

**PATNA HIGH COURT**

Jaday Gilua

Vs

Suraj Narain Jha

Civil Writ Jurdn. Case No. 787 of 1972

(Madan Mohan Prasad, J.)

11.11.1972

**ORDER**

**Madan Mohan Prasad, J.**

1. This is an application under Article 227 of the Constitution for quashing an order dated the 17th May, 1972 (Annexure "4") passed by the Election Tribunal appointed for Panchayat Election in the district of Sinshbhum, allowing a prayer of opposite party No. 1 for re-opening the result of an election and allowing re-counting, of ballot papers.

2. It appears that an election took place for the office of Mukhiya of Kiriburu Gram Panchayat, in the district of Singhbhum. There were several candidates for this office. Polling was held on the 27th May, 1971 and as a result of counting it was found that the petitioner had secured 303 votes; opposite party No. 1 had got 302 votes and opposite Party No. 2 had sot 140 votes. Beside these, 53 ballot papers had been rejected as invalid. The petitioner was, therefore, declared elected as the Mukhiya on the aforesaid date.

3. An application was then filed by opposite party No. 1 before the Election Tribunal (Annexure "1") on the 31st May, 1971, challenging the election of the petitioner on the ground that the counting had not been done properly, inasmuch as 53 ballot papers were illegally rejected, his agent was not allowed entrance in all the booths, and counting was done in a haphazard manner and in the presence of unauthorized person, which affected the decision that was taken for rejection of ballot papers. The petitioner filed a rejoinder (Annexure "2") on the 6th July, 1971, controverting the allegations aforesaid and further alleged that the election petition was not maintainable in law. It was further stated that no irregularity or, illegality had been pointed out by the election-petitioner at any earlier stage.

4. In the aforesaid election petition, the election-petitioner had impleaded the Block Development Officer of Noamundi Block, who was the Presiding Officer at the aforesaid election, as Opposite Party No. 3, and the aforesaid officer also filed a rejoinder (Annex. "3") denying that the facts alleged in the election petition and stating that the counting was done legally and properly. Evidence was led by the election-petitioner by examining four witnesses,

and the present petitioner, the successful candidate, also examined two witnesses. The election-petitioner, however, did not examine himself in support of his allegations. The Election Tribunal came to the conclusion that from the evidence adduced in the case "a prima facie case appears to have been made out that large number of ballot papers had in fact been rejected in the course of counting and it also has been brought out that petitioner's polling Agent was not present at booth No. 1." He found that in view of the prayer of the election-petitioner being merely for re-counting and in view of the fact that the election-petitioner had lost only by a margin of one vote, it was a case for ordering re-counting of ballot papers and, accordingly, passed that order (Annexure "4"). Hence this application.

5. Learned counsel for the petitioner has urged two points before me; firstly that the election petition not being properly verified, as required by Rule 75 of the Bihar Panchayat Election Rules, hereinafter called the "Rules", read with Order 6, Rule 15 of the Code of Civil Procedure, the petition should have been dismissed under Rule 77 of the Rules aforesaid, instead of being allowed. Secondly he has urged that the allegations providing a basis for the prayer for recounting were much too vague, no material facts had been stated that there had either been illegal or improper rejection of ballot papers and the Tribunal had not even come to a finding that there was a prima facie evidence to that effect, and as such the Tribunal had no jurisdiction to order re-counting in such circumstances. Both the contentions put forward have great force.

6. In the present case, admittedly the election petition had not been verified in the manner required by Order 6, Rule 15 of the Code of Civil Procedure, as amended by the Patna High Court sub-rule (1) of which reads as follows :

"Save as otherwise provided by any law for the time being in force, the facts stated in every pleading shall be verified by solemn affirmation or on oath of the party or of any of the parties plead or of some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, before any officer empowered to administer oath under Section 139 of the Code." Rule 75 of the Rules requires the election petition to be verified in the manner laid down in the Code of Civil Procedure for the verification of pleadings. It is thus obvious that the verification of the election petition in the present case was not in accordance with Rule 75. Rule 77 of the Rules lays down as follows :

"If there is any failure to comply with the provisions of sub-rules (2) and (3) of Rule 72. Rule 73, sub-rule (1) and clause (a) of sub-rule (2) of Rule 75, the Election Tribunal shall summarily dismiss the election petition :

Provided that the petition shall not be dismissed without giving the petitioner an opportunity of being heard." It is thus obvious that the failure to comply with the provision of Rule 75 entails dismissal of the election petition in accordance with Rule 77. The conclusion is thus irresistible that the Election Tribunal, in the circumstances of the present case, ought to have dismissed the election petition after giving the election-petitioner an opportunity of being heard under Rule 77 aforesaid.

