

(2009) 11 SC CK 0069

In the Supreme Court Of India

Case No : Civil Appeal No. 7701 of 2009 (Arising out of Special Leave Petition (Civil) No. 20515 of 2007)

Kattinokkula Murali Krishna

APPELLANT

Vs

Veeramalla Koteswara Rao and Others

RESPONDENT

Date of Decision : 23-11-2009

Acts Referred:

Andhra Pradesh Panchayat Raj (Conduct of Elections) Rules, 1994 — Rule 34(4)
Andhra Pradesh Panchayat Raj Act, 1994 — Section 233

Citation : AIR 2010 SC 24 : (2010) 10 AWC 1754 Supp : (2009) 14 JT 458 : (2010) 1 OLR 66 : (2009) 14 SCALE 123 : (2010) 1 SCC 466 : (2009) 15 SCR 1063 : (2010) 1 UJ 10

Hon'ble Judges : R. M. Lodha, J;D. K. Jain, J

Bench : Division Bench

Advocate : C. Mukund, Shashank Sharma, Avneesh Garg, Vandana Anand, Meera Mathur and Bijoy Kumar Jain, for the Appellant; CBN Babu, Renu Tyagi and Rameshwar Prasad Goyal, for the Respondent

Final Decision : Allowed

Judgement

D.K. Jain, J.—Leave granted.

2. Challenge in this appeal, by Special Leave, is to the judgment and order dated 27th September, 2007, rendered by the High Court of Judicature of Andhra Pradesh at Hyderabad. By the impugned judgment, the High Court has affirmed the order, dated 10th August, 2007, passed by the Principal Junior Civil Judge, Kovvur, (hereinafter referred to as "the Election Tribunal") in E.O.P. No. 7 of 2006, ordering re-count of the votes cast in the election for the post of Sarpanch of a Gram Panchayat.

3. Briefly stated, the material facts, giving rise to the present appeal are as follows:

Election to the post of Sarpanch of Gram Panchayat of Ravimetla Village, Nidadavole Mandal, West Godavari District in the State of Andhra Pradesh was

held on 2nd August, 2006. The appellant, the first respondent (hereinafter referred to as the "election petitioner"), and two others contested the election. Upon counting of votes, the appellant secured 552 votes and the election-petitioner, the nearest rival, got 550 votes. 67 votes were declared to be invalid. The election petitioner made a request to the Election Officer, respondent No. 4 in this appeal, for a re-count of the votes. His request was acceded to. In the re-count, the number of invalid votes was reduced to 65 as 2 votes were found to be valid, one each cast in favour of the appellant and the election petitioner. Thus, the difference of votes between the appellant and the election petitioner continued to be that of 2 votes. Accordingly, the appellant was declared as elected.

4. Being dissatisfied with the election result, the election petitioner filed an election petition before the Election Tribunal u/s 233 of the Andhra Pradesh Panchayat Raj Act, 1994. Paragraph 4 of the Election Petition, containing the grounds of challenge to the result, is in the narrative form and the relevant portion thereof reads thus:

The 5th respondent is the support (sic supporter) of the congress party. The election officials, the 3rd respondent and the police have been managed and so many corrupt practices have been taken place. The counting of the elections rejection of the votes and bundling of the votes were not property (sic properly) done. More than 50 votes belonging to the petitioner were wrongly rejected as invalid. Even though, the petitioner and his agents strongly opposed the same. The votes belonged to the petitioner were wrongly counted and inserted in the bundles of the 5th respondent. If the above illegalities and irregularities were not taken place, the petitioner would have got 606 votes and the 5th respondent would have got only 498 votes. Due to the above illegalities and corrupt practices, the result of the election was effected and the 5th respondent was wrongly declared as elected instead of declaring the petitioner as elected for the Sarpanch of Ravimetla Village Grama Panchayat. The petitioner also presented an application before the 3rd respondent requesting him to make recounting of the votes but the same was refused on 2.8.2006. No endorsement was given.

5. The election petition was contested by the appellant. Denying the allegation that the election officer had turned down the demand for re-count, it was stated that, in fact, two written representations were made by the election agents of the election petitioner and the same were accepted. After two re- counts, the report was compiled in Form No. 25 (sic 26) and signed by the Returning Officer. On the pleadings of the parties, the Election Tribunal framed the following issues:

1. Whether the counting of votes by the 3rd respondent was not according to the rules and regulations?
2. Whether the votes polled in favour of the petitioner were rejected as invalid and whether the votes polled in favour of the petitioner were mixed in the votes polled in favour of the 5th respondent?

3. Whether the petitioner is entitled for the relief of recounting of votes including the rejected votes?

4. Whether the petitioner is entitled for the relief of declaration that the election of the 5th respondent is to be declared as void?

