Sunaina Devi Vs. the State of Bihar and ors.

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Court : Patna

Decided On : Jul-17-2008

Judge : Ajay Kumar Tripathi, J.

Acts : Bihar Panchayat Election Rules, 2006 - Rule 79, 79(2) and 79(3)

Appeal No. : CWJC No. 9402 of 2007

Appellant : Sunaina Devi

Respondent : The State of Bihar and ors.

Advocate for Def. : R.B. Mahto, Sr. Adv., U.K. Singh and S.B.K. Manglam, Advs. for Respondent No. 10

Advocate for Pet/Ap. : Y.V. Giri, Sr. Adv. and A.K. Pandey, Adv.K.B. Nath and Sanjiv Nikesh, Advs.

Disposition : Application allowed

Prior history : Ajay Kumar Tripathi, J. 1. The present writ application arises out of an Election Petition No. 72 of 2006 which was filed by one Meena Devi, respondent No. 10 to the present writ application challenging the election result for the post of Mukhiya of Gram Panchayat Miya Ke Bhatkan in the district of Siwan. 2. The present petitioner is the returned candidate and initially the challenge in the writ application was to an order dated 21.7.2007 passed by learned Munsif-I, Siwan by virtue of which di

Judgement :

Ajay Kumar Tripathi, J.

1. The present writ application arises out of an Election Petition No. 72 of 2006 which was filed by one Meena Devi, respondent No. 10 to the present writ application challenging the election result for the post of Mukhiya of Gram Panchayat Miya Ke Bhatkan in the district of Siwan.

2. The present petitioner is the returned candidate and initially the challenge in the writ application was to an order dated 21.7.2007 passed by learned Munsif-I, Siwan by virtue of which direction for recounting of votes was issued. Contention of the petitioner was that the order for recounting can not be given as a matter of course or routine because there is no material on record to show that the mandatory requirement of Rule 79 of Bihar Panchayat Election Rules, 2006 (hereinafter referred to as 'the Rules') was actually invoked. It is not for asking that a recount can be ordered without there being sufficiency of material or evidence to show that the mandatory provisions or Rule 79 had been followed in this case or not.

3. While the writ application was pending consideration in the Court, learned Munsif without waiting for the decision of the High Court in the matter went ahead and did the recounting. Based on the outcome of the recounting final order in the election petition, in question, has been passed on 30.10.2007. Vide this order petitioner's election has been set aside and respondent No. 10 has been declared elected. This order therefore has now been challenged by way of an Interlocutory Application No. 6087 of 2007. The I.A. has been allowed way back on 7.11.2007 and for the reasons stated and recorded therein the judgment dated 30.10.2007 came to be stayed. The matter thereafter has been heard and decided by way of this order.

4. Some basic facts are not in dispute that on the initial counting of votes for the post of Mukhiya of the Gram Panchayat, in question, petitioner Sunaina Devi was declared the returned candidate. At the time when the final result was declared the petitioner had secured 944 votes and respondent No. 10 Meena Devi got 892

votes. Winning margin therefore was for about 52 votes. This was the basis for declaring the petitioner to be the returned candidate. The result therefore came to be challenged in Election Case No. 72 of 2006 by Meena Devi.

5. In the election petition many things have been said that there was large scale bungling in the counting process and this has materially affected the result of the election in question. She has also stated in the plaint that complaint in this regard was made with the Returning Officer but it was not paid heed to. Subsequently protest and complaint was lodged with the higher officials. This is the foundational fact with regard to demand of recounting as contemplated under Rule 79 of the Rules. Learned Munsif after taking evidence of the parties ordered recounting vide his order dated 21st July, 2007. The reason as given for the said counting is seriously challenged by the writ petitioner in the present writ application. But it seems the learned Munsif did not have the requisite patient because in his opinion justice must be done at the earliest even when some serious question of law may have been raised at a higher judicial level.

6. Learned Senior counsel appearing on behalf of the petitioner has therefore attacked both the orders which is the order for recounting dated 21st July, 2007 and the final order dislodging her from the post of Mukhiya dated 30.10.2007.

