
(2008) 01 MP CK 0042
In the Madhya Pradesh High Court

Kamlesh Bai

APPELLANT

Vs

Upper Commissioner Bhopal and Hosangabad Division and
Others

RESPONDENT

Date of Decision : 16-01-2008

Acts Referred:

Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 — Section 122

Citation : (2008) ILR (MP) 465 : (2008) 2 MPHT 466 : (2008) 2 MPJR 134 :
(2008) 2 MPLJ 558

Hon'ble Judges : Rajendra Menon, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajendra Menon, J.

Challenging the order dated 03.04.07 Annexure P/1 passed by the Upper Commissioner, Bhopal and Hosangabad Division exercising powers of an Election Tribunal u/s 122 of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as "the Adhiniyam, 1993") and seeking quashment of the directions issued by the aforesaid order for recounting of 2173 invalid votes, petitioner has filed this petition.

Petitioner is an elected representatives having been elected in the election to District Panchayat, Vidisha from ward no.19. Election to the aforesaid post were held on 16.01.05 and it is stated that she was declared elected in the aforesaid election by a margin of 46 votes. Challenging the election of petitioner on various grounds, respondent no. 2 -Alpana Saxena filed a election petition u/s 122 of the Adhiniyam, 1993 and rules framed thereunder, on the basis of pleadings of the parties six issues were framed. For the purpose of deciding this petition, only issue no. 6 is relevant. Issue no. 6 pertains to the question of recounting prayed for by the respondent no. 2 in the election petition. The election petition was put to trial and has been decided by the impugned order. All the irregularities alleged by the respondent no. 2 in the election petition which were framed vide issues

no. 1 to 5, were negated and rejected. As far as the issue no. 6 with regard to recounting of votes is concerned, learned tribunal has rejected the prayer for recounting of all the votes but had ordered recounting of votes limited to the extent of 2173 votes that were declared as invalid and has directed for recounting of these votes.

Shri Pratip Visoria, learned Counsel representing the petitioner submitted that while directing for recounting of the invalid votes numbering 2173, learned tribunal has committed grave error in directing for recounting of votes in a very causal manner without following the principles of law applicable in this regard. Inviting my attention to the pleadings available, the grounds made by respondent no. 2 seeking recounting of the votes, reasons given by the tribunal in paras 6 and 7 directing for recounting, it was emphasised by Shri Visoria that grounds and reasons for recounting are not tenable under the law. Placing reliance on the following two judgments of the Supreme Court in the cases of Satyanarain Dudhani Vs. Uday Kumar Singh and Others, and Chandrika Prasad Yadav Vs. State of Bihar and Others, , Shri Visoria argued that without any basis and cogent material being available for directing recounting, order passed by the tribunal for recounting of votes is unsustainable and he prays for interference into the matter.

Refuting the aforesaid contention and submitting that recounting order is proper, does not warrant any interference, Shri Deepak Shrivatava, learned Counsel representing the respondent no. 2 prays for dismissal of this petition. Inviting my attention to the averments made by the respondent no. 2 in the election petition as contained in para 6, the application filed in the said election petitioner for recounting of votes as contained in Annexure R/2, learned Counsel for the respondent no. 2 submitted that as the order is only a order of remand to the Returning Officer for recounting of the invalid votes considering the margin of votes between the elected body and the defeated candidates being only 46, no case is made out for interference in the matter exercising discretionary relief. Accordingly, he prays for dismissal of this petition.

I have learned Counsel for the parties at length and perused the record.

Before advertng to consider the dispute involved in this petition, it would be appropriate to take note of the legal principles laid down by the Supreme Court in the matter of direction for recounting of votes in a election petition.

While considering the question of recounting of votes in a election petition filed under the Representatives of Public Act in the case of Shri Satyanarain Dudhani (supra), the Supreme Court has observed that recounting of votes cannot be permitted as a matter of course, it was held that secrecy of ballot papers cannot be permitted to be tinkered lightly. Recounting of votes it has been held by the Supreme Court has serious consequence and same can only be granted if grave illegality is pointed out. The Supreme Court has so dealt with in para 10 of the aforesaid judgment:

10. ...A cryptic application claiming recount was made by the petitioner respondent before the Returning Officer. No details of any kind were given in the said application. Not even a single instance showing any irregularity or illegality in the counting was brought to the notice of the Returning Officer. We are of the view when there was no contemporaneous evidence to show any irregularity or illegality in the counting. Ordinarily, it would not be proper to order recount on the basis of bare allegations in the election petition. We have been taken through the pleadings in the election petition. We are satisfied that the grounds urged in the election petition do not justify for ordering recount and allowing inspection of the ballot papers. It is settled proposition of law that the secrecy of the ballot papers cannot be permitted to be tinkered lightly. An order of recount cannot be granted as a matter of course. The secrecy of the ballot papers has to be maintained and only when the High Court is satisfied on the basis of material facts pleaded in the petition and supported by the contemporaneous evidence that the recount can be ordered.

