
(2001) 05 MP CK 0043
In the Madhya Pradesh High Court
Case No : Writ Petition 2099 of 2000

Pooran

APPELLANT

Vs

The Election Officer, Janpad Panchayat and Others

RESPONDENT

Date of Decision : 17-05-2001

Acts Referred:

Madhya Pradesh Panchayat Election Rules, 1994 — Rule 73(2), 76, 76(1)
Madhya Pradesh Panchayat Election Rules, 1995 — Rule 80
Madhya Pradesh Panchayat Raj Adhiniyam, 1993 — Section 122
Madhya Pradesh Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 — Rule 3, 7, 8

Citation : (2001) 5 MPHT 477 : (2001) 2 MPJR 190

Hon'ble Judges : S.S. Jha, J

Bench : Single Bench

Advocate : Jitendra Maheshwari, for the Appellant; R.D. Jain and Sangam Jain, for the Respondent

Final Decision : Allowed

Judgement

S.S. Jha, J.

Petitioner has challenged the order passed by the Sub-Divisional Officer whereby he has allowed the election petition filed by respondent No. 3 Ram Niwas.

Petitioner was elected as Sarpanch of Gram Panchayat, Sirsod in the elections held in the year 1999-2000 under the Madhya Pradesh Panchayat Raj Adhiniyam, 1993. Respondent No. 3 was not satisfied with counting, therefore, he has filed an election petition u/s 122 of the Madhya Pradesh Panchayat Raj Adhiniyam, 1993 (hereinafter, referred to as Adhiniyam"). It was contended by the election-petitioner that he has contested the elections of Gram Panchayat, Sirsod for the post of Sarpanch. Spectacle was allotted as election symbol to him. It was alleged that it was decided that the counting shall not be held in the night on 1-2-2000 and shall be held on 3-2-2000 at Sheopur College by the election officer. Later on the election-petitioner and his agent returned back to their

home. After respondent No. 3 had gone to him, then counting was conducted by the election officer in presence of petitioner. The counting was conducted during night and there was no facility of electricity. Petitioner was declared elected by 16 votes. In spite of objection to the counting by the election-petitioner and prayer for recount, the election officer has refused to order recount. Therefore, the election petition was filed.

Notices were issued in the election petition and after notice and recording evidence directions for recount were given and in recounting respondent No. 3 has been declared election.

Counsel for the petitioner submitted that the election petition did not contain any ground for setting aside election under Rule 3 of the M.P. Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 (hereinafter, referred to as the "Rules"). There is no ground for filing petition for re-count. Without following the due procedure of law, elections could not be set aside.

Counsel for the petitioner referred to the judgment in the case of Smt. Ram Rati Vs. Saroj Devi and others, and submitted that under the Madhya Pradesh Panchayat Election Rules, 1994, the essential condition precedent for recount is that there must be an application in writing giving reasons in support thereof and in the absence of such application, the Court or the Tribunal is not empowered to direct recounting even after adduction of evidence and consideration of alleged irregularities in the counting.

This judgment relates election to the post of Sarpanch of Gram Panchayat Kaua Kothar Block Raipur, District Rewa which were held on 30-5-1994. In the election 223 votes were polled in favour of the appellant while 207 votes were polled in favour of the respondent. After declaration of the results, appellant in that case was declared as duly elected, respondent had filed an election petition. In the said petition it was alleged that the election was not properly conducted, an application for recount was made, but recount was refused. Evidence was adduced in support thereof. The Tribunal directed recount which has been affirmed by the High Court. On the question whether the respondent has made any application for recounting to the prescribed authority, it is simply recorded that from the evidence on record it is decided in order to adjudicate the dispute properly and administering justice to the parties that it is essential that recounting be got done, therefore, the Returning Officer (Panchayat) was directed to present himself in Court at 10.30 a.m. alongwith connected documents of the election. The Supreme Court referred to Rule 76 of the M.P. Panchayat Election Rules, 1994 and considering the scope of Rule 76 of the aforesaid Rules, the Supreme Court held that by application of Sub-rule (1) of Rule 76 after the completion of counting, the Returning Officer (Panchayat) or such other officers authorised by him shall record in the result-sheet, in forms mentioned in Sub-rule (2) of Rule 73, total number of votes polled by each candidate and announce the same. Under Sub-rule (2) after such announcement

