

Smt. Guthrati Vs. Iind Additional District Judge and Others

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Court : Allahabad

Decided On : Aug-12-1999

Reported in : 1999(4)AWC2986

Judge : D.K. Seth, J.

Acts : Uttar Pradesh Panchayat Raj Act, 1947 - Sections 12C(6); Uttar Pradesh Panchayat Raj (Election of Members, Pradhan and Up-Pradhan) Rules, 1994 - Rules 47, 49, 50 and 50(1); [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115

Appeal No. : C.M.W.P. No. 28948 of 1996

Appellant : Smt. Guthrati

Respondent : Iind Additional District Judge and Others

Advocate for Def. : S.C. and ;M.K. Gupta, Adv.

Advocate for Pet/Ap. : Tripathi B.G. Bhai, ;Jokhan Prasad and ;Anita Tripathi, Advs.

Judgement :

D.K. Seth, J.

1. The order dated 29.8.1996 passed by the Additional District Judge, II Court. Siddharth Nagar in Election Petition No. 4 of 1996 has since been challenged in

this writ petition.

2. Mr. Jokhan Prasad assisted by Mr. Tripathi B. G. Bhai, learned counsel for the petitioner contended that the revisional court could not assume jurisdiction beyond the scope and ambit of sub-section (6) of Section 12C of the U. P. PanchayatRaj Act, 1947. The revisional authority can interfere with the decision of the prescribed authority only on the grounds mentioned in clauses (a), (b) and (c) of sub section (6) of Section 12C of the said Act. In the present case, none of the clauses (a), (b) and (c) is satisfied. According to him, there was no illegality or irregularity. He further contends that the order of recounting was challenged in revision, which was rejected, and thereafter it travelled to this Court which had again rejected the same. Therefore, it is no more open to take the ground with regard to the validity of the order for directing the recounting. He then contends there were sufficient grounds pleaded in the application on the basis whereof recounting could be ordered. He then contends that the recounting was made in the presence of the parties as well as their counsel. After having participated in the recounting, it is not open to the parties to challenge the re-counting. In the recounting the petitioner was said to have been elected and, therefore, the prescribed authority had rightly ordered declaring the petitioner having elected. On these grounds, he prays that the order of the revisional authority should be set aside.

3. Mr. M. K. Gupta, learned counsel for respondent, however, had contended that in the order passed by this Court challenging the order for recounting the question was kept open to be challenged in revision. Therefore, unless sufficient materials have disclosed, no order for recounting could be made. In the present case, there is no ingredient pleaded in the election petition so as to enable the Court to come to a finding that there were sufficient material for issuing a direction for recounting. He then contends that there was no material evidence to support the pleadings. The Court had relied on the hearsay evidence of the husband of the petitioner in order to direct recounting. Therefore, the order for recounting can very well be assailed. In support of his contention, he had cited two decisions, to which reference would be made at appropriate stage. He then contends that the Court received the records on 15.5.96. On 17.5.96 an application was made that the seal of the Panchayat Raj Adhikari has to be compared with the seal on the packets of

the ballot papers which were brought. But the said seal has not been sent along with the record. Therefore, the seal should be called for and be compared with before opening the seal. On 20.5.1996 the said application was rejected and the seal was broken and counting was done and on the same very date the order was passed. Accordingly no opportunity was given to his client to oppose such an irregular step in the matter of recounting which is in violation of Rule 47 (f) of the Uttar Pradesh Panchayat Raj (Election of Members. Pradhan and Up-Pradhan) Rules. 1994. He then contends that originally 30 ballot papers were declared invalid at the time of initial counting but while recounting 68 votes have been declared invalid without recording any reason as is required in Rule 49 (f) of the said rules. He has also pointed out that though the ballot papers were kept in bundles of 50 yet. It was found that ballot papers which were counted. were of different bundles consisting of different numbers of ballot papers. Therefore, according to him. these are illegalities and material irregularities in exercise of the jurisdiction by the prescribed authority on which it was Open to the revisional authority to interfere. Thus, he supports the finding of the revisional authority. He therefore prays that the writ petition should be dismissed.

