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Court : Rajasthan

Decided On : Dec-03-1982

Reported in : 1982WLN(UC)330

Judge : S.C. Agrawal, J.

Appeal No. : S.B. Civil Writ Petition No. 1530/1982

Appellant : Mangtaram

Respondent : Palaram and anr.

Advocate for Pet/Ap. : Shri. R.N. Bishnoi

Disposition : Petition allowed

Judgement :

S.C. Agrawal, J.

1. This writ petition filed under Articles 226 and 226 of the Constitution of India is directed against the order dated 7th August, 1982 passed by the Munsif and Judicial Magistrate, Nohar in election petition No. 14/82. By the order aforesaid the Munsif allowed the said election petition filed by Palaram, respondent No. 1, set aside the election of the petitioner Mangtaram, as Sarpanch of Gram Panchayat, Mahanderpura is Panchayat Samiti, Nohar, District Sri Ganganagar, and declared respondent No 1 as duly elected as Sarpanch of the said Gram Panchayat.

2. The election for the office of Sarpanch of the Gram Panchayat Mahanderpura was held on 10th December, 1981. The petitioner and respondent No. 1 were the only two contesting candidates. The total number of votes which were cast in the election were 1862 out of which 110 votes were rejected as invalid. Out of the 1752 valid votes the petitioner received 879 votes whereas respondent No. 1 received 873 votes and the petitioner was, therefore, declared as duly elected. Thereupon respondent No. 1 filed the election petition in the court of Munsif challenging the election of the petitioner. Amongst the grounds on which the aforesaid election of the petitioner was challenged by respondent No. 1, one was that 16 valid votes cast in favour of respondent No. 1 had been improperly rejected during the course of counting and the other was that 12 ballot papers containing valid votes in favour of respondent No. 1 had been put in the packets of ballot papers containing votes in favour of the petitioner and were wrongly counted as votes cast in favour of the petitioner. According to the aforesaid election petition respondent No. 1 had secured 901 valid votes whereas the petitioner had secured 867 valid votes only and, therefore, respondent No. 1 had secured a majority of valid votes. The aforesaid election petition was contested by respondent No. 1. The Munsif framed 9 issues No. 7 was as to whether the Returning Officer declared the petitioner as elected by a majority of 6 votes by rejecting 16 valid votes of respondent No. 1 and including 12 valid votes of respondent No. 1 in the packet of the petitioner. On 14th July, 1982, respondent No. 1 moved an application before the Munsif for summoning of the record containing the ballot papers for the purpose of recounting. On the said application the Munsif passed an order dated 26th July 1982 wherein he held that the main controversy between the parties was with regard to improper rejection of the votes cast in favour of the petitioner and that it was necessary in the interest of justice to inspect the rejected ballot papers. The Munsif, therefore, ordered that the rejected ballot papers may be inspected and directed that the ballot papers connected with the election be summoned. The matter was taken up on 31st July 1982 and on that date 110 rejected ballot papers were inspected and none of those ballot papers was found to be valid. Thereafter the ballot papers containing votes in favour of the petitioner were inspected and 25 ballot papers which were considered doubtful were sorted out and kept separately for the purpose of considering the validity of the same and the matter was a

adjourned to 6th August 1982. On 6th August 1982 an application was submitted by the petitioner wherein an objection was raised with regard to inspection of the ballot papers containing votes in his favour on the ground that by order dated 26th July 1982 the Munsif had only directed that inspection of the rejected ballot papers be made and no order had been passed for the inspection of ballot papers containing votes in favour of the petitioner and that the court was not entitled to inspect the ballot papers containing votes in favour of the petitioner. The aforesaid application submitted by the petitioner on 6th August 1982 was rejected by the Munsif by his order dated 6th August 1982 on the view that on 31st July, 1982 an oral prayer had been made by the learned Counsel for respondent No. 1 for inspection of the votes cast in favour of the petitioner and no objection was raised on behalf of the petitioner to the aforesaid request for the inspection of his votes. In the order dated 6th August 1982 the Munsif further observed that his order dated 26th July, 1982 did not preclude the inspection of the ballot papers containing votes in favour of the petitioner and that it was necessary in the interest of justice to inspect the ballot papers containing votes in favour of the petitioner. Thereafter the Munsif examined the 25 ballot papers which had been kept separately on 31st July, 1982 and in the light of the said scrutiny he passed the impugned order dated 8th August, 1982 whereby he allowed the election petition filed by respondent No. 1. In the order aforesaid, the Munsif while dealing with issue No. 7 held that during the course of inspection of rejected votes, no vote was found to have been improperly rejected and no valid vote of respondent No. 1 was found to have been included in the bundle of ballot papers containing votes in favour of the petitioner. In his order aforesaid the Munsif has considered the 25 ballot papers containing votes cast in favour of the petitioner which had been separated by order dated 31st July, 1982 and after examining the said ballot papers the Munsif held that six ballot papers (bearing Nos. 147322, 147712, 147494, 146496, 146701, and 147728) were invalid because they did not contain the mark of the instrument supplied for the purpose as required under Rule 39 (1)(iii) of the Rajasthan Panchayat and Nyaya Panchayat Election Rules, 1960 (here in after referred to as 'the Rules'). The Munsif further found that two ballot papers (bearing Nos. 146367 and 147229) were invalid for the reason that they did not contain the seal but contained thumb impressions and were liable to be

