

Kailash Singh Vs. Narayan Singh and ors.

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Court : Madhya Pradesh

Decided On : Aug-27-1998

Reported in : AIR1999MP183

Judge : S.K. Kulshrestha, J.

Acts : Madhya Pradesh Panchayat Raj Adhiniyam, 1994 - Sections 122; Madhya Pradesh (Election petitions, corrupt practices and Disqualification of Membership) Rules, 1995 - Rule 21

Appeal No. : W.P. No. 4599 of 1997

Appellant : Kailash Singh

Respondent : Narayan Singh and ors.

Advocate for Def. : P.K. Tiwari, Adv.

Advocate for Pet/Ap. : P. Rusia, Adv.

Disposition : Petition allowed

Judgement :

ORDER

S.K. Kulshrestha, J.

1. By this petition, the petitioner has challenged the order dated 22-9-97 passed by the Additional Collector, Katni, in an Election Petition filed by the respondent No. (sic) directing recount of the votes concerning election of the President of the Janpad Panchayat Katni, held on 30-5-94 in the Election Petition No. 52-B-121/ 96-97 and the Election Petition No. 163/B-121/ 93-94. It is not disputed that in the election to the office of the President of the Janpad Panchayat Katni, the petitioner as also the election petitioner Narayan.Singh (respondent No. 1 in W.P. No. 4599/97) and Praveen (respondent No. 1 in W.P. No. 4600/97) were candidates and after the votes polled by each of them were counted on 21-5-94, the petitioner was declared elected. Against the election of the Returned Candidate, the petitioner herein, two election petitions were filed; one by Narayan Singh and the other by Praveen on the ground that there was improper acceptance and rejection of the votes and the votes had not been counted properly and although the election petitioners in each case had polled greater number of votes, the present petitioner had been declared as a returned candidate on the basis of the said illegal acceptance and rejection of the votes. Each of the petitioners before the Specified Officer, therefore, sought relief that election of the returned candidate namely the petitioner as President of the Janpad Panchayat, Katni, be set aside and instead, the election petitioner be declared as duly elected after recounting of the votes.

2. It is not disputed that on filing of the election petition, notice was issued to the returned candidate and the returned candidate had filed his written statement traversing and denying the allegations made in the election petition and it was specifically pleaded that the returned candidate had in fact polled the votes which were counted in his favour and there was no improper acceptance or rejection of votes as alleged. It appears that the election petition remained pending without making any appreciable progress and although issues had been framed, without the parties having led any evidence in the matter, the Specified Officer by his impugned order contained in the proceedings Annexure-R/1 to the Return of respondents 6 & 7 directed recount of the votes on the ground that the election petition had been filed about 3 years prior to the date of the said order and to avoid delay, in the interest of justice, the proposal of the election petitioner deserved to be accepted. The Chief Executive Officer of the Janpad Panchayat,

Katni, was directed to remain present with all documents and the ballot papers in the Court of the Specified Officer so that recounting could be done. It is, against this order, common to both the election petitions, that the present two petitions have been filed. Since both the petitions assail the validity, propriety and legality of the very order directing recounting of the votes, both the petitions are being disposed of by this common order.

3. The M.P. Panchayat Raj Adhiniyam, 1993 (1 of 1994) provides in Section 122 thereof that an election under this Act shall be called in question only by a petition presented in the prescribed manner to the Sub-Divisional Officer in the case of Gram Panchayat, to the Collector in the case of Janpad Panchayat and to the Divisional Commissioner in the case of Zila Panchayat within thirty days from the date the election in question was notified. Sub-section (3) of Section 1-22 provides that such petition shall be enquired into and disposed of according to such procedures as may be prescribed. With a view to prescribe such procedure. Rules have been framed entitled 'The Madhya Pradesh Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995. Rule 3 provides for the Presentation of election petition to the specified officer during the office hours by the person making the petition, or by a person authorised in writing in this behalf by him. Rule 3 lays down that an election petition shall contain a concise statement of all material facts on which the petitioner relies and set forth with sufficient particulars, the grounds on which the election has been called in question. The petition is required to be signed and verified in the manner laid down in the Code of Civil Procedure, 1908. Rule 6 provides for the relief that can be claimed by the petitioner and lays down that the petitioner may claim a declaration that the election of all or any of the returned candidates is void and in addition thereto, a further declaration that he himself or any other candidate has been duly elected. Rule 9 requires a copy of the election petition to be served on each respondent and Rule 10 provides for enquiry into an election petition and if there be more than one concerning the election of a candidate, either in one or more proceedings as per the discretion of the specified officer. Rule 11 lays down the procedure before the specified officer and enuinerates his powers while Rule 12 provides for adducing evidence by production of the witnesses. Rule 21 enumerates the grounds for declaring election to be void. Since the ground on

which the election can be declared void are enumerated in Rule 21, it is reproduced hereunder for proper appreciation of the controversy raised in the present petition :--

'Rule 21: Grounds for declaring election to be void: (1) Subject to the provisions of Sub-rule (2) if the specified officer is of opinion -

(a) that on the date of his election the returned candidate was not qualified or was disqualified to be chosen to fill the seat under the Act; or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

(c) that any nomination paper has been improperly rejected; or

(d) that the result of the election in so far as it concerns returned candidate has been materially affected-

(i) by the improper acceptance of any nomination; or

(ii) by a corrupt practice having been committed in the interest of the returned candidate by a person acting with the consent of the candidate or his agent; or .,

(iii) by the improper acceptance, refusal or rejection of any vote or the reception of any vote which is void; or

(iv) by any non-compliance with the provisions of the Act or of any rules or orders made thereunder; the specified officer shall declare the election of the returned candidate to be void.

