

(1988) 10 MAD CK 0030
In the Madras High Court

K.A.M. Mappillai Mohideen

APPELLANT

Vs

P.K.K. Shamsudeen and Others

RESPONDENT

Date of Decision : 07-10-1988

Acts Referred:

Citation : (1988) 2 LW 425 : (1989) 1 MLJ 14

Hon'ble Judges : Mohan, J

Bench : Division Bench

Judgement

Mohan, J.—This civil revision petition is directed against the order of the Election Tribunal (District Munsif), Kulithalai, in Election O.P. No. 7 of 1986 filed u/s 178 of the Tamil Nadu Panchayats Act setting aside the election of the revision petitioner. The parties are referred to in the manner arrayed in this revision petition.

2. The revision petitioner and respondents 1 and 2 contested the election for the Post of President of the Keelapaguthi Panchayat, Kulithalai Taluk. The said Panchayat is a unit of Kadavur Panchayat Union. The revision petitioner contested on the symbol of "Squirrel" while the first respondent was given the symbol of "Saw" and the second respondent "Scissors". The election took place on 23.2.1986. The counting of the votes took place on 25.2.1986. The revision petitioner secured 649 votes while the first and the second respondents secured 556 votes and 8 votes respectively. The invalid votes were 55. Consequent to this, the revision petitioner was declared elected. The first respondent in this revision challenged the election of the revision petitioner on the following grounds.

(i) At the time of counting, the first respondent and his agent, A. Mohammed Ibrahim preferred objection in respect of invalidation of votes. As a matter of fact, the votes polled in favour of the first respondent had been counted in favour of the revision petitioner.

(ii) While bundling the Ballot papers separately, one bundle of 50 votes cast in

favour of the first respondent had been wrongly counted in favour of the revision petitioner. If the same had been counted in favour of the first respondent, he would have obtained 606 votes.

(iii) No opportunity was afforded to the first respondent to verify whether the ballot papers have been rejected validly and lawfully.

(iv) About 10 Panchayat Presidents' election results have been announced in the Union Office along with that of the Union Chairman. The haste with which the ballot papers were counted and rejected will clearly show that the counting was not proper. If proper counting had taken place, more number of votes polled in favour of the first respondent would not have been rejected.

(v) The postal ballot papers were not shown to the first respondent. Without showing the same, the results were announced.

(vi) The first respondent approached the Assistant Returning Officer and put forth his demands which were not complied with. Therefore, a notice was sent by him to the Returning officer, Kadavur Panchayat Union, by registered Post with acknowledgement due on 27.2.1986. Telegrams were also sent to the concerned authorities. The counting officials has not discharged their duty properly. Thus a lot of irregularities took place in the election. There was no observance of the election rules.

3. In the counter statement, these allegations were denied by the returned candidate, namely, the revision petitioner, stating that it was not correct to urge that invalid votes were treated as valid votes; the allegation that the votes polled in favour of the first respondent had been wrongly counted in favour of the revision petitioner is wrong. It is equally false to say that a bundle of 50 votes had been wrongly counted in favour of the revision petitioner. The counting took place properly. First respondent and his agents Mohammed Ibrahim and Sindhai Mohammed Ismail were present throughout the counting. The allegations has been invented to bolster up the false petition. The counting took place according to the rules.

4. It is incorrect to contend that the postal ballot papers were not opened in the presence of the first respondent and his agent. There are no merits in the election petition.

5. The Election Tribunal found that the election results were announced on 25.2.1986. Soon after that, on 27.2.1986, ExA.1 had been issued by the first respondent objecting to the counting and the further praying for re-counting. Therefore, though re-counting was not asked for during the counting, there is compliance with law. Hence, a direction was issued for re-counting. After the said re-counting by the Tribunal, it was found that the first respondent had polled 556 votes while the revision petitioner had polled 528 votes and the invalid votes were 176. Thus, the election of the revision petitioner was set aside and the first respondent was declared elected, he having polled 556 votes. Though a relief

was asked for re-election, that was rejected. Thus, this revision.

6. It was argued by Mr. N.T. Vanamamalai, learned Counsel for the petitioner as follows:

(i) In this case there are not enough allegations to warrant ordering of re-counting, only on three grounds, namely where (i) Invalidation is wrong: (ii) Valid votes have been wrongly rejected and (iii) a bundle of 50 votes had been wrongly counted in favour of the revision petitioner.

(ii) In *A.V. Palaniswami Vs. V. Ramamurti and Others*, , which was a case arising under the Panchayat Act, re-counting was accepted because there was no provision for recount and for scrutiny of rejected votes in the Tamil Nadu Panchayat (Conduct of Election of President of Village Panchayat) Rules, 1970 and that was prior to coming into force of the Tamil Nadu Panchayats (Conduct of Election of Chairman of Panchayat Union Councils and Presidents and Members of Panchayats) Rules, 1978. Rule 38 provides for scrutiny and rejection of ballot papers. Rule 39 provides for rejection of ballot papers. Rule 40 lay down the procedure for counting of valid votes. Rule 41 stipulates the procedure relating to the recount of votes.

