

(2014) 05 P&H CK 0408
In the Punjab And Haryana At Chandigarh
Case No : Cr No. 454 of 2014

Deepak Sharma

APPELLANT

Vs

Hardeep Kaur and Others

RESPONDENT

Date of Decision : 12-05-2014

Acts Referred:

Constitution of India, 1950 — Article 227
Punjab State Election Commission Act, 1994 — Section 108, 21, 66

Citation : (2014) 176 PLR 190

Hon'ble Judges : Rajiv Narain Raina, J

Bench : Single Bench

Advocate : Harshit Jain, Advocate for the Appellant; Manish Kumar Singla, Advocate for Respondent No. 1 and Mr. Rajat Bansal, AAG, Punjab for Respondent No. 2, Advocate for the Respondent

Final Decision : Allowed

Judgement

Rajiv Narain Raina, J.—Elections to the Gram Panchayat Raidharana were held in July 2013. The post of Sarpanch in Gram Panchayat village Raidharana is reserved for women candidates. The petitioner-Deepak Sharma and the 1st respondent-Hardeep Kaur contested for the post in the elections held for the post of Sarpanch. The total votes polled were 3061. Forty four votes were cancelled. Deepak Sharma won with a margin of 65 votes. The petitioner polled 1541 votes whilst Hardeep Kaur polled 1476.

2. Aggrieved by the result of the election, loosing candidate Hardeep Kaur filed an election petition before the Election Tribunal, Sunam, District Sangrur. It is complained that the returning officer did not provide a copy of the result of the election on the spot even though asked for repeatedly and which was available after three days from the day of polling by the office of the Sub Divisional Magistrate, Moonak. It was alleged that wrong procedure was adopted in the election; the polling and counting officers were appointed in connivance with the successful candidate and the SDM concerned; fake persons had cast votes in

favour of the winning candidate or in the names of dead persons; votes of people living abroad were cast to the detriment of the losing candidate. Election rules and legal provisions were violated and therefore the election result was liable to be quashed on account of corrupt practices resorted to in the hustings and the counting of votes. It was urged that where there are more than one booth there can only be one returning officer, and the rest could only be presiding officers for each booth. The returning officer appointed was a Science teacher in a local Government school. It is averred that every presiding officer in case of more than one booth would seal the ballot boxes after casting of votes polled in each booth and to carry the boxes in bags from the respective polling booths to one place for counting all the votes together in the presence of the returning officer. It was complained that in the present case, counting was done at three different polling booths which is against the procedure laid down. Hardeep Kaur says that she protested but her protests went unheeded that counting did not take place in one spot. At the time of counting, the election petitioner was present at booth No. 34, her polling agents Shingara Singh at booth No. 35 and Hakam Singh at No. 36 which are the three disputed booths. Her polling agents were present but according to her "far away from the counting tables" (para. 8). Where her polling agents sat they could not see the counting at close hand. She complains that her counting agents were not allowed to stand near the counting table and the votes which have been cancelled have not been shown to the petitioner and no reasons were given why those votes were cancelled. Therefore, the election was not held as per law. If proper counting was done, Hardeep Kaur would have won. Charge of connivance with election staff is alleged in the election petition and re-counting of votes was demanded as an alternative prayer.

3. The Election Tribunal by the impugned order dated January 15, 2014 has ordered re-counting of votes. The only reason that has weighed in the mind of the Election Tribunal to order re-counting is that counting of votes was done at three different polling booths and was not done at one place. It is reasoned that due to this the counting agents of the election petitioner were not satisfied with the counting process and they have harboured serious doubt as to the result and the fairness of the counting process since the counting was not done properly.

4. The Election Tribunal has gone by the deposition of the polling agents of Hardeep Kaur in booth Nos. 34, 35 and 36 to order re-counting on January 27, 2014.

5. Aggrieved by the order of re-counting the successful candidate has approached this Court through the present petition filed under Article 227 of the Constitution challenging its correctness.

6. The first question which arises is whether the Punjab Panchayat Election Rules, 1994 (for short "the Rules") permit counting in multiple polling stations scattered in the ward or at one central place before the returning officer where alone the counting should be done. Rule 34 of the Rules lays down the procedure of counting of votes where there is more than one polling station. Rule 34 relates to

Section 66 of the Punjab State Election Commission Act, 1994 since there is no *pari materia* rule in the Punjab Panchayati Raj Act, 1994 governing the subject of counting. Section 66 of the Act reads as follows:-

66. Counting of votes.--At every election where a poll is taken, votes shall be counted by or under the supervision and direction of, the Returning Officer, and each contesting candidate, his election agent and his counting agents, shall have a right to be present at the time of counting.