4. I have heard learned counsel for the parties at length.

5. So far as the question of validity of the order for recounting is concerned. Mr. Gupta had relied on the decision in the case of Bhabhi v. Sheo Govind and others, AIR 1975 SC 2117, wherein it was provided that before a Court can order for Inspection of ballot papers in an election petition, the following conditions are Imperative :

'Thus, on a close and careful consideration of the various authorities of this Court from time to time it is manifest that the following conditions are imperative before a Court can grant inspection, or for that matter sample inspection, of the ballot papers :

(1) That it is Important to maintain the secrecy of the ballot, which is sacrosanct and should not be allowed to be violated on frivolous, vague and Indefinite allegations ;

(2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts ;

(3) The Court must be prima facie satisfied on the materials produced before Court regarding the truth of the allegations made for a recount ;

(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties ;

(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to Indulge in a roving inquiry with a view to fish materials for declaring the election to be void ; and

(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials.

If all these circumstances enter into the mind of the Judge and he is satisfied that these conditions are fulfilled in a given case, the exercise of the discretion would undoubtedly be proper.'

6. He had also relied on the decision in the case of Smt Nanki Devi v. District Judge. Allahabad and others, 1995 HVD (3) (22). which was rendered following the decision in the case of Bhabhi (supra). There is no dispute about the legal proposition that has been relied on by Mr. Gupta. The Court has to find out that the allegations made are not frivolous. vague or indefinite and that in support of such allegation, adequate statement of material facts have been made and that the Court is satisfied prima facie on the material produced before the Court regarding the truth of such submission before an order for recounting is issued and that the Court should come to a conclusion in order to grant the relief of inspection is imperative without allowing the applicant to Indulge in roving enquiry. Only in a special case where special facts are pleaded, a sample inspection may be ordered in order to arrive at a prima facie satisfaction regarding the truth of the allegations

made for recounting.

7. Thus, it is necessary to refer to the pleadings made in the election petition. Various allegations have been made in the election petition with details disclosed in the said petition as would be apparent from the perusal thereof. In paragraph 4 (cha) of the election petition, it has been pleaded that instead of making bundles of 50 ballots, bundles of 122. 92. 121. 99. 131, 71. 63 and 25 ballots have been made. This pleading appears to be one of the sufficient pleadings on which recounting could be ordered. Now the recounting was ordered and it was directed to be challenged after the prescribed authority passes the order. On recounting, it appears that the said allegations were found to be correct with a little discrepancies in respect of 3 or 4 bundles but it seems that they were justified in issuing the order for recounting. Thus, on material as is available, I do not find any reason to interfere with the order for recounting at this stage because of the subsequent development as is apparent from the record itself.

8. So far as the question raised by Mr. Jokhan Prasad with regard to the question as to whether revisional court could interfere in the matter, is concerned, the said sub-section (6) of Section 12C of the 1947 Act provides that revisional authority can interfere on any one or more of the grounds. viz., that the prescribed authority had 'exercised a jurisdiction not vested in it by law, it had failed to exercise a jurisdiction so vested ; or that it had acted in the exercise of its jurisdiction illegally or with material irregularity. In the present case. Mr. Gupta had not contended that the prescribed authority had exercised the jurisdiction not vested in it by law. But he has contended that though vested with the jurisdiction by law but has failed to exercise such Jurisdiction. He contended that while exercising such jurisdiction, the prescribed authority had acted illegally and with material irregularity. Mr. Gupta had sought to draw my attention to the illegalities and irregularities, while Mr. Jokhan Prasad, on the other hand, had sought to draw my attention from the order of the prescribed authority that there was no Illegality or material irregularity on which the revisional jurisdiction could be exercised. On the other hand, he contends that there was no illegality or material irregularity in the order of the prescribed authority, and as such the revisional authority could not have interfered with the order passed by the prescribed authority. He relied on the decision in the

case of Managing Director, Hindustan Aeronautics Ltd. and another v. Ajit Prasad Tiwary, Manager (Purchase and Stores), Hindustan Aeronautics Ltd., AIR 1973 SC 76, in support of his contention. Relying on the said decision, he contends that whether the order is right or wrong or is illegal, still then unless there is illegality or irregularity in the exercise of jurisdiction, the revisional court cannot interfere. He relied on the observation made in para 5 of the said decision, which is quoted below :