(iii) In this case it is clear that this procedure has not been followed. The application for recount was given only on 27.2.1986. Therefore, in so far as no re-counting was asked for, the first respondent cannot have it as a matter of course.

(iv) Even if a petition is filed for re-count, there must be specific allegations as laid down in *Jagjit Singh v. Kartar Singh* AIR 1966 S.C.733 therein, it has been held that vague or general allegations will not be enough to order re-count.

(v) The procedure now available under the Panchayats Act is very similar to what is available under the Representation of the People Act. On that basis, it has been held that the importance of maintaining secrecy of any election is necessary and referring to the decision in *Dr. Jagjit Singh Vs. Giani Kartar Singh and Others*, in *Shri Jitendra Bahadur Singh Vs. Shri Kirshna Behari and Others*, in paragraph 7 it had been held that a strong case must be made out for re-count. The practice of ordering re-count as a matter of course has been deprecated in *Chanda Singh Vs. Choudhary Shiv Ram Verma and Others*, and *R. Narayanan Vs. S. Semmalai and Others*, . In this case, by a reading of the order of the Tribunal, it is clear that it has gone on the footing that there will be no harm or prejudice if recount is ordered. That can hardly be a ground for re-count.

7. Mr. M.N. Padmanabhan, learned Counsel for the first respondent, the candidate who had been declared successful by the Tribunal says;

(i) This is a case in which both the parties agreed that all disputed votes should be recounted. No doubt, after the announcement of the votes polled by the candidates before the actual declaration of results, recount has not been asked for. But that does not mean that such a prayer could straightaway be rejected because this is a case in which Ex.A.1 notice was sent. Therefore, according to

the learned Counsel, one has to analyse whether the prayer for re-count proceeded on a mere suspicion and there cannot be any microscopic view as held in Chanda Singh Vs. Choudhary Shiv Ram Verma and Others, .

(ii) All the Supreme Court decisions laid down that the re-counting could be done only in the interests of justice. It was this ratio that was adopted in A.V. Palaniswami Vs. V. Ramamurti and Others, . To the same effect is the decision in Dr. Jagjit Singh Vs. Giani Kartar Singh and Others, and the decision in N. Gopal Reddy Vs. Bonala Krishnamurthy and Others, .

(iii) As regards the jurisdiction under Article 227, it is limited and it is not an appellate jurisdiction. Therefore, where in the interest of justice re-counting has been ordered, it cannot be interfered with.

8. In this case, re-counting has been prayed for on three grounds namely:

(i) Invalidation of votes was wrong;

(ii) Valid votes which ought to have been added to the tally of the present first respondent had been wrongly rejected; and

(iii) One bundle of 50 votes had been wrongly counted in favour of the returned candidate.

The procedure for re-counting, after the introduction of the Tamil Nadu Panchayats (Conduct of Election of Chairman of Panchayat Union Councils and Presidents and Members of Panchayats) Rules, 1978, is laid down by Rules 38 to 41. [After reproducing the text of Rules 38 to 41. His Lordship proceeded:]

9. It is clear on the admission of P.W.1 himself that no-recounting was asked for as per Rule 41. It is also corroborated by the evidence of the Returning Officer who was examined as R.W.1. But on that score I do not think that should the petitioner make out a valid case for re-count, his prayer in that regard must be rejected. In a case that arose prior to the introduction of the rules, namely, A.V. Palaniswami Vs. V. Ramamurti and Others, where the difference of votes was only 2 between the first respondent and the petitioner therein, the learned judge held as follows:

As far as the present case is concerned, the Election Court has, in its discretion, ordered recount. Further, as observed by me supra, there is no provision in the panchayat Election Rules analogous to the provisions contained in the conduct of Election Rules, 1961, framed under the Representation of the People Act, for recount and also for scrutiny of rejected votes. As far as the present case is concerned the allegations are specific, and not speculative as in the case covered by the decision of the Supreme Court I have noticed. In those circumstances, I do not think the Election Court was wrong in allowing the re-count in the interests of justice.

This decision was rendered prior to 1978. Presently the law is exactly the same as is obtainable under the Representation of the People Act. Having regard to the

above discussion, the question which requires to be determined is whether the election petitioner (the first respondent herein) had made out a strong case to direct recount. It has already been seen as to the grounds on which re-count could be asked.

10. The law on this aspect could be culled out from the following cases. In *Dr. Jagjit Singh Vs. Giani Kartar Singh and Others*, in paragraph 31 it has been observed as follows.

