Narayan Dutt Vs. Ibrahim

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SooperKanoon Citation : sooperkanoon.com/765868

Court : Rajasthan

Decided On : Jan-10-1997

Reported in : 1997(2)WLC134; 1997(1)WLN90

Judge : P.C. Jain, J.

Appeal No. : S.B. Civil Revision Petition No. 646 of 1996

Appellant : Narayan Dutt

Respondent : ibrahim

Disposition : Petition allowed

Judgement :

P.C. Jain, J.

1. The petitioner has filed this petition Under Section 115 C.P.C. against the order dated 24.7.1996 passed by the learned Addl. Distt. Judge, Churu in election petition No. 4/95 by which the learned Addl. Distt. Judge ordered for recounting of the votes that were cast in election of ward No. 9 of Ratan Nagar, Distt. Churu.

2. The relevant facts may be recalled. The election to ward No. 9 of Ratan Nagar, Distt. Churu was held on 27.8.1995. The petitioner contested the above election. After completion of the voting, the result was declared on 28.8.1995 by the appropriate authority and the petitioner was declared duly elected to ward No. 9 of

Ratan Nagar Municipal Board. In due course, the petitioner was also elected as the chairman of the Municipal Board, Ratan Nagar. On 26.9.1995, the next defeated candidate, respdt. No. 1 filed an election petition Under Section 36 of the Rajasthan Municipalities Act, 1959 (for short 'the Act') before the learned Distt. Judge, Churu. The election petition was filed on insufficient stamp papers, but, deficiency was made up by respondent No. 1 later on. It appears that the learned Distt. Judge thought it proper to transfer the above election petition from his file to the file of the learned Addl. Distt. Judge and passed an order accordingly. He also directed the parties to be present before the learned Addl. Distt. Judge on 4.11.1995. The petitioner contested the petition and filed reply to the petition on 3.7.1996. On the pleadings of the parties as many as 9 issues were framed on 24.7.1996. The learned Addl. Distt. Judge ordered to decide issues nos. 6, 7 and 8 and arguments were heard. By the impugned order, the learned Addl. Distt. Judge was of opinion that looking to the margin of win, it was necessary in the interest of justice recounting of the votes cast in the election. He, therefore, ordered recounting and fixed 21.8.1996 for recounting of the votes. Aggrieved by the above order, the petitioner has filed this petition. The petitioner has challenged the impugned order on the following two grounds, namely;

(1) According to Section 40 of the Act, such election petition may be presented to and shall be heard by the Distt. Judge sitting at the place where the Municipal Office is situated, or where there is no such district, the Civil Judge so sitting, or other Judge specially appointed by the State Government for the purpose. The proviso to the Section states that where an election petition is presented as aforesaid to a Distt. Judge, he may, for reasons to be recorded in writing, transfer the same for hearing and disposal to a Civil Judge, subordinate to him and sitting at the place where the Municipal Office is situated. In the instant case, the learned Distt. Judge, in flagrant violation, transferred the election petition not to the Civil Judge but to the Addl. Distt. Judge who is not an authority named in Section 40 of the Act to entertain and dispose of the election petition. The learned Addl. Distt. Judge therefore, had no authority to hear the election petition.

(2) That the petitioner wanted to lead evidence on issue No. 2 which was with regard to recounting of the votes. The learned Addl. Distt. Judge did not allow the

petitioner to lead evidence and without recording evidence of the parties and with no material justifying recounting, ordered the recounting which cannot be sustained in law. In support of this argument learned Counsel has relied on the following rulings-N. Narayan v. Semmalai : [1980]1SCR571 , Satyanarayan Dhoodhani v. Udai Kumar : AIR 1993 SC367 and Thakhur Sen Negi v. Devraj Negi AIR 1994 SC 2596.

3. The order of recounting is a material irregularity in exercise of jurisdiction and calls for interference in this revision petition.

4. Learned Counsel for the non-petitioner, on the other hand, supported the order of the learned Addl. Distt. Judge and submitted that the learned Distt. Judge did not contravene the provisions of Section 40 of the Act by transferring this election petition to the Addl. Distt. Judge. The Addl. Distt. Judge is a subordinate to him.

5. Learned Counsel has also justified the recounting of votes in view of the margin of the victory. In this connection, learned Counsel has strongly placed reliance on paras 4 and 13 of N.E. Harod v. Lender Tiry 1989 SC 2023. Learned Counsel has also referred to the observations made by the learned trial court in which the petitioner alleged that two votes, one of which was valid and cast in his favour was declared invalid and five other votes were counted in the favour of the other candidate. If the votes are recounted, the whole matter would be resolved without any difficulty. In such circumstances this Court should not interfere with the jurisdiction exercised by the trial court. The power of this Court in revisional jurisdiction is very limited.

