry of the said period of 6 months.

There are additional reasons also as to why we find this ground to be without any merit and substance. Firstly, the four Form 16 referable to the parliamentary election and found contained in the bundle of Form 16 referable to legislative assembly election in question contain the serial numbers of the ballot papers and those serial numbers are of the ballot papers used in the parliamentary election and not of the legislative assembly election. Secondly, the possibility of ballot papers cast for parliamentary election having been taken into account and included in the ballot papers of legislative assembly election is very very remote, virtually nil, as the two ballot papers would be of different size, with names of different candidates and different election symbols. Even if a single ballot paper would have been wrongly included at the counting, the counting agent of any of the political parties would have taken a strong exception to it then and there. It is pertinent to note that it is also not the case of the petitioner in the election petition that the counting was

vitiated on account of ballot papers referable to parliamentary election having been included in the bundle of ballot papers referable to legislative assembly election at the time of counting. It appears that when the bundle of Form-16 was opened in the court the mistake of about four Form 16 referable to parliamentary election having been placed in the bundle of Form 16 referable to legislative assembly election came to the fore and the election petitioner sprang up to cash on such discovery. The mistake appears to be bonafide and inadvertent. The election petitioner cannot be permitted to make out a case for re-count of ballot papers on a ground for which there is no foundation laid by him, not even a whisper, in pleadings and which does not appear to have a ring of truth, even prima facie.

That apart admittedly a prayer for re-count in terms of Rule 63(2) of the Conduct of Election Rules, 1951 was not made by or on behalf of any of the contesting candidates including the petitioner before the Returning Officer which the election petitioner would ordinarily have made if there was any truth in any of the pleas canvassed by the petitioner before the High Court or this court.

The power vesting in the court seized of an election dispute to order for inspection and re-count of the ballot papers has been subject matter of several decisions of this Court which have by authoritative exposition settled the law thereon. Without burdening this judgment with the series of available decisions, it would suffice to mention a few only, namely, Constitution Bench decision in Ram Sewak Yadav Vs.Hussain Kamil Kidwai and Ors. - AIR 1964 SC 1249, three- Judges bench decision in Suresh Prasad Yadav Vs. Jai Prakash Mishra & Ors. - AIR 1975 SC 376, Bhabhi Vs. Sheo Govind and Ors. - AIR 1975 SC 2117 which refers to all the decisions available till then and a recent decision in M.R. Gopalkrishnan Vs. Thachady Prabhakaran & Ors. - 1995 Suppl. (2) SCC 101 to which one of us (Dr. A.S. Anand, J., as his Lordship then was) is a party. We may briefly restate the principles as under:-

1. The secrecy of the ballot is sacrosanct and shall not be permitted to be violated lightly and merely for asking or on vague and indefinite allegations or averments of general nature. At the same time purity of election process has to be preserved and therefore inspection and re-count shall be permitted but only on a case being properly made out in that regard.

2. A petition seeking inspection and re-count of ballot-papers must contain averments adequate, clear and specific making out a case of improper acceptance or rejection of votes or non-compliance with statutory provisions in counting. Vague or general allegations that valid votes were improperly rejected, or invalid votes were improperly accepted would not serve the purpose.

3. The scheme of the rules prescribed in Part V of the Conduct of Election Rules, 1961 emphasises the point that the election petitioner who is a defeated candidate, has ample opportunity to examine the voting papers before they are counted, and in case the objections raised by him or his election agent have been improperly over-ruled, he knows precisely the nature of the objections raised by him and the voting papers to which those objections related. It is in the light of this background that S.83 (1) of the Act has to be applied to the petitions made for inspection of ballot boxes. Such an application must contain a concise statement of the material facts.

4. The election-petitioner must produce trustworthy material in support of the allegations made for a re-count enabling the Court to record a satisfaction of a prima-facie case having been made out for grant of the prayer. The Court must come to the conclusion that it was necessary and imperative to grant the prayer for inspection to do full justice between the parties so as to completely and effectually adjudicate upon the dispute.

5. The power to direct inspection and re-count shall not be exercised by the Court to show indulgence to a petitioner who was indulging in a roving enquiry with a view to fish out material for declaring the election to be void.

6. By mere production of the sealed boxes of ballot-papers or the documents forming part of record of the election proceedings before the Court the ballot papers do not become a part of the court record and they are not liable to be inspected unless the court is satisfied in accordance with the principles stated hereinabove to direct the inspection and re-count.

7. In the peculiar facts of a given case the court may exercise its power to permit a sample inspection to lend further assurance to the prima-facie satisfaction of the court regarding the truth of the allegations made in support of a prayer for re-count and not for the purpose of fishing out materials.

Once a re-count is validly ordered the statistics revealed by the re-count shall be available to be used for deciding the election dispute. However, if the validity of an order passed by High Court permitting inspection of ballot papers and directing a recount is brought in issue before the Supreme Court, the facts revealed by re-count cannot be relied upon by the election-petitioner to support the prayer and sustain the order for re-count if the pleadings and material available on record anterior to actual re-count did not justify grant of the prayer for inspection and re-count.

On the facts as set out hereinabove we are clearly of the opinion that the averments made in the petition and the material brought on record by the election-petitioner did not make out a case for re-count. The petitioner has indulged into a roving enquiry and has tried to fish out materials in the hope that the re-count if allowed may probably twist the balance of votes in his favour which in the facts and circmstances of the case is nothing beyond a wishful thinking of the petitioner.

We also do not agree with the submission of the learned senior counsel for the appellant that this court had directed the High Court to permit an inspection and re-count if a prima facie case was made out for such relief but the High Court has unreasonably insisted on availability of 'good grounds before allowing the relief of recount. In Suresh Prasad Yadavs case (supra) the law stated by this Court is that the order for recount of ballot papers would be justified if, inter alia, on the basis of evidence adduced the requisite allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting. This answers the submission which is more a play on jugglery of words. What was needed was proof of prima facie case of availability of good grounds wherein the election petitioner/appellant has failed.

For the foregoing reasons we find ourselves entirely in agreement with the view taken by the learned designated election Judge declining the prayer for re-count and finding the election petitioner not entitled to such relief. The appeal is devoid of any merit and is liable to be dismissed. It is dismissed accordingly, though, without any order as to the costs in the facts and circumstances of the case.