SUPREME COURT OF INDIA

Udey Chand

Vs.

Surat Singh

C.A.No.5462 of 2008

(D.K. Jain and Aftab Alam JJ.)

09.10.2009

JUDGEMENT

D.K. JAIN, J.:

1. This appeal, by Special Leave, is directed against the judgment and order dated 19th October, 2007, rendered by the High Court of Punjab & Haryana at Chandigarh in Civil Revision No.5432 of 2007. By the impugned judgment, the High Court has affirmed order dated 12th October, 2007 passed by the Civil Judge (Jr. Division), Hansi (hereinafter referred to as "The Election Tribunal") in Civil Suit No.4C of 2006, directing the re- counting of votes cast in the election for the post of Sarpanch, Gram Panchayat, Village Bas Badshahpur, Tehsil Hansi, District Hissar.

2. The facts, giving rise to the present appeal, may be briefly summarised as follows:

Re-poll for the said post was held on 18th December, 2005. In the result declared the same evening,

the appellant was declared elected by a margin of four votes, having secured 881 votes as against 877 votes secured by his nearest rival, respondent No.1 (hereinafter referred to as `the election petitioner'), in this appeal.

The result was compiled by the Returning Officer in Statutory Form No.19, prescribed under Rule 70(1) of the Haryana Panchayati Raj Election Rules, 1994 (for short `the Rules'). The Form was signed by the appellant as well as the election petitioner. The result was declared thereafter.

3. Being dissatisfied with the election result, the election petitioner filed an election petition under Section 176 of the Haryana Panchayati Raj Act, 1994 (for short `the Act'). The election of the appellant was challenged on several grounds (all in paragraph 3 of the petition in the narrative form) viz. (i) on completion of election and counting of votes, the election petitioner was found to have secured 877 votes as against 871 votes cast in favour of the appellant; (ii) the Returning Officer declared the election petitioner as elected to the post of Sarpanch; he got Form No.19 signed from him and after the election petitioner had left for his residence to celebrate his victory, the Returning Officer, in connivance with the appellant and under political pressure, wrongly recorded the number of votes secured by each of them and declared the appellant as elected for the said post; and (iii) on account of political pressure and ill-will, the Returning Officer wrongly cancelled a number of votes cast in favour of the election petitioner and, therefore, "re-counting" of votes was illegal. It was alleged that since the Returning Officer had violated the provisions of the Act and the Rules framed thereunder and had committed "certain" illegality, the election of the appellant was a nullity. It was prayed that the election of the appellant be set aside; re- counting of votes be ordered and the election petitioner may be declared as elected to the said post.

4. The election petition was contested by the appellant. It was pleaded that case for re-counting was not made out as the counting of votes was in the presence of the contesting candidates as well as their agents; the allegations in the election petition were frivolous and the election petition was an abuse of the process of law.

5. From the record it appears that neither issues were framed nor any affidavit by way of evidence was filed or oral evidence in support of the respective pleas was adduced. Upon hearing oral submissions and relying on a Full Bench decision of the Tribunal-Cum-Sub Judge1, the Tribunal allowed the petition, observing thus:

"From the above discussed case law it can be said that the recounts of votes can only be ordered on the basis of material facts which have been asserted by the petitioner and which are duly supported by some evidence thus, making out prima facie case for recounting and there must be some contemporaneous evidence in support of the fact of any irregularity of illegality in the counting.

In the instant case, there is margin of only four votes between the petitioner and the respondent No.1 whereby the respondent No.1 has been declared as elected candidate. It is the plea of the petitioner that earlier he was declared elected in the said election, however, the respondent No.2 by coming under political pressure etc., declared the respondent No.1 to be an elected candidate."

1 1999 (2) PLJ 8

6. Being aggrieved, the appellant took the matter to the High Court by preferring a Civil Revision petition. As stated above, the High Court has dismissed the revision petition, holding that in view of the decision of the Full Bench in Radha Kishan's case (supra), when there is sufficient evidence available on record warranting a re-count, no documentary evidence was required to direct the re-counting of votes under Section 176(4)(b) of the Act. Aggrieved by the said decision, the appellant is before us.

