

RAJASTHAN HIGH COURT

Ram AvtarKhandelwal

Vs.

Bar Council of Rajasthan

Civil Spl. Appeal (Writ) No. 312 of 2004
(Anil Dev Singh, C.J. and K.K. Acharya, JJ.)

14.05.2004

JUDGEMENT

Anil Dev Singh, C. J.

1. This appeal is directed against the order of the learned single Judge dated April 20, 2004, whereby the writ petition challenging the entire elections to the Bar Council of Rajasthan, 2004 has been dismissed on the ground of existence of an efficacious alternative remedy provided under Rule 34 of the Bar Council of Rajasthan Rules, 1968 (for short, referred to as 'the Rules').

2. The appellant is a lawyer practicing at *Jaipur*. He was one of the candidates, who contested the election of the Bar Council of *Rajasthan*. Polling for the election was held on March 19, 2004. The counting of the votes commenced on March, 29, 2004. When the writ petition was filed, the counting was still counting. The counting of the First Preference Votes was concluded on April 9, 2004. It is averred in the writ petition that on March 31, 2004, during the counting of ballot papers of Polling Booth No. 26 located at *Kama, District Bharatpur*, it came to light that alteration and obliterations had been carried out in some of the ballot papers and the original marking of preference were also changed. According to the petition, there was a clear cut evidence of tempering of ballot papers. The appellant and other candidates preferred written objections before the Returning Officer in regard to such ballot papers. Thereupon, the Returning Officer segregated 36 ballot papers and referred to the objections thereto to the Advocate General in consonance with the provisions of Rule 23(3) of the Rules. The objections were considered by the nominee of the Advocate General under Rule 23(3) of the Rules. The nominee of the Advocate General opined that all the 36 ballot papers should be counted. While expressing his

opinion by a written communication dated April 9, 2004 (Annexure 5 to the writ petition), the Returning Officer, observed as follows :-

"I have examined all the Ballot Papers and sought the report from the Returning Officer also about the Polling at the Polling Station Kaman. According to the Returning Officer, there is no official report of any Booth capturing or alternation at the Polling Station or after the Ballots were cast as per the report of the Polling Officer. In these circumstances, there is no material available on record to believe that the alteration in the disputed Ballot Papers have not been done by the voter himself and in my opinion, the Ballot Papers in which intention of the voter is clearly shown, the same should be taken up for counting."

3. Pursuant to the opinion of the nominee of the Advocate General, the disputed ballot papers were counted by the Returning Officer.

4. In the petition, the result of the elections, was also challenged on the ground that 89 ballot papers were illegally counted by the Returning Officer. It was pointed out that when the ballot boxes of Booth No. 68, located in the premises of *Rajasthan High Court, Jaipur* Bench, were opened on April 3, 2004, the total number of ballot papers found in the ballot boxes did not tally with the Statement of Account prepared by the Presiding Officer as 89 votes were found in excess. A written complaint was submitted by the appellant and by few others. The Returning Officer, on April, 3, 2004, during the process of counting, rejected the complaint. While doing so, the Returning Officer observed as under :-

"..... All the seven boxes were one by one shown for lock and seal to the candidates/agents who were present in the counting hall. All were satisfied and hence one by one boxes were opened. On counting total 2237 ballot papers were found in these seven boxes. One tendered vote was also found in Box No. 5.

As per the polling account sent by the Polling Officer, 2148 votes were polled but on actual counting 2237 ballot papers are found, hence there is a difference of 89 votes which are in excess. However, as the ballot papers are found in the ballot boxes, they are required to be counted hence all the ballots are ordered to be counted.

In all five tendered votes are found, four sent by the polling officer and one found in the ballot box. All the five tendered votes were separately sealed."

5. Aggrieved by the counting of the alleged defaced and excess votes, the appellant filed the writ petition for seeking the following reliefs:-

"It is, therefore respectfully prayed that the original election record including the ballot papers may be called for and by issuing an appropriate writ, order or direction the entire Bar Council of Rajasthan Election 2004 may be cancelled.

Any other writ, order or direction which the Hon'ble Court deems fit and proper in the facts and circumstances of the case may also kindly be issued. The costs of the writ petition may also kindly be awarded to the petitioner ."

6. Before the learned single Judge, the appellant raised the following two contentions:-

(1) That in spite of the fact that several ballot papers were defaced within the meaning of Rule 23(2) of the Rules, the same were counted on the basis of decision of the nominee of the Advocate General, which decision cannot be countenanced in law.

(2) That as per the polling account of the Polling Officer of polling booth No. 68, 2148 votes were cast but on actual counting 2237 ballot papers were found in the ballot boxes. Instead of rejecting the excess number of 89 votes found in ballot boxes, the Returning Officer counted them. The action of Returning Officer is contrary to law.

7. On the basis of the aforesaid pleas, the appellant contended before the learned single Judge that the entire election to the Bar Council of Rajasthan stood vitiated. The learned single Judge rejected the writ petition on the ground that it was open for the petitioner to challenge by filing Election Petition(s) before the Election Tribunal. Aggrieved by the impugned order passed by the learned single Judge, the appellant has filed the instant appeal.

