
(2013) 11 GAU CK 0039
In the Gauhati High Court
Case No : W.A. No. 355 of 2013

Anup Kumar Jain

APPELLANT

Vs

Assam State Election Commission and Others

RESPONDENT

Date of Decision : 22-11-2013

Acts Referred:

Citation : (2014) 1 GLT 444

Hon'ble Judges : Abhay Manohar Sapre, C.J.; Arup Kumar Goswami, J

Bench : Division Bench

Advocate : D. Das, Mr. N.J. Dutta and Mr. H. Nath, for the Appellant; M.U. Mahmud, G.A., Assam, Mr. M.K. Choudhury, T.N. Srinivasan and Mr. N. Baruah, for the Respondent

Judgement

Abhay Manohar Sapre, C.J.—This is an intra-court appeal filed by Respondent No. 4 of WP (C) 4082/2013 under Rule 2(3) of Chapter V-A of the Gauhati High Court Rules against the order dated 29.10.2013 passed by the learned Single Judge in abovementioned writ petition. By impugned order, the learned Single Judge (writ court) disposed of the writ petition filed by the writ petitioner (respondent No. 4 herein) with directions to the Election Tribunal (District Judge, Kamrup) to recount the votes polled in one polling centre No. 23(7)-Hazuripara M.E. School (Left Branch) in respect of an election held on 12.2.2013 for the post of member of 12 Rampur Zilla Parishad (M) constituency under Karnrup Zila Parishad.

So the question which arises for consideration in this appeal is whether the learned Single Judge was justified in giving aforementioned directions to recount the votes polled in respect of one polling centre on the facts emerging from the record of the case?

2. In order to appreciate the issue involved in the appeal, few relevant facts need mention in brief.

On 17.12.2012, a notification was issued by the State Election Commissioner, Assam under the provisions of The Assam Panchayat Act, 1994 (for short

hereinafter called - The Act) for election of the members of various Panchayat bodies, including Zilla Parishads in State. So far as election for 12 Rampur Zilla Parishad (M) Constituency was concerned, it was notified to be held on 12.2.2013.

The appellant and the respondent No. 4 were the candidates amongst others who contested the election for the membership of Rampur Zilla Parishad Constituency. After the election was held, the counting of votes began on 14.2.2013 and concluded on 15.2.2013 around 4 P.M. On its conclusion, the respondent No. 4 (writ petitioner) noticed some irregularities in respect of polling Centre No. 23(7) Huzuripara M.E. School (Left Branch) to the effect that in the supervising sheet it was shown that one candidate- Meena Mahanta secured 228 votes whereas according to respondent No. 4, he had secured these 228 votes. He, therefore, contended that 228 votes secured by him were wrongly shown to have been secured by other candidate, namely, Meena Mahanta.

The respondent No. 4, therefore, submitted an application to the Returning Officer on 15.2.2013 pointing out this mistake and prayed for recount. The Returning Officer entertained the application and after hearing all the parties concerned on 18.2.2013, referred the matter to State Election Commission for necessary orders and at the same time, also issued a Winning Certificate on 18.2.2013 in favour of appellant. The Election Commission then on 21.2.2013 examined the objection of the respondent No. 4 and finding merit therein, directed the Returning Officer to count 228 votes as that of the respondent No. 4 and then declare the respondent No. 4 as a winning candidate.

3. The Returning Officer on 21.2.2013 in compliance of the directives of the Election Commission, issued a Winning Certificate in favour of respondent No. 4 by declaring him as the winner and in consequence thereof cancelled the Winning Certificate issued in favour of the appellant. The State Election Commission, thereafter, issued a notification dated 4.3.2013 as provided under Rule 44(7) of the Assam Panchayat (Constitution) Rules 1995 notifying amongst others, the respondent No. 4 as the Member of 12 No. Rampur Constituency.

The appellant, feeling aggrieved by the cancellation of his Winning Certificate as well as declaration made by the Returning Officer declaring Respondent No. 4 as the returned candidate filed an election petition u/s 127 read with Section 129 of the Act before the Election Tribunal (District Judge, Kamrup) being Election Petition No. 1 of 2013. Another Election Petition being Election Petition No. 2 of 2013 was filed by the appellant against grant of winning certificate to the Respondent No. 4. In the election petitions, the appellant, in substance, raised the plea that once the Returning Officer issued a Winning Certificate in his favour on 18.2.2013, then the Returning Officer became functus officio to decide any issue relating to the election and hence, he had neither the power to cancel his Winning Certificate issued on 18.2.2013 nor the power to issue Winning Certificate in favour of the respondent No. 4 on 21.2.2013. It was also contended that remedy of the respondent No. 4 in such circumstances was to file an

Election Petition to challenge the appellant's Winning Certificate issued on 18.2.2013.