7. Assailing the decisions of the Tribunal as also of the High Court, Mr. Mahabir Singh, learned senior counsel appearing on behalf of the appellant strenuously urged that the High Court committed a serious illegality in upholding the order passed by the Tribunal, directing a re-count, inasmuch as it was passed mechanically without understanding and appreciating the ratio of the decision in Radha Kishan's case (supra). It was contended that before directing the re-count in terms of Section 176(4)(b) of the Act, the Tribunal was obliged to record a finding, on the basis of the material on record, that a prima facie case for re-count had been made out. It was argued that in the present case there is neither any documentary nor oral evidence on record on the basis whereof the Tribunal could have recorded such a finding. It was also submitted that having failed to apply for re-count in terms of Rule 69(2) of the Rules after the announcement of the result by the Returning Officer and having signed the result sheet in Form 19, the election petitioner was estopped from raising any objection in regard to the counting at a later stage. Learned counsel also urged that the High Court did not notice insertion of clause (aa) in sub- section (4) of Section 176 of the Act, which contemplates an enquiry into the allegation of non-compliance with or violation of the provisions of the Act etc. In support of the proposition that an order of re-count should not be made unless a definite case for re-count with specific allegation is made out, reliance was Ors.5 to contend that having failed to furnish any explanation as 2 (2005) 2 SCC 1 3 (2000) 8 SCC 355 4 (2001) 3 SCC 81 5 (2004) 6 SCC 331 to why application for re-count had not been made in terms of Rule 69(2) at the time of counting, the Tribunal should have rejected the prayer for re-count.

8. Ms. Indu Malhotra, learned senior counsel, appearing on behalf of the election petitioner, on the other hand, supported the decision of the lower courts and submitted that sufficient material was available on record, on the basis whereof the Tribunal had recorded its prima facie satisfaction that a case for re-count had been made out. Learned counsel argued that since challenge to the election was laid under Section 176(4)(b) of the Act, a detailed enquiry as contemplated in clause (a) of the said section was not required. Learned counsel also pointed out that in the re-count carried out in furtherance of Tribunal's order dated 12th March, 2007, the election petitioner was found to have secured 878 votes as against 873 votes secured by the appellant herein and as a consequence thereof the election petitioner has been declared elected as the Sarpanch. It was, thus, asserted that order

dated 12th October, 2007 having been given effect to, the present appeal is rendered infructuous and deserves to be dismissed. It was, however, conceded that the order of the Civil Judge declaring the election petitioner as having been elected is under challenge before the High Court and the operation of the said order has been stayed.

9. Before adverting to the merits of the issue raised by the parties with reference to the statutory provisions, it would be appropriate to bear in mind the salutary principle laid down in the election law that since an order for inspection and re-count of the ballot papers affects the secrecy of ballot, such an order cannot be made as a matter of course. Undoubtedly, in the entire election process, the secrecy of ballot is sacrosanct and inviolable except where strong prima facie circumstances to suspect the purity, propriety and legality in the counting are made out. The importance of maintenance of secrecy of ballot papers and the circumstances under which that secrecy can be breached, has been considered by this Court in several cases.

It would be trite to state that before an Election Tribunal can permit scrutiny of ballot papers and order re-count, two basic requirements viz. (i) the election petition seeking re-count of the ballot papers must contain an adequate statement of all the 8 material facts on which the allegations of irregularity or illegality in counting are founded, and (ii) on the basis of evidence adduced in support of the allegations, the Tribunal must be prima facie satisfied that in order to decide the dispute and to do complete and effectual justice between the parties, making of such an order is imperatively necessary, are satisfied.

summarising the principles laid down by this Court from time to time in granting prayer for inspection of ballot papers and/or re- counting, a three-Judge Bench of this Court adumbrated the circumstances in which such a prayer could be considered.