6. Learned Counsel also raised an objection that a revision petition Under Section 115 C.P.C. does not lie. An application Under Section 115 C.P.C. can lie only when a court subordinate to the High Court has passed the impugned order. The jurisdiction to hear election petition has been conferred on the Distt. Judge who is a persona designate Hence, the Distt. Judge exercising powers Under Section 40 of the Act, is a different entity and not a Court. Hence, any order passed by him cannot be subjected to revisional scrutiny Under Section 115 C.P.C. Learned Counsel has relied on certain decisions of this Court. In Keshar Prasad v. Badriji 1951 RLW 102, it was observed, while interpreting Section 22 of the Municipalities

(U.P.) Act, 1916, that Distt. Judge is a persona designata and no revision to High Court Under Section 115 C.P.C. lies. Following the above decision in Modaram v. Maluram, Justice Lodha while interpreting Rule 78 of the Rajasthan Panchayat and Nyay Panchayat Election Rules held that the Munsif trying election petition is not subordinate to High Court. Hence, revision petition Under Section 115 C.P.C. do not lay to High Court.

7. I have heard learned Counsel for the petitioner and the non-petitioners.

8. First 1 will endeavour to dispose of the preliminary objection regarding jurisdiction raised by the learned Counsel for the non-petitioners. Learned Counsel has referred to the provisions of Section 40 of the Act and submitted that the power conferred by this statute is a special power conferring jurisdiction on the Distt. Judge. He is, therefore, a persona designata. The authority of the Distt. Judge has been created by the above Act. Hence, the Distt. Judge hearing an election petition is not a Civil Court but a persona designata even though he has the powers and privileges of a civil court. Hence, he is not under the superintendence of the High Court. The Distt. Judge, according to Section 40 of the Act, has been created as a different authority. Hence, he must be considered as a persona designata and not a court.

9. Learned Counsel for the non-petitioners, on the other hand, strongly relies on the later judgment of this Court in Yusuf v. Mohd. Naroo and Ors. (d) (S.B. Civil Revision Petition No. 468/91). In this case, the Single Bench of this High Court considered this very question as to where the Distt. Judge who has been invested with the hearing of the election petition in respect of municipal elections as a persona designata. The learned Judge profusely quoted the observations made by the appex Court in Central Talkies v. Dwarka Prasad : 1961 CriLJ740 . A reference was also made to Sumitra Prasad v. State and Ors. AIR 1968 All 484 (F.B.) and it was held that the Distt. Judge hearing the election matter in respect of Municipal Election Under Section 40 of the Act is not a persona designata and any order passed by him is amenable to the revisional jurisdiction of this Court. It was further observed in this case that while deciding this question in Modaram v. Mularam's case, the observations made in : 1961 CriLJ740 were not considered

and appreciated.

10. I have already referred to the view expressed in Keshar Prasad v. Badriji 1951 RLW 202 and Modaram v. Mularam 1978 RLW 587. In these two cases, while interpreting Rule 78 of the Panchayat and Nyay Panchayat Election Rules and Section 22 of the Municipalities Act, it was held that a Munsif trying election petition is not subordinate to High Court and no revision lies to the High Court Under Section 115 C.P.C. on the ground that by acting as the above authority, the Munsif does not constitute a court but assumes a role of a persona designata.

11. In Central Talkies v. Dwarka Prasad : 1961 CriLJ740 at page 609 'para 9), the following observations were made:

A persona designata is 'a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filing a particular character.' (See Osborns's Concise Law Dictionary, 4th Edn., p. 258). In the words of Schwabe, C.J. in Parthasarathi Naidu v. Koteswara Rao ILR 47 Mad. 369 : AIR 1924 Mad. 561 (FB), personae designata are 'persons selected to act in their private capacity and not in their capacity as Judges'. The same consideration applies also to a well-known officer like the District Magistrate named by virtue of his office, and whose powers the Additional District Magistrate can also exercise and who can create other officers equal to himself for the purpose of the Eviction Act. The decision of Sapru, J. in the Allahabad case, with respect, was erroneous.

12. In Osborn's Concise Law Dictionary, it is stated that 'a persona designata' is a person who has pointed out or described as an individual as opposed to a person ascertained as a member of a class or as filling a particular character. This definition was accepted as correct in AIR 1961 SC 606 (supra).

13. On the basis of the above principles and the observations made in Yusuf v. Mohd. Naroo (supra) this Court held that the Distt. Judge or the Civil Judge performing the function of hearing the election matter arising under the Panchayat Act or the Municipalities Act are not persona designata. I also agree with the view expressed in this case. in 1978 RLW 587 the question was straightway dealt with but unfortunately the weighty observations which clinch the issue appearing in AIR

1961 SC 606 were not appreciated. The observations extracted above do not leave any doubt that the Distt. Judge performs the above special duty in the capacity of the office of Distt. Judge. It may further be observed that under the Act, the procedure for trying the election case is laid down in Section 41 of the Act. The provisions of the Code of Civil Procedure as well as the Evidence Act have been made applicable with certain restriction. Thus the case is tried in accordance with the Code of Civil Procedure and by applying the provisions of the Evidence Act. I am therefore, disposed to hold that the Distt. Judge hearing the election petition of the parties Under Section 40 of the Act was not a persona designata. Hence, the impugned order could be challenged in revision before this Court. The preliminary objection is, therefore, devoid of force.