rejected under rule 39 (1) (iii) of the Rules. The Munsif also held that one ballot paper (bearing No. 147563) was invalid for the reason that it contained marks against the names of both the candidates. The Munsif thus found that nine votes cast in favour of the petitioner were invalid and they had been improperly accepted as valid by the Returning Officer. In view of the aforesaid finding the Munsif held that the petitioner had received 870 votes as against 873 votes received by respondent No. 1 and as such respondent No. 1 had received majority of votes. The Munsif therefore, allowed the election petition filed by respondent No. 1, set aside the election of the petitioner and declared respondent No. 1 as having been elected as Sarpanch. Being aggrieved by the aforesaid order dated 7th August, 1982 passed by the Munsif, the petitioner has filed this writ petition.

3. In the writ petition, the petitioner has challenged the validity of the order dated 7th August, 1982 passed by the Munsif on the ground that the Munsif has committed an error in permitting inspection of the ballot papers containing votes cast in favor of the petitioner inasmuch as in the election petition had not been pleaded that any of the votes in favour of the petitioner was invalid and had been improperly accepted and that in the absence of any such pleading the Munsif was not justified in permitting inspection of the ballot papers containing votes cast in favour of the petitioner. In the writ petition the petitioner has also challenged the findings recorded by the Munsif with regard to the invalidity of the nine votes cast in favour of the petitioner which have been held to be invalid by the Munsif and has submitted that the aforesaid findings are based on no evidence.

4. The writ petition has been contested by respondent No. 1 who has filed a reply. In the reply aforesaid, respondent No. 1 has also raised preliminary objections with regard to the maintainability of the petition.

5. Before dealing with the submissions urged by Shri R.N. Bishnoi, the learned Counsel for the petitioner, in support of the writ petition, it will be necessary to deal with the preliminary objections that have been raised by Shri M.M. Singhvi, the learned Counsel for respondent No. 1.

6. The first objection that has been raised by Shri Singhvi was that the petitioner, having not raised any objection before the Munsif at the time of the inspection of

the ballot papers on 31 July, 1982, is precluded from agitating the question as to the correctness of the order permitting inspection of the ballot papers in this writ petition under Article 226 of the Constitution. In support of this submission Shri Singhvi has placed reliance on the decisions of this Court in *Amarsingh v. The Munsif Magistrate, Jodhpur* 1967 RLW. 224 and *Rameshwar v. Munsif & Judicial Magistrate Nokha* C1981 WLN, Unreported Cases 130. Shri Bishoni, on the other hand has submitted that the present case stands on a different footing in as much as in the present case the petitioner had raised an objection against the inspection of the ballot papers on 6th August, 1982 and at the time the process of inspection of the ballot papers was continuing and, therefore, it cannot be said that the petitioner did not raise any objection at the time of inspection of the ballot papers and for that reason he is precluded from raising any objection in the proceedings under Article 226 of the Constitution.

7. In *Amarsingh v. Munsif Magistrate, Jodhpur* (supra) the petitioner in the writ petition before this Court had failed to raise any objection before the election tribunal when the tribunal proceeded to open the box containing the ballot papers and in view of the said conduct this Court held that he could not be permitted to raise an objection against the recounting of votes before this Court in proceedings under Article 226 of the Constitution. Similarly in *Rameshwar v. Munsif and Judicial Magistrate, Nokha* (supra) this Court found that the petitioner who had filed the writ petition before this Court had not raised any objection before the election tribunal at the time of the inspection of the ballot papers, and it was held that it was not open to the said petitioner to raise an objection before this Court that no case for recounting was made out that the election tribunal should not have inspected the ballot papers or recounted the votes. In view of the aforesaid decisions, it must be held that a party to an election petition who does not raise an objection to the inspection of the ballot papers or recounting of votes before the election tribunal, cannot be permitted to challenge the order regarding inspection of ballot papers or recounting of votes in a writ petition under Article 226 of the Constitution. The present case, however, cannot be equated with the aforesaid decisions. Here the Munsif on 26th July, 1982 had passed an order for inspection of the rejected ballot papers only. The inspection of the ballot papers in pursuance of the said order was taken up on 31st July, 1982. On 31st July, 1982 after the rejected ballot papers

