
(2002) 08 BOM CK 0035

In the Bombay High Court

Case No : Writ Petition No. 3802 of 1997

Bhagwat Vithoba More

APPELLANT

Vs

Civil Judge, Jr. Division and Others

RESPONDENT

Date of Decision : 02-08-2002

Acts Referred:

Bombay Village Panchayats Act, 1958 — Section 15

Citation : (2003) 1 ALLMR 13 : (2003) 1 BomCR 21

Hon'ble Judges : S.A. Bobde, J

Bench : Single Bench

Advocate : J.T. Gilda, for the Appellant; V.G. Wankhede, for the Respondent

Final Decision : Allowed

Judgement

S.A. Bobde, J.—This petition challenges the judgment and order dated 18-12-1997, passed by the learned Civil Judge (Jr. Divn.) Risod, in Election Petition No. 1/1997, by which the learned Judge has ordered for recounting of votes and upon recounting of the votes, set aside the election of the petitioner-Bhagwat Vithoba More, and further declared the respondent No. 2 Santosh as elected in the open category from Ward No. 1 of Gram Panchayat, Ghota, Taluqa Risod.

2. The facts are as follows:

Elections for filling the seats of ward members of Gram Panchayat, Ghota were held in the year 1997. In recounting of votes held on 25th October, 1997, respondent No. 2 Santosh More was apparently declared to have been elected on the basis he had secured 131 votes and the petitioner Bhagwat More had secured 130 votes. Apparently, recounting was ordered on an application made by the petitioner. As a result of recounting of votes, the Returning Officer found that Bhagwat More had secured 131 votes whereas respondent No. 2 Santosh More had secured 130 votes. The Returning Officer, therefore, declared the petitioner Bhagwat More as elected.

3. The respondent No. 2 Santosh More, therefore, filed an election petition u/s 15 of the Bombay Village Panchayats Act, 1958 (hereinafter referred to as "the Act"). In that proceedings, no oral evidence whatsoever was, admittedly adduced either by the respondent No. 2 Santosh More, or by the petitioner Bhagwat More. Only certain certified copies of counting sheets were produced at Exhibits 30 to 32. There was no other evidence adduced.

4. Mr. Gilda, learned Counsel for the petitioner, submitted that recounting of votes could not have been ordered since there was no evidence on the basis of which the Court could have ordered recounting of votes.

5. Mr. Wankhede, learned Counsel for the respondent No. 2, on the other hand, submitted that the facts themselves justify recounting. According to Mr. Wankhede, learned Counsel respondent No. 2 Santosh More, was initially declared elected, thereafter recounting was ordered by the Returning Officer behind the back of respondent No. 2 Santosh More and during the course of recounting, Bhagwat More, i.e. present petitioner was declared elected. According to Mr. Wankhede, there was no application seeking a recount. Even if there was one, recounting could not have been ordered behind the back of respondent No. 2 Santosh More.

6. Having heard the learned Counsel for the parties at length, it appears that the submissions made on behalf of the respondent No. 2 are based on assumptions and advanced on the basis of facts, which have not been proved before the learned Civil Judge.

7. It is settled law that justification for an order for examination of ballot papers and recounting of votes is not to be derived from hind sight and by result of the recounting of votes. This is exactly what the learned Counsel for the respondent No. 2 sought to impress upon me. The submission was that if the result of the recounting ordered by the Election Tribunal shows that the respondent No. 2 secured 131 votes and the petitioner got 130 votes and, therefore, the order of recounting was justified. It is obviously the case of justification by hind sight.

8. In *P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen and Others*, , the Supreme Court observed in paragraph 13, 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 is a democracy and hence unless the affected candidate is able to allege and

substantiate in a 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 interest of justice, a Tribunal or Court should not order the recount of votes."

9. In paragraph 15 of the same case the Apex Court repelled the contention similar to one advanced before me. That paragraph 15 reads as follows:

"15. Mr. Padamanabhan also contended that the purpose and object of the election law is to ensure that only person should represent the constituency who is chosen by the majority of the electors and that is the essence of democratic process, and this position has been observed by a Bench of this Court in their order of reference of the case of N. Gopal Reddy Vs. Bonala Krishnamurthy and Others, , and hence it would be a travesty of justice and opposed to all democratic canons to allow the first respondent to continue to hold the post of the President of the Panchayat when the recount disclosed that he had secured 28 votes less than the petitioner. We are unable to sustain this contention because as we have stated earlier an order of recount of votes must stand or fall on the nature of the averments made and the evidence adduced before the order of recount is made and not from the results emanating from the recount of votes."

10. The aforesaid decision of the Supreme Court in P.K.K. Shamsudeen's case (supra) has been followed by the Apex Court in the case of Vadivelu Vs. Sundaram and Others, , as is apparent from para No. 11 of the said judgment.

11. There is no doubt that the order of recounting must be based on evidence adduced before the Election Tribunal. In the present case, as aforesaid, no evidence having been adduced and, therefore, it is not possible to accept the plea of the respondent No. 2 that initially the recounting which was ordered by the Returning Officer, was done behind the back of respondent No. 2. In fact, in the affidavit filed by the petitioner before the Election Tribunal, he has stated that after completion of the counting of votes, he filed a written application before the respondents No. 6, requesting for recounting of votes. He has further stated that the respondent's representative was also present during the course of recounting of votes sought by the election petitioner.

12. In the circumstances of the case, this petition must be allowed. Accordingly, the petition is allowed and Rule is made absolute in the terms to the effect that the order dated 18-12-1997 directing recount of the votes of ward No. 1 of village Ghotla and the order dated 20-12-1997 allowing the Election Petition No. 1/1997 are hereby set aside, with order as to costs.