(2) If in the opinion of the prescribed authority a returned candidate has been guilty by an agent of any corrupt practice, but the prescribed authority is satisfied-

(a) that no such corrupt practice was committed at the election by the candidate and every such corrupt practice was committed contrary to the instructions and without the consent of the candidate;

(b) that the candidate took all reasonable means for preventing the commission of corrupt practice at the election; and

(c) that in all other respect the election was free from any corrupt practice on the part of the candidate or any of his agent; then the prescribed authority may decide that the election of the returned candidate is not void.'

4. Learned counsel for the petitioner has contended that the order of recounting of votes merely on the ground that the petition had remained pending for a period of 3 years and such course should be followed in the interest of justice, suffers from a patent illegality and tends to commit breach of the secrecy of the ballot which is sacro-sanct and should not be impinged. Learned counsel has pointed out that in view of the pleadings of the parties before the specified officer, since the allegation about the improper acceptance, refusal or rejection of vote or the reception of any vote which was void was itself a triable issue, the specified officer could not have ordered a recount unless there was some contemporaneous evidence to enable him to form an opinion about the existence of the said ground. Learned counsel has severely criticised the approach of the specified officer in directing the recount only with a view to ascertain whether or not there was any truth in the allegations made in the election petition about the improper acceptance, refusal or rejection of the votes. Learned counsel has contended that such an approach deserves to be deprecated as it tends to impeach and breach the secrecy of the votes. Attention has been invited by the learned counsel for the petitioner to the decision of the Supreme Court in *P. K. K. Shamsuddeen v. K. A. M. Mohindeen*, AIR 1989 SC 640, in *Shri Satyanarain Dudhani .v. Uday Kumar Singh*, AIR 1993 SC 367 in *Ram Rati v. Saroj Devi*, (1997) 6 SCC 66: (AIR 1997 SC 3072), in *Gayatri Bai (Smt.) v. Alka Sharma*, (1997) 2 WN 98 and to a decision dated 3-4-98 of a Single Bench of this court in W.P. No, 350/97 (reported in AIR 1999 Madh Pra 7), to support his argument that not only that there should be allegation in the election petition, there should be some contemporaneous evidence to justify re: counting of votes. Learned counsel for the respondent (election petitioner) has, however, vehemently opposed the petition on the ground that the impugned order has been passed by the specified officer in the presence of the parties and the petitioner did not object to the course directed by the Election Tribunal and has further contended that the

discretion having properly been exercised, no ground is made out calling for any interference in exercise of the power of the Superintendence under Article 227 of the Constitution of India. Learned counsel has referred to the decision of the Supreme Court in *M. R. Gopalakrishnan v. Thachady Prabhakaran*, 1995 Supp (2) SCC 101 : (1995 AIR SCW 156), *Mohd. Yunus v. Mohd. Mustaqim*, (AIR 1984 SC 38) and the decision in *State of Karnataka v. N. A. Nagendrappa* AIR 1991 Kant 317 (FB). Learned Dy. A. G. appearing for the respondents 6 & 7 has referred to the statement in the Return to the effect that since controversy could have been resolved only by recounting of the votes and the inspection thereof, the course adopted by the Election Tribunal was proper and justified as substantial justice has been done between the parties which does not call for any interference.

5. There cannot be any dispute that if the specified officer is of the opinion that the result of the returned candidate is materially affected by improper acceptance, refusal or rejection of any vote, he has the power to declare the election of the returned candidate to be void. What is, therefore, to be seen is whether merely on the assertion of the election petitioner that there was improper acceptance or rejection of the votes which fact was denied and without any evidence having been adduced by the parties to substantiate the allegations or there being any other contemporaneous evidence in support thereof, could the specified officer have directed recounting of the votes and if so, could he have done so with a view to verify the truth or otherwise of the allegations made in the election petition. In *P. K. K. Shamsudeen v. K. A. M. M. Mohindeen*, (AIR 1989 SC 640) (*supra*), their Lordships have observed that the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from hind sight and by the result of the recount of the votes. The observations contained in paragraph 13 of the said Judgment read as follows:--'13. Thus the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from hind sight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election petitioner on the threshold before an order for recount 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 recounting 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 by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes .being ordered by the Election Tribunal in the interests of justice, a Tribunal or Court should not. order the recount of votes.'