Speaking for the Bench, Sarkaria J. observed as follows: (SCC pages 824-825) "...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.

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

6 (1975) 4 SCC 822 9 (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."

Ors.7, the petitioner contested the election for the post of the President of a Panchayat in Tamil Nadu. In the election, the 1st respondent was declared elected and the petitioner challenged the election on the ground that while counting, the Returning Officer had wrongly treated some valid votes cast in favour of the petitioner as invalid votes and certain invalid votes were treated as valid votes which were cast in favour of the 1st respondent and that the Returning Officer had not permitted the petitioner's agents to have scrutiny of the ballot papers at the time of counting. The Tribunal, after recording the evidence of all candidates and the Assistant Returning Officer, ordered re- count of votes. On re-counting of votes, it was found that there was no difference in the number of votes secured by the 7 (1989) 1 SCC 526 1 petitioner but insofar as the 1st respondent was concerned he had secured only 528 votes as against 649 votes he was originally held to have secured. 121 votes cast in his favour had been found to be invalid votes. Based on the figures of the re- count, the election petitioner was declared duly elected as he had secured 28 votes more than the 1st respondent on re- count. This order was challenged by the 1st respondent in a Civil Revision petition before the High Court. The learned Single Judge allowed the revision petition and held that the Tribunal had erred in ordering a re-count of the votes when the petitioner had not made out a prima facie case for an order of re-count of votes cast. This order was challenged before this Court. Upholding the view taken by the High Court, it was held as under: (SCC p. 531) "13. Thus the settled position of law is that the justification for an order for examination of ballot papers and re-count of votes is not to be derived from hindsight and by the result of the re-count of votes. On the contrary, the justification for an order of re-count of votes should be provided by the material placed by an election petitioner on the threshold before an order for re-count of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek re-counting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure 1 by means of evidence that a prima facie case of a high degree of probability existed for the re-count of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or court should not order the recount of votes."

(Emphasis supplied by us) observing that re-count of votes should not be ordered as a matter of course, it was held as under:

"A cryptic application claiming recount was made by the petitioner-respondent before the Returning Officer. No details of any kind were given in the said application. Not even a single instance showing any irregularity or illegality in the counting was brought to the notice of the Returning Officer. We are of the view when there was no contemporaneous evidence to show any irregularity or illegality in the counting ordinarily, it would not be proper to order recount on the basis of bare allegations in the election petition. We have been taken through the pleadings in the election petition. We are satisfied that the grounds urged in the election petition do not justify for ordering recount and allowing inspection of the ballot papers. It is settled proposition of law that the secrecy of the ballot papers cannot be permitted to be tinkered lightly. An order of recount cannot be granted as a matter of course.

The secrecy of the ballot papers has to be maintained and only when the High Court is satisfied on the basis of material facts pleaded in the petition and supported by the contemporaneous evidence that the recount can be ordered."

13. Yet again in Vadivelu's case (supra), a case pertaining to an election for the post of the President of a village Panchayat in Tamil Nadu, the result was challenged on the ground of various irregularities in voting and counting. The difference of votes secured by the winning candidate and his nearest rival was only 8 (1993) Supp (2) SCC 82 1 one vote. The election petition by the losing candidate was allowed by the Election Tribunal and a re-count was ordered.

As a result, the election petitioner got 1002 votes and the elected candidate got only 975 votes. Revision petition filed against the order of the Tribunal was allowed by the High Court and it was held that a re-count ought not to have been ordered, because the election petition did not contain material facts and did not make out a prima facie case for re-counting.