7. The aforesaid view has been uniformly taken in several decisions of this Court to which my attention has been drawn. The latest decision on the point is reported in the case of *Ram Narayan*

*Yadav v. Garib Yadav*<sup>1</sup>. In this case a learned Single Judge of this Court relying on a Bench decision of this Court and other decisions held that non-compliance with the mandatory provisions of Rule 75 of the Rules leads to the dismissal of the election petition under Rule 77 and that it is the duty of the Election Tribunal to summarily dismiss the election petition. In a Bench decision of this Court in the case of *Satyanand Singh v. Bujhal Singh*<sup>2</sup>, Narasimham, C.J. and A.B.N. Sinha, J. held that there was no discretion left with the Election Tribunal in cases of non-compliance with the provisions of Rule 75(1) of the Rules and the Election. Tribunal ought to dismiss the election petition summarily under Rule 77 for non-verification of the petition. A similar view has been taken in an un-reported decision of a learned Single Judge of this Court in the case of *Upendra Jha v. Kinu Khan*<sup>3</sup>, to which reference has been made in the case of Ram Narayan Yadav (Supra). Similar view was taken by another learned Single Judge of this Court in an unreported decision in the case of *Kusum Lal Yadav v. Sihip Lal Yadav*<sup>4</sup>. So far as this Court is concerned, the point appears to be well settled that the provisions contained in Rule 75 are mandatory and its non-compliance leaves no option for the Election Tribunal but to dismiss the petition under Rule 77.

8. In the present case, learned counsel for the opposite party has not been able to place before me any material or law to the contrary. I have noticed, however, that no specific objection, apart from saying that the election petition was not maintainable in law was raised by the petitioner in his petition of rejoinder before the Election Tribunal. It can, therefore, be said on behalf of the opposite party that no such objection had been taken. Even so, I am satisfied that it does not improve the case of the opposite party, inasmuch as it is the duty of the Election Tribunal to dismiss the election petition under Rule 77 of the Rules provided it is not in strict compliance with Rule 75. It does not depend upon the Election Tribunal not to do so unless the error or non-compliance is pointed out by the opposite party. In the unreported decision of this Court in the case of *Upendra Jha*, C.W.J.C. No. 28 of 1965, D/-19-12-1966 (Pat) (supra) although the elected Mukhia had not taken any preliminary objection, challenging the verification of the election petition, nevertheless, the election petition, as it stood, being violative of the provision of Rule 75, it was held that irrespective of the objection, it was the duty of the Election Tribunal to dismiss it. I find myself in respectful agreement with the aforesaid view.

9. In the circumstances aforesaid, the only conclusion which is permissible is that the Election Tribunal had no jurisdiction to order re-counting in view of the election petition not complying with the mandatory provision of R. 75. The Election Tribunal should have, after giving an opportunity, to the opposite party No. 1 of being heard in this respect, dismissed the petition under Rule 77 aforesaid. On this ground alone, therefore, the present application must succeed and the order of the Tribunal has to be set aside.

10. There is, however, another ground equally effective in the circumstances of the present case. It appears that only vague allegations were made in respect of re-counting and the Election Tribunal merely came to the conclusion that a prima facie case was made out that 53 ballot papers had been rejected, and further that at booth No. 1, the agent of the election-petitioner was not present. This finding has no relation at all to the reasons which would justify a recounting of votes. In this connection learned counsel has drawn my attention to the case of *Dr. Jagjit Singh v. Giani Kartar Singh*<sup>5</sup>, This was a case where the election to the Punjab Legislative Assembly was challenged. Their Lordships observed at page 783(Paragraph 31) of the report as follows :

