

(2005) 01 SC CK 0088

In the Supreme Court Of India

Case No : Civil Appeal No. 574 of 2005 (Arising out of SLP (C) No. 18490 of 2004)

Hoshila Tiwari

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 19-01-2005

Acts Referred:

Bihar Panchayat Election Rules, 1995 — Rule 76(3), 79, 80

Citation : (2005) 01 SC CK 0088

Hon'ble Judges : S.B. Sinha, J;N. Santosh Hegde, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. Heard Learned Counsel for the parties. Leave granted.
2. In an election held for the post of Mukhiya of Parhi Gram Panchayat the Appellant and the 7th Respondent polled equal number of votes and as required under Rule 80 of the Bihar Panchayat Election Rules, 1995 lots were drawn and in the result of the draw of lots the Appellant herein was elected as the Mukhiya of the said Panchayat.
3. The said election came to be challenged by the 7th Respondent herein on the ground that his request for re-counting of the votes was illegally rejected by the Returning Officer and in view of the fact that 3 votes polled in favour of the Appellant was wrongly rejected, the Appellant was illegally declared as the winner.
4. Even though there was no application as required under Rule 79 of the Rules seeking for recounting of the votes was made by the 7th Respondent, the Election Tribunal allowed the recount. A challenge to the said order came up before a learned Single Judge of the Patna High Court who after considering the judgment of this Court in the case of Chandrika Prasad Yadav Vs. State of Bihar and Others, came to the conclusion that apart from Rule 79 (supra) it is open to

a candidate to challenge the refusal of the Returning Officer to re-count provided he showed grounds to establish that he could not make the required application u/s 79 of the Rules for good reasons. The learned Single Judge also came to the conclusion that from the material on record the 7th Respondent had showed that he could not make the required application because of the "Hungama" that prevailed at the time of counting of the votes.

5. Against the said order Reported in Hoshila Tiwary Vs. The State of Bihar and Others of the learned Single Judge an appeal before the Division Bench of the same High Court was filed. The Division Bench noticing the judgment referred to hereinabove and misreading the same came to the conclusion that the finding of the learned Single Judge affirming the order of the tribunal was correct.

6. It is against the said judgments of the courts below the Appellant is before us.

7. It is argued on behalf of the Appellant that Rule 79 being mandatory and there being no application filed by the 7th Respondent immediately after the counting was over, it is not open to the election tribunal to entertain the request for recounting.

8. It is an admitted fact that an application as required under Rule 79 of the Rules was not made at the required point of time. The Learned Counsel appearing for the 7th Respondent submitted that as correctly held by the learned Single Judge it is open to the aggrieved party to satisfy the election tribunal as to why he could not make such application and how he was prevented from having filed such an application, and if that is done then the election tribunal is justified in allowing his request for recount.

Rule 79. Recounting of votes:-(1) The candidate or in his absence his election agent or counting agent may file a written application to the Returning Officer or the Officer authorised by him for recounting of votes stating therein grounds of the same.

(2) The Returning Officer or the Officer authorised by him may fully or partially accept or reject the application stating the reasons for the same.

(3) If the Returning Officer or the Officer authorised by him accepts fully or partially the application under Sub-rule (3) then he will get the ballot papers recounted and amend the result of the counting in the form prescribed in Sub-rule (3) of Rule 76 and declare the result.

(4) After that no application for recounting will be entertained again.

9. A reading of this Rule and Sub-rule (4) together it is clear that making of an application is a mandatory requirement, for ordering a recount and if the same is not made, the similar prayer cannot be entertained thereafter. this Court in the case of Chandrika Prasad interpreting the said Rule held:?

"20. It is well settled that an order of re-counting of votes can be passed when the following conditions are fulfilled:?"

- (i) a prima facie case;
- (ii) pleading of material facts stating irregularities in counting of votes;
- (iii) a roving and fishing inquiry shall not be made while directing recounting of votes; and
- (iv) an objection to the said effect has been taken recourse to."

21. The requirement of maintaining the secrecy of ballot papers must also be kept in view before a recounting can be directed. Narrow margin of votes between the returned candidate and the election Petitioner by itself would not be sufficient for issuing a direction for re-counting."

10. From the above it is clear that making of an application under Rule 79 of the Rules is a mandatory requirement. The learned Single Judge of the High Court Ed:-Reported in Hoshila Tiwary Vs. The State of Bihar and Others though correctly understood the law laid down by this Court in regard to the application of Rule 79 still distinguishing the same came to the conclusion that a prayer can be made even before the Election Tribunal provided the required ingredients to establish the course for not making the application by the election Petitioner in the election petition is shown. Learned Counsel appearing for the Respondent referring para 25 of this Court's judgment in Chandrika Prasad Yadav contended that even this Court has accepted the above position in law that making of a request in election petition of re-counting is not totally excluded. As noted above we have no quarrel with this proposition provided in the election petition or in the subsequent prayer made by the aggrieved party produces sufficient explanation or material to show that in fact he was prevented by certain prevailing material situation for not making that application. In the present case we have examined the election petition carefully and we do not find any explanation offered by the election Petitioner for not making an application as required under Rule 79 of the Rules. Learned Counsel for the Respondent points out that at a later stage a fax message sent to Chief Election Commissioner which in fact is disputed by the Learned Counsel for the Appellant. Be that as it may, that fax cannot be treated as an application under Rule 79. Thus, though there may be an opportunity available for the aggrieved party to make a complaint before the election tribunal that he was prevented from making an application under Rule 79 for good reasons, in the instant case such a plea has not been raised before the election tribunal and the courts below had erred in granting relief made by the Respondent. For the reasons stated above, we set aside the impugned order of the tribunal as well as of the High Court. The appeal is allowed accordingly.