7. The primary contention with regard to the challenge to the first order has already been taken note of above. It is with regard to the mandatory nature of the provision of Rule 79 which had not been complied and what has been indulged in by the court is a mere roving and fishing enquiry. The above action is also in teeth of at least two decisions, one of the High Court and the other of the Hon'ble Supreme Court. The cases in question are Banwari Yadav v. The State of Bihar reported in 2007 (4) PLJR 169 and the case of Chandrika Prasad Yadav v. The State of Bihar reported in : AIR 2004 SC2036 . Both the High Court as well as the Hon'ble Supreme Court has dealt with Rule 79 quite extensively. Hon'ble Supreme Court in the case of Chandrika Prasad Yadav (Supra) held as under:

20. It is well settled that an order of recounting of votes can be passed when the following conditions are fulfilled:

(i) a prima facie case;

(ii) pleading of material facts stating irregularities in counting of votes;

(iii) a roving and fishing inquiry shall not be made while directing recounting of votes; and

(iv) an objection to the said effect has been taken recourse to.

21 The requirement of maintaining the secrecy of ballot papers must also be kept in view before a recounting can be directed. Narrow margin of votes between the returned candidate and the election petitioner by itself would not be sufficient for issuing a direction for recounting.

25. Rule 79 as noticed hereinbefore enables a candidate to file an appropriate application for recounting of votes. Rule 79 unlike rules framed by other States does not say that such an application would not be maintainable after declaration of the votes polled by the parties or prior thereto. Such an application, therefore, can be filed at any point of time. The very fact that Sub-rule (3) of Rule 79 provides for amendment of the result relating to the votes polled by the respective candidates and as such amended result is required to be announced in the prescribed form under Sub-rule (2) of Rule 79, the same itself is a pointer to the fact that even after announcement of result an application for recounting would be maintainable. It may be true that only because such an application had not been filed before the Returning Officer by itself may not preclude the Election Tribunal to go into the question of requirement of issuing a direction for recounting but there cannot be any doubt whatsoever that Rule 79 serves a salutary purpose. Counting of ballot papers in terms of the rules takes place in presence of the candidate or his counting agent. When an agent or a counting agent or the candidate himself notices improper acceptance or rejection of the ballot papers, he may bring the same to the notice of the prescribed authority. As noticed hereinbefore, in a given case, an application for recounting either before announcement of the result or thereafter, would be maintainable. Once an application is filed by an agent or a counting agent or the candidate himself pointing out the irreg the officers appointed for counting the ballot papers, immediate redressal of grievances would

be possible. As indicated hereinbefore, while filing such an application the basis for making a request for recounting of votes is required to be disclosed. The Returning Officer is statutorily enjoined with a duty to entertain such an application, make an inquiry and pass an appropriate order in terms of Sub-rule (2) of Rule 79 either accepting in whole or in part such request or rejecting the same wherefor he is required to assign sufficient or cogent reasons. In the event such an application is allowed either in whole or in part, he is statutorily empowered to amend the results also.

26. 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 recounting. 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 recounting has been made out.

In the light of the above ratio of the case laid down by the Hon'ble Supreme Court, this Court examined the averment made in the plaint and also the material which had been brought on record by the election petitioner which does not help the trial court and election petitioner to over come the bar of Rule 79.

Surprisingly the only material which has been brought as exhibit by said Meena Devi are postal receipts which are exhibits 1, 1/A and 1/B. These are supposed to be registered letters sent to the S.D.O. Siwan, Bihar State Election Commission and the District Magistrate, Siwan and is dated 19.6.2006. But there is nothing on record to show as to what was the content of these registered letters sent by the election petitioner. More so when it is said in the plaint that this step was taken since the Returning Officer refused to accept the complaint/request for recounting which would fulfill the requirement of Rule 79. This Court finds it surprisingly as to how the learned Munsif has jumped to conclusion that the three postal receipts are good enough to conclude that steps had been taken by Meena Devi under Rule

79. No doubt some oral evidence is led on this, but if the claim of the election petitioner in this regard was correct then why was a copy of the said complaint was not produced or directed to be produced as a final clenching evidence in this regard. This in the opinion of this Court is a vital omission which has caused serious prejudice to the writ petitioner and therefore the order of recounting dated 21st July, 2007 was in breach of not only the rule but also the decisions of the Hon'ble Supreme Court as well as this Court.