The election petition was, thus, dismissed. Affirming the decision of the High Court, a three-Judge Bench, speaking through K.G. Balakrishnan, J. (as His Lordship then was), exposited thus:

"...Re-count of votes could be ordered very rarely and on specific allegation in the pleadings in the election petition that illegality or irregularity was committed while counting. The petitioner who seeks re-count should allege and prove that there was improper acceptance of invalid votes or improper rejection of valid votes. If only the court is satisfied about the truthfulness of the above allegation, it can order re-count of votes. Secrecy of ballot has always been considered sacrosanct in a democratic process of election and it cannot be disturbed lightly by bare allegations of illegality or irregularity in counting. But if it is proved that purity of elections has been tarnished and it has materially affected the result of the election whereby the defeated candidate is seriously prejudiced, the court can resort to re-count of votes under such circumstances to do justice between the parties."

(Emphasis added) 1

14. In the backdrop of the afore-stated principles, enunciated while dealing with election petitions under the Representation of the People Act, 1951 and Conduct of Election Rules, 1961, as also under some of the State Election Laws, the moot question arising for consideration is as to what is the scope of enquiry under clause (b) of sub-section (4) of Section 176 and whether the language of the said provision carves out an exception to the afore-mentioned general principles to be borne in mind while dealing with an election petition seeking inspection of ballots and re-counting?

15. To appreciate the rival submissions in this behalf, it would be necessary to refer to Section 176 of the Act. Insofar as it is relevant for this appeal, it reads as follows:

"176. (1) Determination of validity of election enquiry by judge and procedure.--If the validity of any election of a member of a Gram Panchayat, Panchayat Samiti or Zila Parishad or Sarpanch of Gram Panchayat, Chairman or Vice-Chairman, President or Vice- President of Panchayat Samiti or Zila Parishad respectively is brought in question by any person contesting the election or by any person qualified to vote at the election to which such question relates, such person may at any time, within thirty days after the date of the declaration of results of the election, present an election petition to the Civil Court having ordinary jurisdiction in the area within which the election has been or should have been held, for the determination of such question.

(2) xxx xxx xxx 1 (3) xxx xxx xxx (4) (a) If on the holding of such enquiry the Civil Court finds that a candidate has, for the purpose of election committed a corrupt practice within the meaning of sub-section (5), he shall set aside the election and declare the candidate disqualified for the purpose of election and fresh election may be held.

(aa) If on holding such enquiry the Civil Court finds that - (i) on the date of his election a returned candidate was not qualified to be elected;

(ii) any nomination has been improperly rejected; or (iii) the result of the election, in so far as it concerns a returned candidate, has been materially affected by improper acceptance of any nomination or by any corrupt practice committed in the interest of the returned candidate by an agent other than his election agent or by the improper reception, refusal or rejection of any vote or the reception of any vote which is void or by any non-compliance with or Violation of the provisions of the Constitution of India or of this Act, or any rules or orders made under this Act, election of such retuned candidate shall be set aside and fresh election may be held.

(b) If, in any case to which clause (a) or clause (aa) does not apply, the validity of an election is in dispute between two or more candidates, the Court shall after a scrutiny and computation of the votes recorded in favour of each candidate, declare the candidate who is found to have the largest number of valid votes in his favour, to have been duly elected:

Provided that after such computation, if any, equality of votes is found to exist between any candidate and the addition of one vote will entitle any of the candidates to be declared elected, one additional vote shall be added to the total number of valid votes found to have been received in the favour of such candidate or candidates, as the case may be, elected by lot drawn in the presence of the judge in such manner as he may determine.

(5) A person shall be deemed to have committed a corrupt practice xxx xxx xxx"