had been inspected the court proceeded to inspect the ballot papers containing votes in favour of the petitioner and selected 25 ballot papers out of them and adjourned the case to 6th August, 1982. Before the case could be taken up on 6th August, '82 the petitioner filed an application wherein he raised an objection with regard to the inspection to the ballot papers containing votes cast in his favour. The order dated 31st July, 1982 shows that the process of inspection of the ballot papers containing votes in favour of the petitioner had not been completed on 31st July, 1982. As a result of the inspection that was made on 31st July, 1982, 25 ballot papers, which were considered doubtful, had been selected for further scrutiny. The said scrutiny was to be made on 6th August, 1982. Before this scrutiny could be made on 6th August 1982 an objection was raised by the petitioner. Thus this is not a case where the petitioner did not raise an objection to the inspection of the ballot papers before the election tribunal and allowed the inspection of the ballot papers to be made by the tribunal and raised the said objection for the first time in the proceedings under Article 226 of the Constitution. Moreover while taking into consideration the conduct of the petitioner in permitting inspection of the ballot papers containing votes in his favour, on 31st July, 1982, it has also to be borne in mind that one of the grounds which were raised by respondent No. 1 in the election petition was that 12 ballot papers containing votes cast in favour of respondent No. 1 had been placed in the bundle of votes of the petitioner. The petitioner would be justified in saying that he did not raise any objection in the inspection of the ballot papers containing votes in his favour for the reason that he thought that inspection was being made for the purpose of determining whether any ballot paper containing vote in favour of respondent No. 1 had been mixed up with ballot papers containing votes cast in favour of the petitioner and that he raised an objection to the further inspection of his ballot papers when he found that the inspection was being made for the purpose of determining whether any invalid vote had been counted in favour of the petitioner. In my opinion, therefore the conduct of the petitioner in permitting the inspection of his ballot papers on (sic) 1st July, 1982 must be considered alongwith his subsequent conduct in filing a petition on 6th August, 1982 objecting to the inspection of the ballot papers and, if thus considered, it cannot be said that the said conduct was such as to preclude the petitioner from agitating the question as

to the validity of inspection of the ballot papers in these proceedings under Article 226 of the Constitution. The first objection raised by Shri Singhvi cannot, therefore, be accepted.

8. The second objection that was raised by Shri Singhvi was that the Munsif has found that nine votes that were counted as valid votes in favour of the petitioner were invalid, and that if the order dated 7th August 1982 passed by the Munsif is set aside for the reason that the ballot papers containing votes in favour of the petitioner could not be inspected, the result would be that this Court would be restoring the illegal election of the petitioner and that the jurisdiction of this Court under Article 226 cannot be invoked to achieve such a result. In support of his aforesaid submission Shri Singhvi has placed reliance on the decision of the Supreme Court in *Gadde Venkateswara Rao v. Government of Andhra Pradesh and Ors.* : [1966]2SCR172 and the decision of a Full Bench of this Court in *Jagansingh v. State Transport Appellate Tribunal, Rajasthan and Anr.* . There is no dispute that in exercise of its jurisdiction under Article 226 of the Constitution this Court will not set aside an order if by doing so an illegal order is restored. The aforesaid principle is, however, applicable only on those cases where the order which is to be restored as a result of setting aside of the order which is impugned in the proceedings under Article 226 of the Constitution, can be said to be patently illegal on the face of it. In the present case it cannot be said that the declaration of the result of the petition—having been elected as Sarpanch—is patently illegal and by setting aside the order of the Munsif dated 7th Aug. 1982 this Court would be restoring an order which is patently illegal. The nine votes which have been held to be invalid by the Munsif cannot be said to suffer from a patent illegality. Six of those ballot papers have been held invalid on the ground that they did not contain the mark of the instrument supplied for that purpose. The question as to whether the ballot papers contained the mark of the instrument supplied for the purpose or not is a matter which can only be determined on the basis of evidence and in the absence of evidence it cannot be said that the said ballot papers do not contain the mark of the instrument supplied for the purpose & are, therefore, invalid. In the circumstances, it cannot be held that the declaration of the result of the election of the petitioner as Sarpanch was invalid on the very face of it & this Court by setting aside the order of the Munsif dated 7th August, 1982 would be restoring an illegal

order and would thus be perpetuating an illegality. The second objection raised by Shri Singhvi cannot also be accepted.