Rule 34 of the Rules reads as follows:-

34. Counting of votes where there is more than one polling station (Section 66).--

(1) In a Gram Sabha where there is more than one Polling Station, the Presiding Officer of each Polling Station shall, as soon as practicable, after the close of the poll, close the ballot-boxes used at the Polling Station in such manner as the Election Commission may direct and forward them to the Returning Officer.

(2) When the ballot-boxes used at all the Polling Stations, in his Sabha or Constituency area have been received, the Returning Officer shall, as soon as practicable, follow the procedure prescribed in rule 33 for the counting of votes and the declaration of results:

Provided that in case of Constituency of a Panchayat Samiti and (Zila Parishad,) ballot-boxes from all the polling stations of a Constituency may be kept at a secure place and counting may be done on a day fixed for counting by the Returning Officer and at a place to be notified in advance.

Provided further that separate parties will be deployed for counting and the candidate may also deploy one counting agent for each counting table and one more counting agent for the table of the Returning Officer. The counting will be done by the counting parties and at the end of the each (round,) the result of counting shall be compiled. Final result shall be declared in accordance with rule 33.

7. The procedure involves the following steps where there is more than one polling station and ordains as follows:-

i) The Presiding Officer of each PS shall, as soon as practicable, after the close of the poll, close the ballot boxes.

ii) Forward the ballot boxes to the Returning Officer.

iii) The Returning Officer on receipt of all ballot boxes used at the polling stations in the Sabha shall, as soon as practicable follow procedure in Rule 33 for counting and for declaration of results.

8. The second proviso to Rule 34 prescribes that separate parties will be deployed for counting and the candidate may also deploy one counting agent for each counting table and one more counting agent for the table of the Returning Officer. The counting has to be done by counting parties and at the end of the

round the result of counting shall be compiled. The final result is to be declared in accordance with Rule 33 which has connectivity with Section 66 of the Punjab State Election Commission Act, 1994. Rule 33 reads as follows:-

33. Counting of votes (Section 66).--(1) In a Sabha area where there is only one polling Station, the Returning Officer shall follow the (procedure set out in sub-rule (2)) for the counting of votes and declaration of result for election to the Gram Panchayat.

(2) The Presiding Officer shall, as soon as practicable, after the close of the poll and in the presence of any candidate or polling (agent,) who may be present:-

(a) (inspect) and also allow an opportunity to candidates or their polling agents to inspect the ballot-boxes and their seals to satisfy themselves that they are in order;

(b) open the ballot-box after checking the mark or marks made on the box and the label affixed, takes out the ballot papers from the box and arrange them in (convenient) bundles, separating the ballot-papers which he deems valid from those he rejects;

(c) allow the candidates and their agents who may be present, reasonable opportunity to inspect all ballot-papers, which is in the opinion of the Presiding Officer, are liable to be rejected but shall not allow them to handle those or any other ballot-papers. The Presiding Officer shall on every ballot-paper which is rejected, endorse the word "rejected" and record briefly on such ballot-papers the grounds for its rejection. A brief record shall be kept of the serial numbers of all ballot-papers (rejected);

(d) count the valid votes given in each candidate with the aid of persons appointed to assist in the counting of votes and declare the election of the candidate who is found to have obtained the largest number of valid votes, or, if more than one member is to be elected for the Gram Panchayat, then the candidates who are found to have obtained the largest number of valid votes shall be declared to have been (elected and);

(e) (after) the counting of ballot-papers contained in all the ballot-boxes has been completed, the Returning Officer shall record a statement in Form IX showing the total number of votes polled by each candidate.

9. The procedure laid down has to be meticulously observed and any departure may fault the result. One fact is certain and indisputable that there were three polling booths and counting was done there and not through the centralized process envisioned by Rule 34 read with Rule 33 of the Rules read with Section 66 of the Punjab State Election Commission Act. The petitioner submits that counting could only be done in the manner provided by law. The winning candidate argues that there is substantial compliance of the Act and the Rules in booths 34, 35 and 36 in the presence of Hardeep Kaur's polling agents.