8. We have heard learned counsel for the appellant and the learned counsel for the respondents at length. The two submissions advanced before the learned single Judge were reiterated before us by the learned counsel for the appellant. It was submitted by the learned counsel for the appellant that since the validity of the elections in to were challenged by the appellant on the aforesaid two counts, the learned single Judge was not right in relegating the appellant to the remedy provided under Rule 34 of the Rules. According to the learned counsel for the appellant, the Election Tribunal does not have the power to declare the entire election as invalid. He also submitted that the decision of the Advocate General or his nominee under Rule 23(3) of the Rules with

regard to the defaced and obliterated votes is final, and therefore, the Election Tribunal is powerless to deal with the decision of the Advocate General or his nominee and this being so, it is only in the writ petition that the appellant can question the decision of the Advocate General or his nominee. Moreover, the learned counsel for the appellant contended that the Election Tribunal has no power to hold the entire election to have been vitiated on account of illegal counting of 89 excess votes. It was canvassed that where the election of all the candidates is challenged, the availability of the alternative remedy by way of election petition is not an efficacious remedy.

9. We have considered the submissions of the learned counsel for the appellant. However, we have not been able to persuade ourselves to accept his submissions including the submission that remedy under Section 34 of the Rules is not an efficacious alternative remedy to challenge the elections.

10. Rule 34 of the Rules provides for procedure for resolution of disputes as to the validity of the elections. Rule 34 of the Rules, to the extent is relevant, reads as follows:

"Disputes as to the Validity of Elections.- (1) Any voter may contest the validity of the election of a candidate declared to have been elected to the Bar Council by a petition signed by him and supported by an affidavit and delivered to the Secretary personally or sent by registered post so as to reach him within 15 days from the date of publication of the results of the election.

.....

.....

(3) Such petition shall include as respondents all the contesting candidates, and the petition shall be accompanied by as many copies as there are respondents.

(4) All disputes arising under the above sub-rules shall be decided by a Tribunal to be known as an Election Tribunal comprising 3 Advocates who agrees in writing not to seek election and whose names are on the State roll and who are not less than 10 years' of standing.

.....

.....

(6) The Election Tribunal shall have all or any of the following powers -

- (i) to dismiss a petition;
- (ii) to order recount;
- (iii) to declare any candidate to have been duly elected on a recount;
- (iv) to set aside the election of the candidate who either by himself or through any other person acting with his consent is guilty of corrupt practices."

As is clear from the aforesaid rule any voter can contest the validity of the election of a candidate through a petition, signed by him and supported by an affidavit, delivered to the Secretary, Bar Council. It is significant to note that sub-rule (4) of Rule 34 mandates that the disputes shall be decided by the Election Tribunal.

11. The petitioner instead of resorting to the remedy provided under Rule 34 of the Rules, invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution for challenging the entire election of the Bar Council. Article 226 of the Constitution is a discretionary remedy. Normally the Court will not exercise jurisdiction in case an efficacious remedy exists. Therefore, what is to be seen is whether the remedy provided under Rule 34 is an efficacious alternative remedy for challenging the validity of the elections. The answer lies in sub-rule (6) of Rule 34 of the Rules. Sub-rule (6) of Rule 34 of the Rules empowers the Election Tribunal to dismiss the petition, order a recount, declare any candidate to have been duly elected on a recount and set aside the election of a candidate who either by himself or through any other person acting with his consent is guilty of corrupt practice. Sub-rule (6) of Rule 34 of the Rules defines corrupt practices to mean bribery, undue influence hiring or procuring any vehicle or vessel for the free conveyance of any elector to any polling station.

12. It was submitted by the learned counsel for the appellant that the Election Tribunal was not empowered to set aside the election of the candidates on account of counting of the defaced and obliterated votes and counting of 89 excess votes of polling booth No. 68. According to the learned counsel, recounting can be ordered by the Election Tribunal only if it finds that there was a mistake in physical counting of the votes and not where excess votes are discovered in the ballot boxes and where the defaced and obliterated votes are counted. He canvassed that the entire elections to the Bar Council cannot be assailed under Rule 34 of the Rules. Consequently, it was submitted that remedy provided under Rule 34 of the Rules is not an efficacious alternative remedy and therefore the petitioner had rightly invoked the extraordinary jurisdiction of this

Court under Article 226 of the Constitution.

13. Basically, the learned counsel for the appellant wants us to give a restrictive interpretation to the word "recount" occurring in Rule 34 of the Rules when there is no reason to construe the word in such a manner. The word "recount" occurring in Rule 34 is not hedged in by any limitations. Therefore, where there is a mistake in the physical counting of votes, or where invalid votes are counted, the Election Tribunal is empowered to order recount.

14. Under Rule 23(2) a voting paper shall not be signed by a voter and in the event of any erasure, defacement or obliteration the same shall not be taken into account for the purposes of the election. Rule 23 reads as follows:

"23. Marking of ballot paper.- (1) A voter in giving his vote -

(a) shall place on his voting paper the figure '1' in the space opposite the name of the candidate whom he chooses for his first preference, and

(b) may in addition place on this voting paper the figure '2' or the figure '2' and '3', or the figure '2', '3', and '4', and so on, in the space opposite the names of the other candidates in the order of this preference.