4. The appellant also applied for grant of interim relief in his Election Petitions. The Election Tribunal, however, declined to grant any interim relief and hence, the appellant filed two writ petitions before this Court being W.P. (C) No. 1631 of 2013 and W.P. (C) No. 1633 of 2013. The writ court, while disposing of the writs by orders dated 1.6.2013, observed that the Tribunal may take up any preliminary issue including an issue relating to jurisdiction of the Returning Officer to recall the earlier Winning Certificate and to issue a fresh Winning Certificate for the purpose of disposal of the election petition and that the Tribunal should ensure expeditious disposal of the petitions.

The Tribunal had framed the following preliminary issue:

Once the result has been declared and winning certificate has been issued in respect of No. 12 Rampur Zilla Parishad (M) Constituency, whether the Deputy Commissioner-cum-Returning Officer, Kamrup (S) has the jurisdiction to cancel the earlier winning certificate issued to the petitioner and issue a fresh certificate in favour of the Respondent No. 4.

5. By order dated 16.7.2013, the Election Tribunal allowed the Election Petitions filed by the appellant and quashed the order dated 21.2.2013 whereby Winning Certificate issued in favour of the respondent No. 4 on 18.2.2013 was cancelled. The Tribunal held that once the result was declared and Winning Certificate was issued by the Returning Officer, he (Returning Officer) had neither the jurisdiction to cancel/withdraw the Winning Certificate already issued by him nor the jurisdiction to issue another Winning Certificate in favour of respondent No. 4. This is what was held by the Election Tribunal:

For the discussions made hereinabove I am of the considered view that once the result was declared and winning certificate was issued in respect of No. 12 Rampur Zila Parishad(M) Constituency, the Deputy Commissioner-cum-Returning Officer, Kamrup (Sadar) has no jurisdiction to cancel the earlier winning certificate issued in favour of the petitioner and issue a fresh certificate to the Respondent No. 4. The preliminary issue is therefore decided in favour of the petitioner.

Since it is nobody's case that an application before the Returning Officer for re-counting was submitted before declaration of the result and that the Returning Officer failed to exercise the relevant powers conferred under the Rules to pass any such order for re-counting, I am not inclined to consider the submission made by the learned counsel for the Respondent No. 4 for a direction for re-counting of the votes, more so, in view of the fact that the procedure established by law of filing of an Election Petition would necessarily be required to be followed before such power can be considered.

In view of the above discussion, the order dated 21.02.2013 issued by the

Deputy Commissioner-cum-Returning Officer, Kamrup (Sadar), whereby the winning certificate dated 18.02.2013 issued in favour of the petitioner was cancelled and Respondent No. 4 Pankaj Lochan Goswami was declared as a winner for the No. 12 Rampur Zila Parishad(M) Constituency in the recently held Panchayat Election is hereby set aside.

6. The respondent No. 4, feeling aggrieved by the order of the Tribunal, filed the writ petition out of which this appeal arises. The writ court (Single Judge), though did not specifically set aside the order of the Election Tribunal (because it is not so mentioned in the order) but in effect, it set aside the order and remanded the case to the Election Tribunal for undertaking recounting of the votes polled in one disputed polling station referred above.

In Para 29, the writ court held that Tribunal was not right in holding that no application was filed by the respondent No. 4 for recounting before the Returning Officer. It was held that the respondent No. 4 had applied for recounting of the votes on 15.2.2013 and Winning Certificate was issued in favour of the appellant herein on 18.2.2013 and hence, to that extent, the view taken by the Tribunal was incorrect on facts. The writ court then took up the issue of recount on facts for the first time and in para 31 held that with a view to see to it that the dispute is brought to an end finally, a direction for recount of votes in relation to one polling booth is called for. Accordingly, a direction was issued to the Tribunal to undertake the recounting of votes polled in Polling Centre No. 23(7) -Huzuripara M.E. School (Left Branch) through the Returning Officer within 15 days and to pass appropriate orders in relation to the election depending upon the result of recounting.