5. If so, whether the petitioner is entitled for declaration that he has been duly elected as Sarpanch of Ravimetla Grama Panchayat?

6. To what relief?

6. Evidence was adduced by the parties. On behalf of the election petitioner, five witnesses, including the election petitioner himself, were examined and certain documents were exhibited. The appellant examined four witnesses including himself (RW2) and the Election Officer (RW1). Form No. 26, regarding the summary of the process of votes polled in favour of the candidates was also exhibited as (Ex.B1).

7. Upon consideration of the evidence, the Election Tribunal came to the conclusion that the election petitioner had failed to make any specific allegation as to on which table the votes polled in his favour were mixed with the votes polled in favour of the appellant and on which table the votes polled in his favour were rejected as invalid. The Election Tribunal also noted that admittedly in the election petition the election petitioner had not stated any material facts regarding the failure of the Election Officer to mention the reason for rejecting a vote, and, therefore, the evidence led by the election petitioner in this behalf, being beyond the pleadings, could not be relied upon. The Election Tribunal also rejected the contention of the election petitioner that there was non-compliance with Rule 34(4) of the Andhra Pradesh Panchayat Raj (Conduct of Elections) Rules, 1994, which provides for an endorsement by the word "Rejected" by the Election Officer on every rejected ballot paper, and thus the election result was not vitiated on that account. As regards the allegation of overwriting and corrections in Form No. 26 (Ex.B1), by the Election Officer, material for the present purpose, the Election Tribunal observed as follows:

In view of the above evidence on record, even though the petitioner did not aver the said material fact in the Election Petition that the Election Officer had made a number of corrections or over writings in Form No. 26 and thereby the Election result is vitiated, nor adduced any cogent evidence regarding the said corrections made in Ex.B1 even though the Ex.B.1 was filed before this Court along with the counter of the 1st respondent. I am of the considered opinion that heavy burden was there upon the 3rd respondent R.W.1 to have adduced cogent evidence before this Court as to the reasons why those corrections and over writings are made by him in Ex.B.1. But strangely neither in the counter filed by the 3rd respondent nor in chief examination affidavit of R.W.1 he has stated anything regarding the said corrections and over writings made by him in Ex.B.1. It is also an admitted fact that R.W.1 was not at all cross-examined, regarding the said corrections and over writings as appearing on Ex.B.1 but R.W.2 to 4 were cross-

examined regarding the said corrections and over writings made in Ex.B.1.

Thus, although the Election Tribunal noted that there was no averment in the election Petition regarding corrections and over- writings in the said Form nor any cogent evidence was led by the election petitioner in this behalf, yet it came to the conclusion that the Election Officer had failed to adduce evidence before the Tribunal to indicate the reasons why those corrections and over-writings were made in Form No. 26. The Tribunal held that since no prejudice would be caused to the appellant and re-counting of all the votes will re-determine the number of votes polled by the contesting candidates, including the election petitioner and the appellant, it was a fit case for re-count of ballot papers. The Election Tribunal answered issues No. 1 and 2 against the election petitioner and issue No. 3 in favour of the election petitioner and against the appellant. As regards issues No. 4 to 6, the Election Tribunal observed that these will be answered only after completion of re-counting of votes.

8. Aggrieved by the direction for re-count of ballot papers, the appellant preferred Civil Revision Petition before the High Court. As already stated, the High Court has dismissed the revision petition. The High Court has observed that though it is true that re-counting of votes cannot be resorted to as a matter of course and every endeavour should be made to protect the secrecy of ballots but at the same time suspicion surrounding the genuineness and correctness of the figures mentioned in the crucial document, such as Form No. 26, cannot be ignored, particularly when the difference between the successful and unsuccessful candidates is razor thin; viz. two votes; in the re- counting, two votes, which were initially declared invalid, were treated as valid and had those been, counted in favour of the election petitioner, the result would have tilted completely. Observing that on account of mere re-counting of votes, the appellant would not be put to any hardship, rather it would reinforce the transparency in the process, the High Court affirmed the direction given by the Election Tribunal and dismissed the revision petition preferred by the appellant. Hence the present appeal.

9. Assailing the decision of the Election Tribunal as also the High Court, Mr. C. Mukund, learned Counsel appearing on behalf of the appellant strenuously urged that the High Court committed a serious error of law in upholding the order passed by the Election Tribunal, directing re-count of the ballots. It was submitted that having decided the two material issues, viz. issues No. 1 and 2, in favour of the appellant, the authorities below were not justified in directing a re-count of the votes merely on the premise that no prejudice or hardship would be caused to either of the parties by such order of re-count. It was also argued that the High Court committed serious illegality in holding that the Election Officer had failed to show as to why corrections and over-writings were made by him in Form No. 26, when admittedly no material facts in this regard were stated in the election petition and even the onus to prove the allegation was on the election petitioner. In support of the proposition that an order of re-count cannot be on

the basis of general and bald allegations and the election petition must contain specific details regarding illegality or irregularity alleged to have been committed, learned Counsel relied on the decisions of this Court in *Vadivelu Vs. Sundaram and Others*, , *Mahendra Pal Vs. Shri Ram Dass Malanger and Others*, , *M. Chinnasamy Vs. K.C. Palanisamy and Others*, , *Baldev Singh Vs. Shinder Pal Singh and Another*, and *Pothula Rama Rao Vs. Pendyala Venakata Krishna Rao and Others*, .