Vague or general allegations that valid votes were improperly rejected, or invalid votes were improperly accepted, would not serve the purpose which Section 83(1)(a) has in mind. An application made for the inspection of ballot boxes must give material facts which would enable the Tribunal to consider whether in the interests of justice, the ballot boxes should be inspected or, not. In dealing with this question, the importance of the secrecy of the ballot papers cannot be ignored, and it is always to be borne in mind that the statutory rules framed under the Act are intended to provide adequate safeguard for the examination of the validity or invalidity of votes and for their proper counting. It may be that in some cases, the ends of justice would make it necessary for the Tribunal to allow a party to inspect the ballot boxes and consider his objections about the improper acceptance or improper rejection of votes tendered by voters at any given election; but in considering the requirements of justice, care must be taken to see that election petitioners do not get a chance to make a roving or fishing enquiry in the ballot boxes so as to justify their claim that the returned candidate's election is void. We do not propose to lay down any hard and fast rule in this matter. Indeed to attempt to lay down such a rule would be inexpedient and unreasonable.

In *Shri Jitendra Bahadur Singh Vs. Shri Kirshna Behari and Others*, in paras 7 and 13 it has been observed as follows:

Para 7: The importance of maintaining the secrecy of ballot papers and the circumstances under which that secrecy can be violated has been considered by this Court in several cases. In particular we may refer to the decisions of this Court in *Ram Sewak Yadav v. Hussain Kamal Kidwai*, (1964) 6 S.C.R 238 and *Dr. Jagjit Singh Vs. Giani Kartar Singh and Others*, .

These and other decisions of this Court and of the High Courts have laid down certain basic requirements to be satisfied before an election tribunal can permit the inspection of ballot papers. They are: (1) That the petition for setting aside the election must contain an adequate statement of the material facts on which the petitioner rely in support of his case and (2) the tribunal must be prima facie satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary.

Para 13: We have earlier referred to the principles enunciated by this Court to be followed before ordering the scrutiny of ballot papers. The legal position in England is the same as in this country. In fact our election law is patterned on

the basis of the English Election Law. In Halsbury's Law of England (Vol.14 at Page 310, paragraph 559), it is observed:

The usual practice is for an application for a recount to be made by summons to a judge on the rota for the trial of parliamentary election petitions before the trial on an affidavit showing the grounds on which the application is based. A recount is not granted as of right, but on evidence of good grounds for believing that there has been a mistake on the part of the returning officer.

In Rogers on Elections (Vol. II at P.199), it is observed that an application for recount should be made by summons supported by affidavits showing grounds. Fraser in his Law of Parliamentary Elections and Election petitions observes at Page 222:

A strong case must be made on affidavit before an order can be obtained for inspection of ballot papers or counter-foils.

In Beliram Bhalaik v. Jai Behari Lal Khachi 1975 S.C. 289 in paragraph 45 it has been observed as follows:

Since an order for a recount touches upon the secrecy of the ballot, it should not be made lightly or as a matter of course. Although no cast-iron rules of universal application can be or has been laid down yet, from a beadroll of the decision of this Court, two broad guidelines are discernible: that the Court would be justified in ordering a recount or permitting inspection of the ballot papers only where: (i) all the material facts on which the allegations of irregularity or illegality in counting are founded, are pleaded adequately in the election petition: and (ii) the Court/Tribunal trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties. See Ram Sewak Yadav Vs. Hussain Kamil Kidwai and Others, , Dr. Jagjit Singh v. Giani Kartar Singh (1967)1 S.C.J. 762, Jitendra Bahadur Singh v. Krishna Behari (1970)1 S.C.C. 353 and Sutnitra v, Shri Shed Shankar Prasad Yadav (1973)1 S.C.J. 334.

11. It may be noted that in the last of cases cited, the other two decisions of the Supreme Court have also been relied on. In Chanda Singh v. Ch. Shiv Ram Varma (1976)1 S.C.J. 432, Head Note A reads as under:

Conduct of Election Rules (1961), Rule 63 -order for recount of ballot papers by Court-When permissible. If the counting of the ballots is interfered with by too frequent and flippant recounts by courts a new threat to the certainty of the poll system is introduced through the judicial instrument. Moreover, the secrecy of the ballot which is sacrosanct becomes exposed to deleterious prying if recount of votes is made easy. The general reaction, if there is judicial relaxation of this issue, may well be a fresh pressure on luckless candidates, particularly when the winning margin is only of a few hundred votes, to ask for a recount micawberishly looking for numerical good fortune or windfall of chance discovery of illegal rejection or reception of ballots. This may tend to a dangerous