7. The writ court, however, did not examine the legality and correctness of findings recorded by the Tribunal which had resulted in allowing of the Election Petitions. The writ court did not also record any finding with the view taken by the Election Tribunal on the preliminary issue though, to some extent, it examined the scheme of the Act and the legal position arising therefrom.

This is what the writ court held in paras 31 and 32.

31. In such circumstances, without entering into the debate as to whether issuance of the winning certificate in favour of respondent No. 4 resulted in the culmination of the election process or subsequent issuance of notification notifying the elected candidates including the petitioner after cancelling the winning certificate of respondent No. 4 would actually mark the completion of the election process, the Court is of the view that it would be in the interest of justice, more particularly, keeping in view the sequence of events and the consistent stand taken by the Returning Officer and the Election Commission, to have a recounting of the votes to finally set at rest all disputes and confusion.

32. Accordingly, the Election Tribunal i.e. the learned District Judge, Kamrup, Guwahati is directed to ensure recounting of votes polled in Polling Centre No. 23(7) i.e. Huzuripara M.E. School (Left Branch) in respect of No. 12 Rampur Zilla

Parishad(M) Constituency through the Returning Officer within a period of 15 days from the date of receipt of a copy of this order. Registry shall ensure immediate communication of this order to the establishment of the District judge, Kamrup, Guwahati. Till the above exercise is completed, stay order passed by this Court on 23.07.2013 would continue and would be subject to the outcome of the recounting.

It is against this order, the appellant (Election Petitioner) being aggrieved, had filed this writ appeal.

8. Heard Shri Diganta Das, learned Senior Counsel assisted by Shri R. Sinha, learned counsel for the appellant, Shri M.K. Choudhury, learned Senior Counsel assisted by Shri T.N. Srinivasan, learned counsel for the Respondent No. 4 and Shri M.I. Hussain, learned Standing Counsel for the Assam State Election Commission.

Though learned counsel for the parties argued at length several issues arising in the case, but having heard them at length and on perusal of the record of the case, we have formed an opinion to allow the appeal by setting aside the impugned order and to remand the case to the writ court for deciding the writ petition afresh on merits in the light of our observations made infra.

Since we have formed an opinion to remand the case to the writ court, we do not consider it apposite to burden our order by taking note of elaborate arguments raised by the learned counsel. We also refrain from recording any finding on merits of the controversy raised in this appeal for the first time in our appellate jurisdiction. In our view, it will now be for the writ court to record its finding on merits after hearing parties on the issues raised in support of their contentions.

9. In our considered opinion, the need to remand the case to the writ court has occasioned for more than one reason. First, it being a writ petition filed under Article 227 of the Constitution of India arising out of the final order of the Election Tribunal, it was necessary for the writ court, in the first instance, to have examined the findings recorded by the Election Tribunal on its merits in accordance with law and then to decide whether such findings deserve to be upheld or set aside. It was, however, not so done. Secondly, the Election Tribunal having allowed the Election Petitions on a specific preliminary issue framed as per observations of the High Court in the earlier round of litigation, it was necessary for the writ court to have decided the said issue in its writ jurisdiction and thirdly, it is a settled principle of law that jurisdiction of the writ court under Article 227 of the Constitution is essentially confined to examine the legality and correctness of findings, particularly, the findings which relate to jurisdictional or/and legal issues recorded by the Election Tribunal which are assailed in writ petition. Equally well settled is the proposition that writ court cannot act like an appellate court to examine the legality of every finding rendered on all factual issues and that it cannot take upon itself the jurisdiction to decide issues which were neither pleaded nor put in issue for its decision or which were not decided

by the Election Tribunal and lastly, howsoever laudable the object of the writ court was, namely, that the issue in question should come to an end finally, in our opinion, issue relating to recount of the votes which was not decided by the Election Tribunal, should not have been dealt with by the writ court at the first instance.

10. It is essentially for these reasons, we are of the view that impugned order of the writ court is unsustainable and the matter deserves to be remanded to the writ court for deciding the writ petition on merits, viz: whether Election Tribunal was justified in answering the preliminary issue in favour of election petitioner and if so, how and if not, why?

Depending upon the findings of the writ court on this issue, the writ court will naturally pass such consequential order(s) as the circumstances may warrant.

In the light of foregoing discussions, the appeal succeeds and is allowed in part. The impugned order is set aside and as a consequence, the writ petition is restored to the file of the writ court. It will now be listed before the appropriate bench as per roster for its disposal in accordance with law keeping in view our observations made supra.

No cost.