10. Mr. C.B.N. Babu, learned Counsel appearing on behalf of the election petitioner, on the other hand, supporting the decisions of the Election Tribunal and the High Court submitted that sufficient material was brought on record by the election petitioner, on the basis whereof the Election Tribunal had correctly recorded its satisfaction that a case for re-count had been made out.

11. Before examining the merits of the issues raised on behalf of the parties, it would be appropriate to bear in mind the salutary principle laid down in the Election Law that since an order for inspection and re-count of the ballot papers affects the secrecy of ballot, such an order cannot be made as a matter of course. Undoubtedly, in the entire election process, the secrecy of ballot is sacrosanct and inviolable except where strong prima facie circumstances to suspect the purity, propriety and legality in the counting of votes are made out. The importance of maintenance of secrecy of ballots and the circumstances under which that secrecy can be breached, has been considered by this Court in several cases. It would be trite to state that before an Election Tribunal can permit scrutiny of ballot papers and order re-count, two basic requirements viz. (i) the election petition seeking re-count of the ballot papers must contain an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded, and (ii) on the basis of evidence adduced in support of the allegations, the Tribunal must be, prima facie, satisfied that in order to decide the dispute and to do complete and effectual justice between the parties, making of such an order is imperatively necessary, are satisfied. Broadly stated, material facts are primary or basic facts which have to be pleaded by the election petitioner to prove his cause of action and by the defendant to prove his defence. But, as to what could be said to be material facts would depend upon the facts of each case and no rule of universal application can be laid down.

12. In *Suresh Prasad Yadav Vs. Jai Prakash Mishra and Others*, , summarising the principles laid down by this Court from time to time in granting prayer for inspection of ballot papers and/or re-counting, a three-Judge Bench of this Court indicated the circumstances in which such a prayer could be considered. Speaking for the Bench, Sarkaria, J. observed as follows: (SCC pages 824-825)

...this Court has repeatedly said, that an order for inspection and recount of the ballot papers cannot be made as a matter of the course. The reason is two-fold. Firstly such an order affects the secrecy of the ballot which under the law is not to be lightly disturbed. Secondly, the Rules provide an elaborate procedure for

counting of ballot papers. This procedure contains so many statutory checks and effective safeguards against mistakes and fraud in counting, that it can be called almost trickery foolproof. Although no hard and fast rule can be laid down, yet the broad guidelines, as discernible from the decisions of this Court, may be indicated 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 founded;
- (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.

13. In *P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen and Others*, , the petitioner contested the election for the post of the President of a Panchayat in Tamil Nadu. In the election, the first respondent was declared elected and the petitioner challenged the election on the ground that while counting, the Returning Officer had wrongly treated some valid votes cast in favour of the petitioner as invalid votes and certain invalid votes were treated as valid votes which were cast in favour of the first respondent and that the Returning Officer had not permitted the petitioner's agents to have scrutiny of the ballot papers at the time of counting. The Tribunal, after recording the evidence of all candidates and the Assistant Returning Officer, ordered re-count of votes. On re-counting of votes, it was found that there was no difference in the number of votes secured by the petitioner but insofar as the first respondent was concerned he had secured only 528 votes as against 649 votes he was originally held to have secured. 121 votes cast in his favour had been found to be invalid votes. Based on the figures of the re-count, the election petitioner was declared duly elected as he had secured 28 votes more than the first respondent on re-count. This order was challenged by the first respondent in a civil revision petition before the High Court. The learned Single Judge allowed the revision petition and held that the Tribunal had erred in ordering a re-count of the votes when the petitioner had not made out a prima facie case for an order of re-count of votes cast. The order was challenged before this Court. Upholding the view taken by the High Court, it was held as under: (SCC p. 531)

13. Thus the settled position of law is that the justification for an order for examination of ballot papers and re-count of votes is not to be derived from hindsight and by the result of the re-count of votes. On the contrary, the justification for an order of re-count of votes should be provided by the material placed by an election petitioner on the threshold before an order for re-count of

votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek re-counting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the re-count of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or court should not order the recount of votes.