6. In the present case, the course adopted by the specified officer is the course which has been strongly deprecated in the above observations of the Apex Court. There was nothing beyond the pleadings of the parties on record, to enable the specified officer to form an opinion as required by Rule 21 of the Rules that there was in fact an improper acceptance or rejection of the votes or refusal of any vote or reception of any vote which, was void. In fact the specified officer has proceeded to order the recount merely to ascertain whether or not the allegations contained in the election petition with regard to the improper rejection or reception of the votes were true or not. This clearly indicates that the specified officer had not formed any opinion about the improper rejection or reception of the votes but only with a view to enable him to form such an opinion he had proceeded to pass the order directing production of the ballot papers and for recounting of the votes.

7. Learned counsel has also referred to the decision in, *Satyanarain Dudhani v. Uday Kumar Singh* (AIR 1993 SC 367) (*supra*) in which it has been observed that it is the 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, which is to be resorted to only upon satisfaction that material facts pleaded in the petition and supported by the contemporaneous evidence justify such an order. The observation contained in paragraph 10 of the said judgment reads as follows:--

'10. It is thus obvious that neither during the counting nor on the completion of the counting there was any valid ground available for the recount of the ballot papers. 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 that there was no contemporaneous evidence to show any irregularity of 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.'

8. Learned counsel for the contesting respondents, however, submits that the said judgment does not come to the rescue of the petitioner as in the said case there was no pleading at all to indicate that there was any improper acceptance or rejection of the votes while in the present case, specific allegations were made in the election petition. There does not appear any substance in the argument of the learned counsel for the respondents as reference to the three line objections in the said judgment is with regard to the objection contained in the application filed before the returning Officer and not a reference to the allegations contained in the election petition which can be readily elicited from the Satyanarain's case (AIR 1993 SC 367) (supra) in paragraph 4 of the said judgment which reads as follows:--

'4. It was pleaded in the election petition that 339 valid ballot papers in favour of the petitioner were neither counted nor rejected by the Counting Supervisor. 35 valid votes in favour of the petitioner were not counted in his favour on the false plea that the ballot papers were missing. It was also claimed in the petition that irregularities committed in the fifth round of counting at table No. 8 in respect of booth No. 64 materially affecting the result of the election. 30 votes were counted less in booth No. 3 by the Counting Supervisor. Similar allegations in respect of counting were alleged in the election petition.'

9. The claim made and the contention raised in the present petition is more or less on the same grounds as were present in the case considered by the Supreme Court. The election petitioner in the present case has stated in the petition in paragraph 4 as follows:--

4- ;g fd mRrjnkrk ekad 1] dks iksfyax cwFkekad 57 esa erx.kuk ds le; dsoy 6 er feys Fks tcfd x.kuk vf/kdkfj;ksa usmRrjnkrk ekad 1 ds eri=ksa ds cUMy esa 11 er i= tks ljkj voS/k eri= Fks]mudks feydkj dqy la;k 17 cMohd. Yunus v. Mohd. Mustaqim, AIR 1984 SC 38 to contend that a mere wrong decision without anything more is not enough to attract the jurisdiction of the High Court under Article 227 and the Supervisory jurisdiction conferred on the High Courts is limited to seeing that an inferior Court or Tribunal functions within the limits of its authority and not to correct an error apparent on the face of the record, much less an error of law. In the present case, controversy relates to the jurisdiction in the sense that whether or not without forming any opinion as required under Rule 21 about the improper rejection or acceptance of any vote, could the authority have mechanically proceeded to order a recount more to confirm the truth or otherwise of the allegations in the election petition rather than to proceed on an opinion about any illegal rejection or acceptance of the votes necessitating such a recount. The learned counsel for the respondents has also referred to the decision in, M.R. Gopalakrishnan v. Thachady Prabhakaran, (1995) Supp(2) SCC 101 : (1995 AIR SCW 156) but, I am afraid, the decision supports the petitioner rather than the case of the respondents. In the said case also, it has been laid down that the secrecy of the votes should be the paramount consideration in mind and the errors must be of such magnitude as to materially affect the result of the election. Unless the election petitioner not only pleads and discloses the material facts but also substantiate the same by evidence of reliable character, a prime facie case for recounting is not made out and the Tribunal would not be justified in directing the same.

12. Learned Dy. A.G. has argued that since the recounting of the votes has done substantial justice between the parties, the order does not deserve to be interfered with. The decisions of the Courts referred to above, each emphasises the sacrosanctity of votes and as such the Tribunal cannot be permitted to follow the rule

more in its breach rather than its observance. It is patent from the impugned order that the approach of the specified officer has been more to seek an evidence from the recount of the votes about the truth of the allegations made by the election petitioner, than to first form an opinion about the existence of the ground; which calls for the course adopted by him to be disapproved in strong terms. The order passed by the specified officer suffers from a patent illegality as also from the impropriety of the procedure and deserves to be quashed.

13. In the result, both the petitions are allowed. The impugned order dated 22-9-1997 in each of the two election petitions is quashed and all subsequent proceedings in pursuance of the said order are set aside. The specified officer shall now proceed with the election petition in accordance with law. The parties shall appear before the specified officer on 9-9-1998 and the specified Officer shall expeditiously deal with the matter in accordance with law and endeavour to conclude the proceedings within a period of 3 months or so. There shall be no order as to costs.

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