(2) A voting paper shall not be signed by a voter, and in the event of any erasures, obliterations or alteration in the voting paper or of the voting paper purporting to have been signed by the voter, the voting paper shall be deemed to have been defaced and no votes purporting to have been given, thereby shall be taken into account for the purpose of the election.

(3) The decision of the Advocate General or in his absence an advocate of not less than 15 years standing at the Bar nominated by him in advance whether a voting paper has or has not been defaced shall be final".

Thus, the votes purported to have been cast in violation of Rule 23(2) cannot be taken into account for the purpose of election. In other words, they cannot be considered or counted. Therefore, it appears to us that recounting of votes can be ordered by the Tribunal whenever the votes are counted in violation of the provisions of the Rules. Since no words of restricted nature precede or follow the word "recount" in Rule 34(6)(ii) of the Rules, no limitation can be read into the provisions so as to limit the powers of the Tribunal for ordering recount of the votes.

15. It is true that according to sub-rule (3) of Rule 23, the opinion of the Advocate

General or his nominee in regard to the question whether or not a voting paper is defaced has been made final. But that finality is for the Returning Officer and not for the Election Tribunal. That is how the provision needs to be read. There is a purpose behind the finality attached to the opinion of the Advocate General or his nominee *qua* the returning officer. In case the opinion of the Advocate General or his nominee is not made binding on the returning officer, the election process once started will be liable to be delayed and derailed as a voter or a candidate will be able to challenge the same, at time, even before the completion of the election process. It seems to us that it was only with a view to allow the election process to complete without obstruction or impediment that the decision of the Advocate General or his nominee was made final for the returning officer. The finality attached to the decision is binding on the Returning Officer and does not bind the Election Tribunal. After the result of the election is declared the voter or a candidate can challenge the decision before the Tribunal on the ground that there are erasures, obliterations, alterations, in the voting paper and the vote could not be taken into account. The Election Tribunal can physically check the voting papers to find out whether or not there are erasures, obliterations or alterations in them and in case the Election Tribunal finds erasure, obliteration or alteration in the voting papers, it can direct the Returning Officer to recount the votes by ignoring the votes, which are defaced. Since the Election Tribunal is empowered to direct recounting of votes on the ground that the votes counted by the Returning Officer are defaced, the appellant ought to have resorted to the remedy provided under Rule 34 of the Rules.

16. Similarly, the grievance of the appellant that 89 excess votes were illegally counted can also be considered by the Election Tribunal and in case the Election Tribunal comes to the conclusion that the votes have been illegally taken into account, it can order recount of the votes by the Returning Officer. It can also direct the returning officer not to count the excess votes.

17. In *K.K. Srivastava v. Bhupendra Kumar*,¹ the Supreme Court considered the effect of availability of the alternative remedy for challenging the election of candidates under Rule 31 of the Election Rules framed by the Bar Council of Madhya Pradesh. In this regard, the Supreme Court held as follows:

"It is well-settled law that while Article 226 of the Constitution confers a wide power on the High Court there are equally well-settled limitations which this Court has repeatedly pointed out on the exercise of such power. One of them which is relevant for the present case is that where there is an appropriate or

equally efficacious remedy the court should keep its hands off. This is more particularly so where the dispute relates to an election. Still moreso where there is a statutorily prescribed remedy which almost reads in mandatory terms. While we need not in this case go to the extent of stating that if there are exceptional or extraordinary circumstances the Court should still refuse to entertain a writ petition it is perfectly clear that merely because the challenge is to a plurality of returns of elections, therefore, a writ petition will lie, is a fallacious argument."

Thus, in view of the aforesaid decision of the Supreme Court the appellant must be relegated to the alternative remedy prescribed by law. The learned counsel for the appellant, however, relied on the decision of the Supreme Court, rendered in *Bar Council of Delhi v. Surjeet Singh*,²In that case, the Supreme Court held that a writ petition was maintainable as illegal preparation of the electoral roll vitiated the entire election process. The decision of the Supreme Court is clearly distinguishable as there is no allegation that the electoral rolls prepared for the elections to the Bar Council of Rajasthan suffer from any such defect.

18. The Supreme Court, in K.K. Srivastava's case (supra), held that there was no foundation whatever for thinking that where the challenge is to the entire election then the writ jurisdiction springs into action. We may add that it is only in a case where entire election process is challenged on the ground of a rule or a statute being invalid that the writ jurisdiction of the High Court can be invoked without resorting to the alternative remedy. Since the election of candidates is not being attacked on the ground of invalidity of any statutory provision or rule, the appellant was not right in invoking the writ jurisdiction. Both the aforesaid grievances of the appellant on the basis of which the petition was filed can be examined by the Election Tribunal. In the circumstances, therefore, the learned single Judge was entirely right in dismissing the writ petition.

19. Accordingly, the appeal fails and is hereby dismissed.

Appeal dismissed.

Cases Referred.

1. AIR 1977 SC 1703
2. 1980 (4) SCC 211: (AIR 1980 SC 1612)