
(2004) 07 PAT CK 0099
In the Patna High Court
Case No : C.W.J.C. No. 8635 of 2002

Hoshila Tiwary

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 15-07-2004

Acts Referred:

Citation : (2004) 07 PAT CK 0099

Final Decision : Dismissed

Judgement

Chandramauli Kr. Prasad, J.—This application has been filed for quashing the order dated 16.5.2002 passed by the Munsif, Kaimur at Bhabua in Election Petition No. 125 of 2001 whereby he has directed for recounting of the votes.

2. Shorn of unnecessary details, facts giving rise to the present application are that the petitioner as also respondents No. 7 besides other persons were candidates in the election to the office of the Mukhiya of Parhi Gram Panchayat. In the said election, petitioner, Hoshila Tiwary, hereinafter referred to as the returned candidate, and respondent No. 7, Munna Singh, hereinafter referred to as the election petitioner secured equal number of votes but the luck favoured the returned candidate in the lot and he has been declared to have been elected to the office of the Mukhiya of the Gram Panchayat. Election petitioner challenged his election, inter alia, contending that in spite of protest made by him, the Deputy Development Commissioner did not recount the votes of all the booths but recounted the votes of Booth No. 90 of village Bhadaura and illegally declared three votes cast in favour of the election petitioner as invalid which made the number of votes polled by the election petitioner and the returned candidate equal and in spite of the protest declared the returned candidate elected as Mukhiya as a result of draw of lots. Election petitioner further averred that he protested about the same by faxing a letter to the Chief Election Officer, Patna.

3. The learned Munsif accepted the case of the election petitioner that he was leading by three votes but the returned candidate and his supporters started

raising hue and cry and ugly scene was created at the counting hall and the Deputy Development Commissioner ordered for recounting of the votes and three valid votes cast in favour of the election petitioner at Booth No. 90 were declared invalid. The learned Munsif had after appreciating the evidence led on behalf of the parties directed for recounting of the votes.

4. Mr. Kali Parsana Dubey appearing on behalf of the petitioner contends that the election petitioner having failed to make any request for recounting of the votes as provided under Rule 79 of the Bihar Panchayat Election Rules, 1995 (hereinafter referred to as the Rules) no application for recounting is permitted to be entertained later on and hence the impugned order is clearly illegal and completely without jurisdiction. In support of his submission he has placed reliance on a Division Bench judgment of this Court in the case of Chandrika Prasad Yadav v. The State of Bihar and Ors., 2003 (1) BLJR 85 and my attention has been drawn to paragraph 6 of the judgment, which read as follows :

"6. In the matter of Bam Rati (supra) the Supreme Court has observed that not only the fact that an application was made is to be pleaded but is also to be proved. The Supreme Court has observed that if the basic requirement is not proved then the Court would not be entitled to interfere with the secrecy of the ballots in directing recount of the ballots. In the present case undisputedly no evidence has been brought on record to show or suggest or to satisfy the judicial conscience of the Court that such an application was made immediately after declaration of the result of the election or such an application was rejected unceremoniously and illegally." (Underlining mine)

5. Reliance has also been placed on a decision of the Supreme Court in the case of Chandrika Prasad Yadav Vs. State of Bihar and Others, , which appeal arose from the Division Bench judgment of this Court in the case of Chandrika Prasad Yadav v. State of Bihar and Ors. (supra) and while affirming the judgment of this Court it has been held as follows :--

"Once an application is filed by an agent or a counting agent or the candidate himself pointing out the irregularities committed by the officers appointed for the counting the ballot papers, immediate redressal of grievances would be possible. As indicated hereinbefore, while filing such an application the basis for making a request for recounting of votes is required to be disclosed. The returning officer is statutorily enjoined with a duty to entertain such an application, make an inquiry and pass an appropriate order in terms of Sub-rule (2) of Rule 79 either accepting in whole or in part such requests or rejecting the same wherefor he is required to assign sufficient or cogent reasons. In the event, such an application is allowed either in whole or in part, he is statutorily empowered to amend the results also.

Ordinarily, thus, it is expected that the statutory remedies provided for shall be availed of. If such an opportunity is not (sic) availed of by the Election Petitioner, he has to state the reasons therefor, if no sufficient explanation is furnished by

the Election Petitioner as to why such statutory remedy was not availed of. the Election Tribunal may consider the same as one of the factors for accepting or rejecting the prayer for recounting. An order of the prescribed authority passed in such application would render great assistance to the Election Tribunal in arriving at a decision as to whether a prima facie case for issuance of direction for recounting has been made out." (Underlining mine)

6. Mr. Rajendra Prasad Singh, Senior Advocate appearing on behalf of the election petitioner i.e. respondent No. 7, however, contends that the very assumption of the returned candidate that the election petitioner did not request for recounting of the votes before the Returning Officer is unfounded on fact and as such the entire submission made on behalf of the returned Candidate is fit to be rejected.

7. Having considered the rival submission, I am of the opinion that the petitioner has not been able to make out a case for interference by this Court and the authorities relied on in no way support his case.

8. Before I advert to the submission advanced on behalf of the party, it is apt to observe that right to be elected or challenge the result of an election is neither a constitutional right nor a right flowing from a common law but a statutory right. While directing for recounting of the votes the Court has to be circumspect and the requirement of maintaining the secrecy of ballot paper must be kept in view. Order or recounting of votes can be passed when the Court comes to the conclusion that the election petitioner has made out a prima facie case, material facts stating irregularities in counting of votes has been pleaded and an objection to the said effect has been taken before the returning officer. Roving and fishing enquiry shall not be made while directing recounting of the votes.