10. The losing candidate Hardeep Kaur complains that due process was not followed and on this point in issue, she has led evidence of her polling agents to the effect that they were not satisfied with the procedure followed at the respective polling booths and this has contributed in bungling in the elections for which re-counting of votes is the only cure. It is stated that even the result was not signed by Hardeep Kaur since they were not supplied copies of the result at the spot. She accessed the result after three days on a complaint made by her to higher authorities. One such complaint is dated July 5, 2013 (R-7) in the docket produced by Mr. Manish Kumar Singla, learned counsel appearing for Hardeep Kaur with copy supplied to the opposite side. The cross-examination of the polling agents of the losing candidate bare out that they were not allowed to be at the counting tables and that counting was not done in their presence.

11. Learned counsel appearing for the petitioner argues that re-count is not to be ordered in a routine manner and the test of prejudice will have to be satisfied whether breach of rule has resulted in prejudice to the parties. He relies on the decision of the learned Single Judge of this Court rendered in Gurnam Bindra Singh Vs. Kulwant Singh and Others, holding that in order to succeed for a re-count of votes on the ground of irregularities committed in the counting of votes there must be a written complaint made to the returning officer in the first opportunity and on the spot. In order to succeed in a claim for re-count of votes the election petitioner is required to make categorical averments in the election petition and make out a prima facie case which can win the confidence of the Court. Re-count cannot be ordered on the ground of equity and natural justice. See Shri Jitendra Bahadur Singh Vs. Shri Kirshna Behari and Others, and Arun Kumar Bose Vs. Mohd. Furkan Ansari and Others, .

12. Mr. Jain submits that no written complaint was made on the spot before the returning officer and the complaint made later on was an afterthought. He then relies on the decision of the learned Single Judge of this Court in Rakhi Kaur vs. Gurmail Kaur and others, 2006(1) LAR 320 where the test of jurisdiction has been applied on account of breach of Rule 33 and Section 66. The Election Tribunal has to be prima facie satisfied on the material produced before him regarding the truth of allegations made for a re-count. In absence of such material this Court set aside the order of recounting of votes. In para. 7 brother S.S. Saron, J. observed:-

7. The provisions of Rule 33(2) (c) is part of a procedural provision for the purpose of counting of votes after the elections. In respect of a procedural provision it has to be seen whether the violation is of substantive character or is merely procedural in nature. The procedural provisions are meant for ensuring a free and fair election which would include that the process of counting has been duly carried out in accordance with the provisions of the Act and the Rules. However, violation of any and every procedural provision would not by itself entail an order for recount of votes. In such cases, it is to be examined and ascertained whether any prejudice has been caused to either of the parties. In a

case of prejudice having been caused appropriate orders would be required to be passed to remedy the same including the recount of votes. If, however, no prejudice is established to have resulted therefrom it is obvious that no interference is called for. In the matter of recount of votes a Division Bench of this Court in *Bharat Singh Vs. Dalip Singh and others*, held that recount cannot be ordered as a matter of course and the same can only be ordered on material facts stated in the petition duly supported by contemporaneous evidence leading to making out a prima facie case for recount. A Full Bench of this Court in the case of *Radha Kishan Vs. Election Tribunal-cum-Sub-Judge and Another*, indicated the right of a candidate to demand recount or scrutiny and computation of votes while challenging the validity of an election under the Haryana Panchayati Raj Act, 1994. It was held that recount cannot be ordered on mere asking and disclosure of prima facie case supported by definite averments, verified and supported by documents, if any, are a condition precedent for ordering recount. A detailed inquiry based on evidence though was held to be not necessary. The Full Bench placed reliance on several decision of the Supreme Court and the guide-lines laid down in *Ram Sewak Yadav Vs. Hussain Kamil Kidwai and Others*, Besides, the guide-lines laid down in *Bhabhi Vs. Sheo Govind and Others*, were quoted in the following terms:-

- (1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;
- (2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;
- (3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;
- (4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;
- (5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and
- (6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount and not for purpose of fishing out materials.

If all these circumstances enter into the mind of the Judge and he is satisfied that these conditions are fulfilled in a given case, the exercise of the discretion would undoubtedly be proper.

13. In *M. Chinnasamy Vs. K.C. Palanisamy and Others*, the Supreme Court culled out four principles in para. 15 with respect to a case of re-count under the

Representation of the People Act, 1951 and held that an order of re-count of votes can be passed when the following ingredients are satisfied: i) if there is a prima facie case; ii) material facts therefor are pleaded; iii) the count shall not direct re-counting by way of roving or fishing inquiry; and iv) such an objection has been taken recourse to.