14. Next, I may deal with the objection of the learned Counsel for the petitioner that the learned Distt. Judge committed material irregularity or illegality while exercising the jurisdiction in transferring the election petition from his file to the file of the Addl. Distt. Judge. In this connection, I may quote Section 40 of the Act which reads as follows:

(1) An election petition may be presented to and shall be heard by:

(a) the Distt. Judge sitting at the place where the municipal office is situated.

(b) where there is no such District Judge, the Civil Judge so sitting, or

(c) any other Judge specially appointed by the State Government for the purpose.

Provided that where an election petition is presented as aforesaid to a District Judge, he may, for reasons to be recorded, in writing, transfer the same for hearing and disposal to a Civil Judge subordinate to him and sitting at the place where the municipal office is situated.

(2) The District Judge or Civil Judge or any other Judge to whom an election petition is presented or transferred and by whom it is heard in accordance with the provisions of Sub-section (1) is hereinafter referred to as the Judge.

15. A perusal of the provisions of Section 40 of the Act shows that initially the election petition may be presented to and shall be heard by the Distt. Judge sitting at the place where the municipal office is situated. Thus, the first step while dealing with the election petition is its presentation before the Distt. Judge. Normally the Distt. Judge is expected to entertain election petition himself but he has been empowered by the proviso to Section 40 of the Act to transfer it after recording reasons for the same in writing for hearing and disposal to the Civil Judge subordinate and sitting where the municipal office is situated. Sub-section (2) provides that the Distt. Judge or the Civil Judge or any other Judge to whom an election petition is presented or transferred and by whom it is heard in accordance with the provisions of Sub-section (1) is hereinafter referred to as the Judge. In short on scrutiny of Section 40 three judicial officers have been vested with the power to hear and dispose of the election petition. The Distt. Judge, the Civil Judge and lastly and other Judge specially appointed by the State Government for the purpose. The question, therefore, is whether the Distt. Judge has got the authority to transfer the election petition to the Addl. Distt. Judge? In my humble opinion, the Court or the officer to whom the Distt. Judge can transfer the election petition is only Civil Judge subordinate to him. The office of the Addl. Distt. Judge has been omitted from the Section. Although the Addl. Distt. Judge, for the purpose of administrative control, is subordinate of the Distt. Judge but it is doubtful that the Distt. Judge can, by virtue of Section 40 of the Act, transfer the election petition to the Addl. Distt. Judge. In my opinion, the Distt. Judge was competent or authorised to transfer the election petition either to the Civil Judge subordinate to him. or any other Judge specially appointed by the State Government in this behalf. The Distt. Judge has, therefore, committed material irregularity or illegality while exercising jurisdiction Under Section 4O of the Act to transfer the case to the Addl. Distt. Judge who cannot exercise jurisdiction to hear and dispose of the same Under Section 40 of the Act. The impugned order was, therefore, without jurisdiction.

16. I may now deal with the propriety of the impugned order by which the learned Addl. Distt. Judge has ordered recounting of the ballot papers. In N. Narayan v. S. Semmalai (surpa), the Supreme Court laid down the following guideline:

The relief of recounting cannot be accepted merely on the possibility of there being an error. It is well settled that such allegations must not only be clearly made out but also proved by cogent evidence. The fact that the margin of votes by which the successful candidate was declared elected was very narrow, though undoubtedly an important factor to be considered, would not by itself vitiate the counting of votes or justify recounting by the Court.;

The Court would be justified in ordering a recount of the ballot papers only where;

(i) the election petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded;

(ii) On the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting, and

(iii) The court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectful justice between the parties AIR 1975 SC 2117, Rel. on case law discussed.

17. Again in Satyanarayan v. Udai Kumar Singh (supra), the Supreme Court emphasised the sanctity of the secrecy of ballot papers and the principles on which the court could order recounting of ballot papers. It was observed:

The secrecy of 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 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.

18. In the instant case, a perusal of the impugned order shows that certain vague allegations were levelled by the petitioner against the counting of ballot papers. It is alleged that two ballot papers were declared invalid and one was valid and it was cast in favour of the petitioner. It was also alleged that five ballot papers were counted in favour of the other candidate. What I mean to say is that the allegations

were specific and they involved determination of facts. In my opinion when issue No. 2 was an issue of fact and law, it was obligatory for the learned trial court to have recorded evidence of the parties. The petitioner in this case has made a serious grievance. He wanted to lead evidence but the trial court did not allow to do so. I am, therefore, disposed to hold that there was no sufficient material evidence before the learned court to have ordered recounting of ballot papers showing scant respect to the secrecy of ballot papers. The order of recounting of ballot papers cannot be sustained for the aforesaid reasons.

19. For the above reasons, I allow the revision petition and set aside the order of the trial court. The parties are left to bear their own costs.