'5. In our opinion the High Court had no jurisdiction to interfere with the order of the first appellate court. It is not the conclusion of the High Court that the first appellate court had no jurisdiction to make the order that it made. The order of the first appellate court may be right or wrong, may be in accordance with law or may not be in accordance with law. but one thing is clear that it had jurisdiction to make that order. It is not case that the first appellate court exercised its Jurisdiction either illegally or with material irregularity. That being so. the High Court could not have invoked its jurisdiction under Section 115 of the Civil Procedure Code : See the decision of this Court in Pandurang Dhoni v. Maruti Hari Jadhav, (1966) 1 SCR 102 : AIR 1966 SC 153 and D.L.F. Housing and Construction Co. (P.) Ltd., New Delhi v. Sarup Singh, (1970) 2 SCR 368 : AIR 1971 SC 2324).'

9. While examining the said contention, it appears that when on 15.5.1996 records were received the respondent No. 2 had made an application on 17.5.1996 with the allegation that the seal has not been sent along with the records. Before opening the same, it is necessary to check and compare the seal, since according to her it appeared to be tampered with. That application was fixed on 20.5.1996. The said application appears to have been dismissed on 20.5.1996. On 20.5.1996 after rejecting the said application. the recounting was undertaken. If it is so done, in that event, the respondent could not be said to have an opportunity to assail the said order by moving the higher forum or by any other means. The recounting appears to be done without comparing the seal. It is also not a case that ballot papers were tallied with the counter foils. Then again it is apparent that while originally 30 ballot papers were held to be Invalid while in recounting 68 ballot papers were declared to be invalid. Neither from the memo of recounting nor from the order of prescribed authority, it appears that any reason has been indicated

with regard to the rejection of the ballot papers or declaration of the ballot papers as invalid.

10. Rule 49 (f) of the 1994 Rule provides as follows :

'49. Procedure for counting :

(a)

(b)

(c)

(d)

(e)

(f)The Nirvachan Adhikari shall allow the candidates, their Nirvachan Abhikartas and Ganana Abhikartas. who may be present, reasonable opportunity to inspect all ballot papers which in the opinion of Nirvachan Adhikari are liable to be rejected, but shall not allow them to handle these or any other paper. The Nirvachan Adhikari shall on every ballot paper, which is rejected, endorse rejection in Hindi in Devanagari script. If any candidate or his Nirvachan Abhikarta questions the correctness of the rejection of any ballot papers, the Nirvachan Adhikari shall also record briefly on such ballot papers, the reasons for his rejection.'

11. Thus, it appears that while rejecting the ballot papers. endorsement of rejection is to be made in Hindi in Devanagari script. While rejecting a ballot paper, reason for such rejection has to be recorded briefly on such ballot paper. While recounting, it has not been indicated as to on which ground the ballot papers are rejected. Rule 50 prescribes the grounds or conditions on which the ballot papers can be rejected. There are as many as six grounds or conditions mentioned in sub-rule (1) of Rule 50 on which a ballot paper can be rejected. There is nothing to indicate on which ground the additional 38 ballot papers have since been rejected. There is no indication also that these ballot papers were tallied with the counter foils or that the seal was compared with the original seal. There is also no finding that the seal was even Intact and were valid.