14. Moreover, regard must be had to the fact that an election may not be set aside on hyper technical grounds although no factual foundation therefor had been laid in the pleadings as the elected candidate may not have any hand therein. So far as the requirement of pleadings in a case where a direction of re-counting of ballot papers has been prayed for, the Court must proceed consciously and with circumspection, having regard to the requirement of maintaining secrecy of ballot papers (paras. 16 and 18 of the report).

15. Corrupt practices and electoral offences are dealt with in Chapter XIII of the Punjab State Election Commission Act, 1994 wherein corrupt practices have been defined in Section 108. The petitioner submits that the case does not fall in any of the provision of Section 108 or the explanations thereto.

16. It appears to be well settled that re-count of votes cannot be ordered as a matter of course on the mere asking. Secrecy of ballot is paramount consideration in a democracy. The sanctity and secrecy of votes has to be preserved. A very strong prima facie ground should be made out by a person seeking re-count of votes. If even the allegation regarding rejection of votes is prima facie taken to be corrupt, it does not have the effect of changing the result, the Tribunal in ordering re-counts exceeds its jurisdiction and amounts to disturbing the confidence of the voter and violation of sanctity attaching to secrecy of votes. Judicial opinion expressed by the learned Single Judge of this Court in Kirpal Singh vs. Preet Mohinder Singh, 1999(4) RCR (Civil) 248 is useful guidance. It is in this conspectus of facts that the impugned order deserves to be examined.

17. Mr. Singla relies on an order passed by me in FAO No. 630 of 2014 delivered on March 22, 2014 in Paramjit Kaur vs. Presiding Officer, Election Tribunal etc. to submit that re-count is possible and was so ordered. This was a case where I found the conduct of the Deputy Commissioner, Sangrur acting as Election Tribunal remiss when shown the order sheet of the election petition where orders had been passed by the Reader of the Tribunal. It was also revealed before me that in the Panchayat Election a Gunman working in the State Bank of Patiala at its Longowal Branch, Sangrur was appointed Presiding Officer of the elections. The Gunman by name Balwinder Singh appeared before me and lamented that he had requested for cancellation of duty to the quarters concerned in Government but they paid no heed to his request. He was sixth class pass and had filed written statement in the case doubting the result of the election as not in consonance with the votes polled. It was in these circumstances that I made a comment that this was a sad commentary on the governance of Panchayat Elections in Punjab that the Government should depute a poor Bank Gunman

working in a Nationalized Bank to discharge statutory duties u/s 21 of the Act and empower a private person to do what he likes or on the dictates of pressure he cannot ward off. The Deputy Commissioner, Sangrur was summoned by me and counseled to discharge public trust reposed in her and that in such circumstances she should hold the re-count in her office under her direct supervision and control. I am afraid that order is of no help to Mr. Singla as it turns on its own facts and is not an authority on the law of re-count of votes.

18. As I read the impugned order I find it laconic and stereotyped with hardly any meaningful discussion of evidence of the parties or of any effort made by the Election Tribunal to appreciate the evidence and to apply the law governing re-counting of votes. The satisfaction recorded by the Election Tribunal in the impugned order is subjective and is not an objective decision taken on the materials on record. Merely because the election petitioner made a complaint three days after the event is not sufficient to my mind to order the re-count only for the reason she did so.

19. Mr. Singla's reliance on the decision of the learned Single Judge of this Court in Darshan Singh Vs. Deputy Commissioner-cum-Presiding Officer, Election Tribunal and Others, can be of no help to him. This was a case of rejection of ballot papers and consequent prayer for re-count of votes. This Court held that for rejection of ballot papers the Presiding Officer has to record reasons for its rejection. If the votes have been rejected without recording any reason it amounts to violation of Rule 33(c) and would vitiate the election. It is not the case set up by Hardeep Kaur that the ballot papers were wrongly rejected or the reasons for rejection were bad. The truth of the matter is that her duly authorized polling agents were present in the booths when the ballot boxes were opened and votes counted in the three booths. The complaint is that they were 10 to 12 feet away and not to tables and not that they were not present there at all or that the counting was done behind their back. If this were true then Hardeep Kaur can reasonably be expected to have raised a hue and cry there and then but she did not do so. Nor is there any evidence to suggest to the contrary.

20. In the result, I would apply the tests laid down by the Supreme Court and this Court in the aforesaid judgments on re-count of votes and would accept the petition by setting aside the order of re-counting as not legal and factually justified. The parties are left to bear their own costs.