16. Sub-section (1) of Section 176 enables a contesting candidate or any person who is qualified to vote at the election to question before a civil court of competent jurisdiction the validity of any election of a member of Gram Panchayat, Panchayat Samiti or Zila Parishad etc. The petition so filed is to be adjudicated upon in accordance with the provisions of sub-section (4) of Section 176, depending upon the averments made and the nature of the allegations. A perusal of the said provision would show that an election can be challenged only on two grounds viz., (i) that the returned candidate committed a corrupt practice within the meaning of sub-section (5), and (ii) that some irregularities were committed during the course of counting. Sub-section (5) of Section 176 defines what a corrupt practice means and when a person shall be deemed to have committed the same. In the present case, although a question of corrupt practice, falling within the ambit of sub-section (5) of Section 176 was sought to be raised in the election petition, but the same was not pressed before the Tribunal. The only issue canvassed before the Tribunal was regarding irregularity in counting and declaration of result by the Returning Officer and, therefore, as such, it is 1 unnecessary to delve on the scope of clause (a) of sub-section (4) of the said section. However, in order to appreciate the nature and scope of enquiry by the Election Tribunal in an election petition, questioning the validity of election on a ground other than corrupt practice, reference to both the clauses (a) and (b) of sub-section (4) of Section 176 would be necessary. It is manifest from the language of clause (a) that while trying a petition containing an allegation of corrupt practice in terms of clause (a) of sub-section (4), the Court is required to hold an enquiry to return a finding whether a candidate had indulged in corrupt practice as defined in sub-section (5) of Section 176 of the Act. Significantly, unlike in clause (a), in clause (b) of sub- section (4) of Section 176, the expression "on the holding of such enquiry" is missing and instead the expression used therein is "after scrutiny and computation of votes". Thus, the question is whether in view of the absence of expression, "on the holding of such enquiry" in clause (b) an enquiry into the allegation of irregularity or illegality in the counting of ballot papers, be it on account of acceptance or rejection of ballots or counting simplicitor is required to be conducted by the Tribunal 1 or a bare allegation of some irregularity or illegality in the counting of ballots is sufficient to order a re-count?

17. It is no doubt true that the legislature in its wisdom has not incorporated in clause (b) the expression "on the holding of such inquiry", as it appears in clause (a), but bearing in mind the importance and the sanctity of the secrecy of a ballot, in our considered opinion, it cannot be the intention of the legislature that a bald allegation of irregularity in the counting process would ipso facto warrant a re-count. Such an interpretation of the provision, in our view, would not only tantamount to automatic conversion of a petition under Section 176(1) of the Act into an order for recounting, it would be destructive of the settled principle of secrecy of poll, as also violative of letter and spirit of Section 183 of the Act, which mandates every officer, agent etc.; who performs duty in connection with the recording or counting of votes, to maintain the secrecy of votes. In our judgment, the sole object of the Legislature in giving wide powers to the Election Tribunal is to decide the objections under clause (b) of sub-section (4) of Section 176 of the Act expeditiously without holding a full-fledged regular enquiry, as 1 postulated in clause (a) of the said provision, so that the actual mandate of the electorate is given effect to without any delay;

the successful candidate is able to utilise his complete tenure for the purpose he has been elected and above all the purity of election process is safeguarded. Nonetheless, the secrecy of the ballot being sacrosanct, it cannot be permitted to be tinkered with lightly and an order of re-count cannot be granted just for the asking. We have no hesitation in holding that a petition for re-count as contemplated under clause (b) of Section 176(4) of the Act must contain adequate statement of material facts on which the election petitioner relies in support of his allegation(s) and it must also be supported by some contemporaneous evidence to show irregularity or illegality in the counting. On this basic material, which affords the basis for the allegations in the petition and the response of the opposite party thereon, the Tribunal is required to record its prima facie satisfaction that in order to decide the issue raised in the petition and in order to do complete justice between the parties the "scrutiny and computation of the votes" recorded in favour of each candidate is necessary. The need to record reasons in 1 support of the satisfaction can hardly be over-emphasised because reasons are the soul of the orders/judgment.

Therefore, we hold that though in an election petition seeking an order under Section 176(4)(b) of the Act, it may not be necessary for the Court to hold a regular enquiry as postulated under clause (a) of Section 176(4) of the Act but the Court is obliged to apply its mind to the material facts, disclosed in the petition, on which the allegations of irregularity or illegality are founded, along with some contemporaneous evidence, which would depend on the facts and circumstances of each case.

An order for re-count on the basis of bare allegations in the election petition would not be a proper exercise of jurisdiction under the provision.