9. I may now come to the merits.

10. The first contention urged by Shri Bishnoi was that the Munsif was not justified in law in permitting inspection of ballot papers containing votes cast in favour of the petitioner and in determining the validity of such votes in as much as neither any plea was raised in the election petition that some of the votes cast in favour of the petitioner was invalid nor was there any evidence to that effect. In my opinion the aforesaid contention of Shri Bishnoi merits acceptance. In election law the position is well settled that for passing an order for inspection of ballot papers or recounting of votes, it is necessary that (i) there must be an adequate statement of material facts in the election petition before the court or tribunal and (ii) the court or tribunal must be prima facie satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary. (See : [1964]6SCR238 ; : AIR 1966 SC773 ; : [1970]1SCR852 ; : [1973]2SCR920 ; : [1975]3SCR21 and : AIR 1975 SC2117). The aforesaid principles have been held to be applicable to Panchayat election also. (See 1968 RLW 73).

11. A perusal of the election filed by respondent No. 1 shows that in the election petition the only plea with regard to improper acceptance and rejection of the ballot papers is that contained in sub-para (Chha) of para 3. In the said para, it has been alleged that (sic) 6 valid votes cast in favour of respondent No. 1 have been improperly rejected & the 12 valid votes cast in favour of respondent No. 1 had been included in the packet of the petitioner that the respondent No. 1 had secured 901 valid votes whereas the petitioner had secured 873 valid votes only. Thus according to the election petition the only illegalities which were committed during the course of counting were that 16 valid votes of respondent No. 1 were improperly rejected and 12 valid votes of respondent No. 1 were included in the votes of the petitioner. There is no averment that any of the votes counted in favour of the petitioner was invalid and had been improperly accepted. Apart from the fact that there was complete absence of pleading in the election petition no evidence was adduced to show that any of the votes counted in favour of the

petitioner was invalid & had been improperly accepted. Thus neither of the two conditions which were required to be fulfilled before the Munsif could pass an order for inspection of the ballot papers containing votes cast in favour of the petitioner, was satisfied and in the circumstances it was not open to the Munsif to have permitted inspection of the votes cast in favour of the petitioner. The course adopted by the Munsif in permitting inspection of the ballot papers containing votes cast in favour of the petitioner was clearly in disregard of the law laid down by the Supreme Court and this Court.

12. The Munsif has sought to justify the inspection of the ballot papers containing votes cast in favour of the petitioner on the ground that such a course was in the interest of justice. In my opinion the Munsif was not right in taking the aforesaid view. As observed by the Supreme Court in *Dr. Jagjit Singh v. Kartarsingh* : AIR 1966 SC 773 in considering the requirement of justice care must be taken to see that the election petitioners do not get a chance to make roving and fishing enquiries in the ballot boxes so as to justify their claim that returned candidate's election is void. In the present case the course adopted by the Munsif enabled Respondent No. 1 to make a roving and a fishing enquiry in the ballot box so as to justify his claim that the petitioner's election was void. Such a course was not permissible in law. In my view, therefore, the Munsif was not justified in permitting inspection of ballot papers containing votes cast in favour of the petitioner and the order dated 7th August 1982 passed by the Munsif where by he set aside the election of the petitioner on the basis of the said inspection cannot be upheld.

13. Shri Bishnoi has also contended that the finding recorded by the Munsif in his order dated 7th August, 1982 that nine votes cast in favour of the petitioner were invalid is based on no evidence and for that reason also the order dated 7th August, 1982 cannot be upheld. Since I have accepted the first contention urged by Shri Bishnoi I do not consider it necessary to deal with this contention.

14. In the result, the writ petition is allowed and the order dated 7th August, 1982 passed by the Munsif Magistrate in election petition No. 14/32 in so far it holds that nine votes cast in favour of the petitioner were invalid and that the petitioner had secured 370 votes and sets aside the election of the petitioner and declares

respondent No. 1 to have been duly elected as Sarpanch of Gram Panchayat, Mahenderpura is set aside. The matter will go back to the Munsif for passing an appropriate order in the election petition No. 14/82 filed by respondent No. 1 in accordance with law. In the circumstances of the case, the parties are left to bear their on costs in this writ petition.

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