disorientation which invades the democratic order by injecting wide-spread scope for reopening of declared returns, unless the Court restricts recourse to recount to cases of genuine apprehension of miscount or illegality or other compulsions of justice necessitating such a drastic step. The best surmise, if it be nothing more than surmise, cannot and should not induce the Judge to break open the ballot boxes. If the lead is relatively little and/or other legal infirmities or factual flaws hover around, recount is proper, not otherwise. In short, where the difference is microscopic, the stage is set for recount given some plus points of clear suspicion or legal lacuna militating against the regularity, accuracy, impartiality or objectivity bearing on the original counting. Of course, even if the difference be more than microscopic, if there is a serious flaw or travesty of the rules or gross interference, a liberal repeat or recount exercise, to check on possible mistakes in a fair exercise of power. The court should be reluctant to lend quick credence to the mud of partiality slung at counting officials by desperate and defeated candidates although, what is more important is the survival of the very democratic institutions on which our way of life depends.

In *R. Narayanan Vs. S. Semmalai and Others*, in paragraph 26, it has been held as follows:

Finally, the entire case law on the subject regarding the circumstances under which recount could be ordered was fully summarised and catalogued by this Court in the case of *Bhabhi v. Sheo Govind* 1975 S.C.R. Supp. 202 to which one of us (Fazali Ali, J.) was a party and which may be extracted thus:

The Court would be justified in ordering a recount of the ballot papers only where;

(1) The election petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are found:

(2) On the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting: and

(3) The Court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties.

12. From the above it is clear that a re-count cannot be ordered as a matter of course. There must be strong reasons for ordering the same. Otherwise, the secrecy of ballot cannot be maintained. So viewed, I am clearly of opinion that enough ground has not been made out to warrant an order of recount. The Tribunal after merely stating the allegations and the counter allegations and after referring to the evidence without rendering any finding proceeds that since Ex.A-1 had been issued within two days from the date of declaration of results, that would be a valid ground. Further, an order of re-count will not prejudice the parties. This is hardly a reasoning which could ever be accepted in law in the

light of the above rulings. However, Mr. M.N. Padmanathan, learned Counsel for the first respondent herein, has contended that no rigid views could be taken in matters of this kind. I am afraid that this cannot be pressed as a universal rule unless specific grounds have been made out. If the allegations in this case are vague and more so when it is established that there was no question of counting one bundle of 50 votes in favour of the revision petitioner, mere general allegations that invalidation is wrong or the votes polled by the first respondent have been wrongly counted in favour of the returned candidate would not be enough. More particulars are necessary; otherwise, if this were the yardstick, recounting will become a matter of course, which certainly is against all canons of election law. Therefore, the contention of Mr. N.T. Vanamamalai, learned Counsel for the revision petitioner, on this aspect has to be upheld.

13. The decision in Sukhad Raj Singh Vs. Ram Harsh Misra and Others, has no application to the facts of this case. That was a case wherein the parties agreed that the result of the election as declared by the Joint Registrar would be final. But here the question is more fundamental in that whether re-counting could be ordered at all. At this stage it is imperative to note what the parties agreed before the Tribunal and it is extracted below.

We the undersigned accept the result as found in the recounting held on 15.2.88 in the Public Court as order passed in the above petition.

This is far from saying that the parties agreed to recounting (emphasis supplied). The above extract merely means that the results as declared in the recounting would be accepted without any demur. But that is not the issue before the court.

13. Coming to the question of jurisdiction of this Court under Article 227 of the Constitution, In Khalil Ahmed Bashir Ahmed Vs. Tufelhussein Samasbhai Sarangpurwala, in paragraph (13) it has been held as follows:

... Where two views are possible and the trial court has taken one view which is a possible and plausible view, merely because another view is attractive, the High Court should not interfere with the finding of the trial Court under Article 227.

In my considered view, this ratio has no application to the facts of this case because there is no question of two views being possible. In the question whether the first respondent (election Petitioner) has made out a prima facie case for interference, the answer is in the negative. The order of the Tribunal will have to be set aside.

14. In Smt. Sumitra Devi Vs. Shri Sheo Shanker Prasad Yadav and Others, which also related to an election matter, it was held as follows:

The High Court was justified in rejecting the application for inspection. The allegations in the election petition were vague and the petition did not contain an adequate statement of the material facts. The evidence adduced by the appellant to prove the allegations was found unreliable. No definite particulars were also

given in the application for inspection as to the illegalities alleged to have been committed in the counting of the ballot papers. A recount will not be granted as a matter of right but only on the basis of evidence of good ground for believing that there has been a mistake in the counting. It has to be decided in such case whether prima facie ground has been made out for ordering an inspection.

So tested, in this case, I hold that no prima facie case has been made out for recount and the recount has been ordered by the Tribunal merely stating that no prejudice will be caused to the other side, as a matter of course. This is wrong and therefore; set aside the order of the Tribunal and dismiss the election petition. The Civil revision petition will stand allowed. However, there will be no order as to costs.