8. The Court now turns to the second part of the order of learned Musnif. This is dated 30th October, 2007 which came to be passed after the recount was held. It transpires that on recount this petitioner got 886 votes and the election petitioner got 894 votes. This was made the basis for declaring the result in favour of the election petitioner. But this Court also noticed that learned Munsif with due fairness has also recorded that at the time of recount 38 ballot papers were found missing from booth No. 131 and 6 from booth No. 136. This added to 44 missing ballot papers. The Court finds that nothing much has been done about missing ballot papers and only recount has been done on the actual physical availability of the ballot papers. The result and the final order has been passed therefore on the outcome of the actual counting of the ballot papers available to the court at the relevant time. With regard to the missing ballot papers the court has also ordered for enquiry.

9. Learned Senior counsel appearing for the petitioner therefore submits that this exercise done by learned Munsif defies all logic and it has also caused serious prejudice to the cause of the petitioner because the difference of votes by recounting between her and respondent No. 10 was only 8. The 44 missing ballot papers cannot be presumed against the petitioner but it has been done. His further contention is that either the court below ought to have waited for the finding of the enquiry or gone by final record of counting which is a clear evidence and proof of the number of votes the candidates got by delving into Form 20(1) and Form 20(2) of the Rules. This would have also shed light as to what is the number of actual votes the two candidates got. The Court therefore ordered production of Form 20(1) and Form 20(2).

The matter was looked into basically with regard to booth No. 131 where 38 ballot papers are missing and booth No. 36 where 6 ballot papers are missing at the time of recounting. In booth No. 131 the petitioner got 188 votes whereas the election petitioner had 26 votes. In booth No. 136 both the candidates had got 50 votes each. There is a difference of significant number, therefore if the 38 ballot papers from one booth and 6 from another booth were not available for actual counting before the court, the court should not have jumped to a conclusion by throwing its hands up in the air.

10. Submission has been made on behalf of respondent No. 10 in support of the two orders. There is contention that there is sufficiency of material on record to show that effort was made on her behalf to meet the requirement of Rule 79. She tried her level best for recount but since she failed the only other forum she could have ventilated her grievance was through the election petition. The other submission is that the cause or her grievance stands removed by the judgment of the learned Munsif because he could only count the votes which were available in the ballot boxes. If the ballot boxes physically revealed lessor number of ballot papers then the court had no option but to count which was available. It is also contended that at the time of recounting the petitioner accepted the exercise. Merely because the final outcome has gone against the petitioner she has challenged the decision.

Learned Counsel for the petitioner however tried to bring to the Courts' notice that there was effort made by the election petitioner to tamper with the ballot boxes and their seals. The details has been furnished in one of the petition filed before the trial court. This Court is not willing to decide the case on such claim or counter claim. The matter has to be decided in the light of the law which exists on the statute book. One thing was categorically submitted by the petitioner that there is no question of giving consent of recounting because the recount was itself under challenge before this Court and if her steps to seek some accommodation and adjournment at the level of trial court failed then she was faced by the decision. This petitioner had no option but to watch the proceeding as a mute spectator.

11. To sum this Court is of the considered opinion that both the decisions of learned Munsif are in breach of the mandatory provision of Rule 79 as well as the decisions rendered in the case of Banwari Yadav by this Court and in the case of Chandrika Prasad Yadav (Supra). The Court also records that from perusal of Form 20 shows that there was a vast difference between the number of votes polled in favour of the petitioner and the election petitioner, respondent No. 10. It was the duty of the trial court to also judge the state of affairs at the time of actual counting. If 44 ballot papers were missing from these two booths the court ought to have ponder whether the exercise of recounting should have been carried on without serious examination with regard to the fact of those 44 missing ballot papers. To sum this since Court has already held that the order passed by the learned Munsif in July, 2007 for holding recounting itself was bad and erroneous in law the subsequent exercise which led to passing of the final decision in October, 2007 cannot be sustained. The Court has tried to examine the final order dated 30th October, 2007 from a point of view whether the same can stand alone but there are serious infirmities committed by the trial court which has already been discussed in the earlier part of this order. Even the said order in isolation cannot stand.

12. This Court for the reasons above has no hesitation in quashing the order dated 21st of July, 2007 as well as 30th October, 2007 passed in the Election Petition No. 72 of 2006.

This writ application stand allowed.