Again in the case of Chandrika Prasad Yadav (*supra*), the question is considered in para 20, four conditions are indicated which are required to be fulfilled before directing for recounting of votes, the conditions are:

- (i) a prima facie case;
- (ii) pleadings 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.

Thereafter in para 21, the requirement for maintaining the secrecy of ballot papers is emphasised and the ground of narrow margin is considered and thereafter in paras 22, 23 and 24 the question is so considered:

22. In *M. Chinnasamy v. K.C. Palanisamy* this Court upon noticing a large number of decisions held that it is obligatory on the part of the Election Tribunal to arrive at a positive finding as to how a prima facie case has been made out for issuing a direction for re-counting holding: (SCC p. 358, para 42):

Apart from the clear legal position as laid down in several decision, as noticed hereinabove, there cannot be any doubt or dispute that only because a re-counting has been directed, it would not be held to be sacrosanct to the effect that although in a given case the court may find such evidence to be at variance with the pleadings, the same must be taken into consideration. It is now well-settled principle of law that evidence adduced beyond the pleadings would not be admissible nor can any evidence be permitted to be adduced which is at variance with the pleadings. The court at a later stage of the trial as also the appellate court having regard to the rule of pleadings would be entitled to reject the evidence wherefor there does not exist any pleading.

It was further held that for the said purpose the Tribunal must arrive at a finding that the errors are of such magnitude which would materially affect the result of the election. As regards stands of proof, this Court held:(SCC p. 359, para 44):

44. The requirement of laying foundation in the pleadings must also be considered having regard to the fact that the onus to prove the allegations was on the election petitioner. The degree of proof for issuing a direction of recounting of votes must be of a very high standard and is required to be discharged. (see Mahender Pratap v. Krishan Pal).

The order of the learned Munsif did not satisfy the statutory requirements. It is, therefore, clear from the aforesaid principles laid down by the Supreme Court that recounting of votes can be ordered only if good case on the basis of these principles are made out, roving and fishing inquiry on the basis of vague pleading is not permissible.

When the reasons given by the learned election Tribunal directing recounting of votes in the present case as contained in paras 6 and 7 of the impugned order are evaluated, it is seen that learned Tribunal while deciding issue no. 6 has held that in his comments the District Returning Officer has found that valid ballot papers were rightly counted, all the ballot papers which were found in accordance with rules were counted and only invalid ballot papers have been rejected. Learned Tribunal had directed for recounting of votes only because the margin of votes by which the petitioner is declared elected is 46 and the other defeated candidates respondents no. 2,3,5,6 & 8 appeared before the Election Tribunal and have accepted that 2173 votes were rejected. It is indicated by the Tribunal that as the number of rejected ballot papers is very high, interest of justice to all concerned would be met and it would be appropriate to direct recounting of this invalid votes. This Court is of the considered view that aforesaid reasons indicated by the learned Tribunal for directing recounting of votes is not permissible. The learned Tribunal has not taken note of the pleadings of the respondent no. 2 election petitioner in the election petition Annexure R/1 only vague allegations have been made, no specific irregularity is pointed out and no reason is given as to why and for what reasons petitioner is seeking recounting. It is the considered view of this Court that in the present case, recounting have been ordered in a very casual manner, in remanding the matter to Returning Officer back for recounting the principles of law have been ignored. The grounds indicated in paras 6 and 7 of the impugned order directing for recounting are not sufficient to direct recounting in a election petition on the basis of principles laid down by the Supreme Court. In the case of Chandrika Prasad Yadav (supra), relied upon by Shri Pratip Visoria reference is made to a earlier judgment of the Supreme Court in the case of M. Chinnasamy Vs. K.C. Palanisamy and Others, and after considering the principle laid down by the Supreme Court in para 42 of the said judgment it has been held that recounting could not be ordered without proper evidence and pleadings.

Evaluating the facts and circumstances of the present case and reasons given by

the learned Tribunal for directing recounting, in the back drop of these principles, I am of the considered view that Tribunal has committed grave error in directing recounting and the same being unsustainable, has to be and is accordingly quashed. As the complete pleadings, evidence of the parties and the applications for recounting and the orders of the Returning Officer on these applications, are not available before this Court, it would not appropriate for this Court to decide the question of recounting on merit, interest of justice would be met in case matter is remanded back to the Election Tribunal and issue no. 6 is directed to be decided afresh in accordance with law.

Accordingly, this petition is allowed. Finding recorded and direction contained in Annexure P/1 dated 03.04.2007 so far as it relates to decision on issue no. 6 is quashed, remaining part of the order being not challenged, is hereby upheld. Matter is remanded back to the Election Tribunal with a direction to decide issue no. 6 afresh after taking note of the pleadings of the parties, evidence and documents available on record in accordance to the principles of law as indicated hereinabove.

Petition stands allowed and disposed of with the aforesaid without any order so as to costs.