14. Yet again in Vadivelu's case (*supra*), a case pertaining to an election for the post of the President of a Village Panchayat in Tamil Nadu, the result was challenged on the ground of various irregularities in voting and counting. The difference of votes secured by the winning candidate and his nearest rival was only one vote. The election petition by the losing candidate was allowed by the Election Tribunal and a re-count was ordered. As a result, the election petitioner got 1002 votes and the elected candidate got only 975 votes. Revision petition filed against the order of the Tribunal was allowed by the High Court and it was held that a re-count ought not to have been ordered, because the election petition did not contain material facts and did not make out a prima facie case for re-counting. The election petition was, thus, dismissed. Affirming the decision of the High Court, a three-Judge Bench, speaking through K.G. Balakrishnan, J. (as His Lordship then was), expounded thus:

...Re-count of votes could be ordered very rarely and on specific allegation in the pleadings in the election petition that illegality or irregularity was committed while counting. The petitioner who seeks re-count should allege and prove that there was improper acceptance of invalid votes or improper rejection of valid votes. If only the court is satisfied about the truthfulness of the above allegation, it can order re-count of votes. Secrecy of ballot has always been considered sacrosanct in a democratic process of election and it cannot be disturbed lightly by bare allegations of illegality or irregularity in counting. But if it is proved that purity of elections has been tarnished and it has materially affected the result of the election whereby the defeated candidate is seriously prejudiced, the court can resort to re-count of votes under such circumstances to do justice between the parties.

15. Having viewed the matter in the light of the principles enunciated above, we are constrained to hold that the Election Tribunal as also the High court lost sight of the parameters to be applied while considering the petition seeking re-counting of votes. It is manifest from the afore-extracted paragraph 4 of the election petition, containing the grounds of challenge, the allegations regarding irregularity or illegality in the counting of votes were not only vague, even the basic material facts as could have made the Election Tribunal record a prima facie satisfaction that re-count of ballots was necessary, were missing in the petition.

It is pertinent to note that upon consideration of the evidence adduced by the parties, the Election Tribunal had itself observed that the election petitioner had failed to state any material facts regarding the failure of the Election Officer to mention reasons for rejection of votes and further there was no specific allegation as to on which table the votes polled in favour of the election petitioner were mixed with the votes polled in favour of the appellant; and on which table the votes polled in his favour were rejected as invalid. Precisely for this reason, and in our view rightly, the Election Tribunal had declined to take into consideration the evidence adduced by the election petitioner on the point. It is a settled principle of law that evidence beyond the pleadings can neither be permitted to be adduced nor such evidence can be taken into consideration. Moreover, even the two material issues, viz. as to whether the counting of votes by the Election Officer was in accordance with the rules and regulations as also whether the votes polled in favour of the election petitioner were rejected as invalid or there was improper mixing of the votes have been found in favour of the appellant. It is evident from the observations of the Election Tribunal, extracted in Para 7 above, that the sole factor which had weighed with it to order re-count was that no prejudice will be caused to the appellant if the ballot papers are re-counted. Similarly, the factor which weighed with the High Court to affirm the view of the Election Tribunal is that re-counting of votes will reinforce the transparency in the process of election, particularly when the margin of votes was very narrow. It needs to be emphasised that having regard to the consequences emanating from the direction of re-counting, which may even breach the secrecy of ballot, the doctrine of prejudice is an irrelevant factor for ordering re-count. Similarly, a narrow margin of votes between the returned candidate and the election petitioner does not per se give rise to a presumption that there had been an irregularity or illegality in the counting of votes. In the first instance, material facts in this behalf have to be stated clearly in the election petition and then proved by cogent evidence. Undoubtedly, the onus to prove the allegation of irregularity, impropriety or illegality in the election process on the part of the Election Officer is on the election petitioner and not on the Election Officer, as held by the authorities below. In the present case, both the forums below have found that material facts were lacking in the election petition. Having held so, in our view, the election petition should have been dismissed on this short ground alone. In that view of the matter, the observation of the Election Tribunal, as affirmed by the High Court, that the Election Officer had failed to say anything regarding corrections and over-writings in Form 26, are neither factually nor legally sound.

16. We are of the opinion that in the light of the afore-noted factual scenario and the fact that findings of the Election Tribunal on issues No. 1 and 2 were in favour of the appellant, except for a bald plea that some irregularities and illegalities had been committed in counting, there was no material on record on the basis whereof the Election Tribunal could have arrived at a positive finding that a case to order re-count of the ballot papers had been made out. For all

these reasons, we are convinced that the order of re-count passed by the Election Tribunal was illegal and the High Court erred in upholding it.

17. In view of the afore-going discussion, the appeal is allowed; the order passed by the Election Tribunal ordering re-count of the ballot papers, and affirmed by the High Court is set aside. The appellant shall be entitled to costs, quantified at Rs. 20,000/-.