9. Rule 79 of the Rules, inter alia, provides for recounting of the votes, same reads as follows :--

"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 for 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 (2) of Rule 76 and declare the result.

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

10. From a plain reading of Rule 7.9 (1) of the Rules it is evident that a candidate and in his absence his election agent or counting agent may file a

written application to the Returning Officer for recounting of votes stating therein the grounds for the same. Rule 79 (2) enjoins a duty on the Returning Officer to accept or reject the application fully or partially after assigning reason for the same. In case of acceptance of the application fully or partially by the Returning Officer, he has to get the ballot papers recounted and amend the result of the counting in the form prescribed under Rule 76(2) of the Rules and declare the result. After that according to Rule 79(4), no application for recounting is to be entertained again. It is relevant here to state that Rule 76(2) of the Rules contemplates recording of the result of counting in Form XX in the case of Mukhiya and Rule 79(3) contemplates the announcement of the result in the form prescribed. Thereafter under Rule 81 the Returning Officer is to declare who has secured the maximum number of valid votes and elected and certify the same in Form XXI and send it to the District Election Officer and through him to the State Election Commission and the Director of the Gram Panchayat Raj. After declaration of the result, the Returning Officer is to grant the election certificate in Form XXII to the candidate so elected as provided u/s 82 of the Rules.

11. Now the question is as to whether in case the remedy provided under Rule 79 of the Rules for recounting of the votes is not availed of the Court adjudicating the election petition is precluded from directing recounting of the votes. In my opinion, as an absolute rule it cannot be said that in all circumstances when the election petitioner had not availed the statutory remedy the Court adjudicating the election petition cannot direct for recounting of the vote. What can safely be said that in a case in which election petitioner had the opportunity to request for recounting of the votes but the same is not availed of the Court trying the election petition may decline to order recounting of the votes. One may not lose sight of the fact that there may be a case in which the Returning Officer does not give sufficient time to make a written application. Or there may be a case in which written application is filed but is not acknowledged and in that case; can it be said that the Court trying the election petition lacks jurisdiction. In my opinion filing or non-filing of an application or making a request before the Returning Officer is a relevant factor for accepting or rejecting the prayer for recounting. This would be evident from the decision of the Supreme Court in the case of Chandrika Prasad Yadav, (supra), quoted above, that ordinarily it is expected from the election petitioner that he had availed the statutory remedy and in case such an opportunity is not availed to state reasons therefore, which shall be one of the factors for accepting or rejecting the prayer for recounting.

12. In the present case, the election petitioner had clearly stated that in spite of protest, votes of entire booth were not recounted but only recounted the votes of booth No. 90. Election petitioner has further averred that a fax message protesting the same was sent to the Chief Election Officer but no action was taken. The allegation of the election petitioner that he was leading by three votes and due to uproar by the returned candidate and his supporters recounting of votes of booth No. 90 of village Bahadura was directed by the Deputy

Development Commissioner and on that recounting of the votes of the said booth was done in which three votes counted in favour of the election petitioner earlier was declared invalid and the votes of all the booths were not counted have been found to be prima facie correct by the learned Munsif while directing for recounting of the votes. He has referred to the evidence of DW 7, counting agent of the returning candidates, who in his evidence has stated that upon the objection raised by the returned candidate the Deputy Development Commissioner permitted the recounting of Babania booth.

13. To put the record straight it is relevant here to state that in paragraph 22 of the writ application the returned candidate has stated that DW 7 had nowhere stated in his evidence that the Deputy Development Commissioner permitted the recounting. I have gone through the evidence of DW 7 and have found that he has stated about the Deputy Development Commissioner permitting recounting of Babania booth.

14. The learned Munsif while directing for recounting of the votes has observed as follows :--

"On consideration of entire pleadings and evidence I am of the view that petitioner has succeeded in making out a prima facie case. There is prima facie evidence on record to establish the material allegation raised by the petitioner. Dispute relating to number of votes by candidates and whether any valid vote of petitioner was rejected while accepting one invalid vote of Hoshila Tiwary after recounting of vote suo motu. The aforesaid question cannot be adjudicated effectively without verification of ballot papers and recounting of votes."

15. Mr. Dubey then attempted to assail the finding recorded by the learned Munsif. It is well settled that this Court while exercising its power of judicial review under Articles 226 and 227 of the Constitution of India does not act as a Court of appeal and interferes with the finding recorded, by a subordinate authority only when it is shown that same is perverse meaning thereby that the finding has been recorded without consideration of the relevant material or consideration of irrelevant material or where there is no evidence to support the finding or in a case in which a person duly instructed in law cannot come to the said finding. Reference in this connection can be made to an observation made by this Court in its order dated 24.3.2003 passed in CWJC No. 123314 of 2002, *Laldeo Mahto v. Bam Ekbal Singh and Ors.*

"The High Court certainly can interfere in any matter even under Article 227 if the subordinate Tribunal has exercised jurisdiction not vested in it by law or has refused to exercise its jurisdiction vested in it by law or there is an error apparent on the face of the record. The question of appreciation of the evidence certainly would be a matter within the discretion of the subordinate Court/Tribunal. The High Court again can interfere in the matter if the findings are perverse or there is no evidence to support it but in given case a finding cannot be set aside only on the ground that the evidence submitted by one party falls

short of the expectation of the other party, It would be within the jurisdiction of that Court to accept or reject the evidence, in any case present is not a case where there is no evidence on record, present is a case of appreciation of evidence."

16. Here in the present case the learned Munsif had recorded the finding on appreciation of evidence which cannot be said to be perverse calling for interference by this Court in exercise of its writ jurisdiction.

17. In the result, I do not find any merit in the application and it is dismissed, accordingly but without any order as to cost.