"Vague or general allegations that valid votes were improperly rejected, or invalid votes were improperly accepted, would not serve the purpose which Section 83(1)(a) has in mind. An application made for the inspection of ballot boxes must give material facts which would enable the Tribunal to consider whether in the interests of justice, the ballot boxes should be inspected or not. In dealing with this question, the importance of the secrecy of the ballot papers cannot be ignored and it is always to be borne in mind that the statutory rules framed under the Act are intended to provide adequate safeguard for the examination of the validity or invalidity of votes and for their proper counting. It may be that in some cases, the ends of justice would make it necessary for the Tribunal to allow a party to inspect the ballot boxes and consider his objections about the improper acceptance or improper rejection of votes tendered voters at any given election; but in the requirements of justice be taken to see that election petitioners do not get a chance to make a roving or fishing enquiry in the ballot boxes so as to justify their claim that the returned candidate's' election is void. We do not propose to lay down any hard and fast rule in this matter, indeed, to attempt to lay down such a rule would be inexpedient and unreasonable."

It will be useful to refer to another decision which has been cited before me by the learned counsel. In *Jagan Nath v. Jaswant Singh*<sup>6</sup>, their Lordships said that it is well settled that the statutory requirements of election law must be strictly observed. It was also held that it is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law.

11. On the question of re-counting it has been pointed out that there is no provision in the Bihar Panchayat Raj Act enabling a Tribunal to direct recounting. But the law on the point has been laid down in some of the cases of this Court. In the case of *Maksudan Ram v. Karnla Prasad*<sup>7</sup>, a Bench of this Court held that the Tribunal has no such power. A Full Bench was constituted and the decision of their Lordships on the point is reported in *Rasik Lal Yadav v. Bhola Prasad Mandal*<sup>8</sup>, As a result of this decision, the earlier decision of the Division Bench was overruled and it was held that the Election Tribunal has such power which may be exercised in appropriate cases. In the case of *Chandrika Tiwary v. Thakur Roy*<sup>9</sup>, Untwalia, J., (now C.J.) noticed the

Full Bench decision, and observed :

"..... it has to be pointed out that ordering a recounting of ballot papers is not the rule. It is still an exception, and a proper case has got to be made out for ordering re-counting." In the case before the learned Judge also, re-counting had been ordered in a mechanical way, and by the same order the election petition had been allowed to be amended, and it was held that the Tribunal had committed an error on both points.

12. In the present case, as I have observed earlier, the allegations made in the election petition were vague and no material facts, as pointed out by their Lordships of the Supreme Court in the

case of Dr. Jagjit Singh, AIR 1966 SC 773, (supra) were stated. Even the finding of the Tribunal does not say that there was any prima facie case whatsoever which would have justified an order for recounting. The order passed by the Tribunal is therefore, based on no material, and for that reason also, it is fit to be set aside.

13. I may mention that the mere fact that as many as 53 votes have been rejected is no pointer to the fact that they had been illegally or improperly rejected. The mere fact, again that the Agent of the election-petitioner was not present at one of the polling booth is also not a pointer to the counting having been done improperly. It appears that the case with regard to the absence of the Agent made by the election-petitioner was that he had gone there late and was not allowed to enter the booth. If he had gone late, he had to thank himself for it. In this connection my attention has been drawn to Rule 33 which lays down that where any act or thing is required by the rules to be done in the presence of the candidate or his polling agent, the non-attendance of any such candidate or his agent shall not invalidate the act or thing done. I have thus been unable to and, nor has learned counsel for the opposite party been able to point out any material, which could be said to justify the order passed by the Tribunal.

14. In the result, the order passed by the Election Tribunal in Annexure-"4" is set aside. It will be now for the Tribunal to hear the election-petitioner on the question of verification of the election petition and act in accordance with law.

15. The application is, accordingly, allowed. In the circumstances of this case, there will be no order for costs.

Application allowed.

Case Referred.

<sup>1</sup>1972 BLJR 80

<sup>2</sup>1967 BLJR 439

<sup>3</sup>C.W.J.C. No. 28 of 1965 disposed of on 19-12-1966 (Pat)

<sup>4</sup>C. W. J. C. No. 540 of 1966 disposed of on 7-2-1967 (Pat)

<sup>5</sup>AIR 1966 SC 773

<sup>6</sup>AIR 1954 SC 210

<sup>7</sup>AIR 1967 Pat 305

<sup>8</sup>AIR 1971 Pat 10 (FB)

<sup>9</sup>1970 Pat LJR 529