12. Thus. It appears that there were illegalities and irregularities in the process adopted for recounting by the authority. It is also apparent that on the same date, the recounting was made and the order was passed. These are admitted by Shri Jokhan Prasad to be irregularities but not material irregularities. But the fact remains that there has been an infraction of Rule 49 (f) of the said 1994 Rules, therefore, this Infraction travels to the realm of illegality and irregularity while exercising Jurisdiction by the prescribed authority. Then again it was further found that no memorandum was prepared indicating the manner in which the recounting was done and why certain additional ballot papers were rejected. These are irregularities which are material and cannot be overlooked.

13. There is no scope of any doubt with regard to the proposition laid down by the Apex Court in the decision Ajit Prasad Tiwary (supra) cited by Mr. Jokhan Prasad. In the said case it was found that it was not the case that the first appellate court exercised its Jurisdiction either illegally or with material irregularity. Whereas, in the present case, the situation, as discussed above, is Just the reverse. Therefore, the above decision does not lend support to the contention of Mr. Jokhan Prasad and thus cannot be attracted in the facts and circumstances of the case. Inasmuch as the infraction in the process goes to the root of the election dispute. The declaration of invalidity of additional ballot papers tilts the balance altogether. It completely changes the complexion of the dispute between the parties.

14. Mr. Jokhan Prasad had contended that since the respondent No. 2 had participated in the recounting, therefore, she is not entitled to challenge the same again. He relies on the decision in the case of Basarat D. Sub-Divisional Officer, Sambhal Distt. Moradabad and Others, 1992 AWC 1199, in support of his contention. In the said decision. It was held that once a candidate participates in the recounting, he cannot challenge the same subsequently. In the said case, objection was raised after the recounting was over. Counterfoils of the ballot papers were sought to be summed subsequent to the recounting. In such circumstances, it was held that after such participation, it was not open to a candidate to challenge the recounting. In the present case at the very initial stage before recounting was made, an application was filed on 17.5.1996 indicating the apprehension that there might be some defect in the seal which requires to be

compared with the original seal. It was also pointed out that the seal was not sent along with the records in order to compare the same with the seal, and, therefore, no opportunity was given to the respondent No. 2 after rejecting the said application on 20.5.1996. In the present case, the said application dated 17.5.1996 was fixed on 20.5.1996 and the recounting was held on the same date. Therefore, respondent No. 2 could not have any opportunity to assail the said order dismissing the application dated 17.5.1996 on 20.5.1996. Thus, respondent No. 2 was compelled to participate in the recounting. Therefore her participation shall not preclude her from challenging the same while challenging the order dated 20.5.1996 rejecting the application dated 17.5.1996 . In such circumstances it is very much open to challenge the process undertaken in the recounting.

15. Then again on the basis of the record, materials are such that it assumes the form of a kind of material irregularity and illegality in the matter of exercise of Jurisdiction by the prescribed authority for which it can be said that there were grounds on which the participation in the recounting should be overlooked. In the facts and circumstances, therefore, the said decision in Basarat (supra) cannot be attracted.

16. For all these reasons, the writ petition is disposed of with the following direction in modification of the order dated 29.8.1996 passed by the Additional District Judge. II Court, Siddharth Nagar in the Election Petition No. 4 of 1996 to the following extent. The prescribed authority shall recount the ballot papers having regard to the procedure laid down in Rule 49 (f). Since the question of breaking of seal cannot be gone into after it has been broken on being Incapable of comparison, the prescribed authority should also call for the counterfoils and if necessary to tally the same with the ballot paper while recounting the same once again. The question of rejection shall be reconsidered in the light of Rule 49 (f). Rule 50 (1) of the 1994 Rules. Such recounting be done in accordance with law. In the light of the observation made above, as early as possible, preferably within a period of three months from the date a certified copy of this order is produced before the prescribed authority. He may pass appropriate order on the basis of the materials placed before him after hearing the parties. Till the disposal or till three months from the date certified copy of order is communicated to the prescribed

authority, whichever is earlier, the order of status quo as of today shall continue.

17. The writ petition is thus disposed of.

18. However, there will be no order as to cost.

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