18. Having viewed the matter in the light of the principles enunciated above, we are constrained to note that the Tribunal as also the High Court lost sight of the parameters to be applied while

considering the petition seeking re-counting of votes. We find that the allegations in the election petition were not only vague, even the basic material facts as could have made the Tribunal reach a prima facie satisfaction that re-count of ballots 2 was necessary were missing in the petition. Affidavit in support of the allegations, summarised in paragraph 3, was neither filed nor called for, more so, in a case where serious allegations of misconduct were levelled against the Returning Officer. Having regard to the fact that concededly the result sheet had been signed by the election petitioner, perhaps, it was a fit case where the examination of the Returning Officer was necessary to elicit the correctness of the allegations in the petition. It is manifest from the observations of the Tribunal, extracted in para 5 above, that the sole factor which had weighed with it to order re-count was the margin of only 4 votes between the appellant and the election petitioner. In our opinion, a narrow margin of 4 votes does not per se give rise to a presumption that there had been an irregularity or illegality in the counting of votes. Apart from laying the foundation in the pleadings, the onus to prove the allegation of irregularity or illegality on the part of the Returning Officer was on the election petitioner, which he failed to discharge. The allegation against the Returning Officer of obtaining the signatures of the election petitioner on a blank result sheet and filling up the same after 2 the election petitioner had left the polling station, was a serious allegation involving dereliction of duty. It could not be accepted at its face value and had to be proved with cogent material, which was not done. We are convinced that in order to overcome his lapse in not availing of the statutory remedy for re-counting of votes as provided in Rule 69 as also the factum of his signing the result sheet in Form 19, the plea of incorrect recording of the result after his departure from the polling station was raised by the election petitioner. Clearly, it was an afterthought. In this regard, the following observations by a three-Judge Bench of this Court in Chandrika Prasad Yadav's case (supra) are quite apposite: (SCC page 339):

"Ordinarily, thus, it is expected that the statutory remedies provided for shall be availed of. If such an opportunity is not availed of by the election petitioner; he has to state the reasons therefor. If no sufficient explanation is furnished by the election petitioner as to why such statutory remedy was not availed of, the Election Tribunal may consider the same as one of the factors for accepting or rejecting the prayer for re-counting. An order of the prescribed authority passed in such application would render great assistance to the Election Tribunal in arriving at a decision as to whether a prima facie case for issuance of direction for re-counting has been made out."

19. In the light of the afore-stated factual scenario, we are of the opinion that in the present case there was no material on record on the basis whereof the Tribunal could have arrived at a 2 positive finding as to how a prima facie case had been made out to order a re-count of the ballot papers. The order of re- count was passed by the Tribunal mechanically without any application of mind and, therefore, the High Court erred in upholding it.

20. Before parting with the case, we may also deal with the contention urged on behalf of the election petitioner to the effect that re-counting having taken place in terms of the Tribunal's order, this appeal is rendered infructuous. The argument is noted to be rejected. An order of re-count of votes has to stand or fall on the nature of the averments made in the election petition and the material produced in support thereof before the order of re-count is made and not from the result

emanating from the re-count of votes. A similar view was echoed by a three-Judge Bench of this Court in V.S. Achuthanandan's case (supra). Speaking for the Bench, R.C. Lahoti, J. (as His Lordship then was) held thus:

"...if the validity of an order passed by the High Court permitting inspection of ballot papers and directing a re-count 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 2 material available on record anterior to actual re-count did not justify grant of the prayer for inspection and re-count."

21. A similar contention was rejected by another three-Judge Ors.9, wherein it was held that even if on re-count it was found that the returned candidate had not secured majority of votes, the result could not have been disturbed unless prima facie case of high degree of probability existed for re-count of votes, which is not the case here. Accordingly, we reject the contention.

22. In view of the afore-going discussion, the appeal is allowed; the election petition, lacking material facts, is rejected and consequently, the order passed by the Election Tribunal directing re-count of the votes is set aside. The appellant shall be entitled to costs in this appeal.