has been made, a candidate or in his absence his election agent, may apply in writing to the Returning Officer (Panchayat) or such other officers authorised by him, for a recount of all or any of the ballot papers already counted, stating the grounds on which he demands such recount. Under Sub-rule (3) on such application being made, the Returning Officer Panchayat, or such other officers authorised by him, shall decide the matter and may allow the application in whole or in part or may reject it if it appears to him to be frivolous or unreasonable. Under Sub-rule (4) every decision of the Returning Officer (Panchayat) or such other officers authorised by him under Sub-rule (3) shall be in writing and contain the reasons thereof. The Apex Court held that it is difficult to give acceptance to the contention that the respondent made an application to the Returning Officer and the Returning Officer had not recounted. In the light of mandatory language of Rule 76 of the Rules, it is incumbent upon a candidate or an agent, if the candidate was not present, to make an application in writing and give reasons in support thereof while seeking recounting. If it is not done, then the Tribunal or the Court is not empowered to direct recounting even after evidence is adduced and on consideration of the alleged irregularities in the counting. The essential condition precedent is that application in writing should be made and the Returning Officer should pass an order with reasons in support thereof either to recall the order or otherwise, in writing. The fact that, the officer has not passed any order in writing would indicate that the respondent had not made any application. It is settled legal position that secrecy of the ballot should not be breached and as far as possible secrecy of the ballot should be maintained. In rare cases, the tribunal or the court is required to order recount, that too on giving satisfactory grounds for recounting. Thus, the Apex Court held that the Tribunal has committed manifest error in directing recount.

Petitioner then referred to the judgment in the case of *Vadivelu v. Sundamm and Ors.*, (2000 (7) Supreme 57) and submitted that it is held in this case that recounting 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 recount 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 recount 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 recount of votes under such circumstances to do justice between the parties.

Thus, counsel for petitioner stated that in a rare cases recount can be ordered.

Counsel for petitioner then referred to another judgment in the case of *V.S. Achuthanandan v. P.J. Francis and Anr.* (2001) 3 SCC 81 and submitted that the

Court must examine the pleadings and on examination of the pleadings, if material is available on record anterior to actual re-count did not justify grant of the prayer for inspection and re-count. He submitted that there must be prima facie proof of a availability of grounds and in the absence of specific pleadings, on orders for re-count could be passed, and if any recounting is done that is invalid and the petition deserves to be allowed.

Counsel for petitioner then referred to the judgment in the case of P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen and Others, and submitted that an order of recount of votes must stand or fall on the nature of the averments made and the evidence adduced before the order of recount is made and not from the results emanating from the recount of votes. The settled position of law is that justification for an order for examination of ballot paper and recount of votes is not to be derived from hind sight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election-petitioner on the threshold before an order for recount 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. Right of a defeated candidate to assail the validity of an election result and seek recounting 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 prima facie case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or Court should not order the recount of votes.

This Court in the case of Uday Singh v. Himmat Singh and Ors. (1999 (1) MPLJ 200) has held that the election petitions should be tried by some judicial officer or by an officer higher than the Sub-Divisional Officer and it is for the Legislature to decide the issue. Elections once held be set aside on the basis of election petition found worthy to be allowed. The order of recount cannot be passed on mere asking, issue should be framed and the question should be decided after leading evidence. Secrecy of votes cannot be lightly interfered with.

Counsel for respondent No. 1 submitted that in the present case, specific issues were framed that counting was done behind the back of the respondent-election petitioner and there was no light. The present petitioner has chosen not to contest the petition. Though he has filed his written statement, but he did not make any effort to examine the witnesses. Since he was proceeded exparte, the tribunal was left with no option, but to decide the case ex parte from the evidence on record and the Tribunal was justified in ordering recount.

Counsel for the respondent No. 3 then referred to the judgment in the case of Smt. Basanti Das Vs. Smt. Kamala Nayak and Others, . In this case, both the candidates have secured equal number of votes. The Presiding Officer declared the petitioner to be elected by resorting to lot. The dispute related to number of

votes secured by candidates and whether any valid vote of opposite party was rejected while accepting invalid votes in favour of petitioner, the Court held that it cannot be effectively adjudicated without recounting of votes and consent of the parties for draw of lots cannot operate as estoppel.

In the case of *Gendalal v. Narayan Acharya* (1981 MPLJ 163) it is held that in an election petition recounting of votes can be ordered when averments of illegalities in counting of votes are specifically pleaded.

Counsel for respondent No. 3 also referred to the judgment in the case of *I I. Vikheshe Sema Vs. Hokishe Sema*, . In this case, it is pleaded that there was improper reception of void votes materially affecting the election, It is held that where number of void votes polled appearing to be more than the difference of votes polled by the returned candidate and the defeated candidate, the High Court should examine the ballot papers to ascertain the void votes. It was therefore, directed for recount of votes in order to find whether reception of void votes materially affected the results of the election so far as it concerned the returned candidate.

In the present case, it is an admitted position that there is no evidence on record to demonstrate that any application for recount was filed before the Returning Officer. Copy of the election-petition is filed as Annexure P-3. It is alleged in the petition that it was decided not to hold counting in the night and later on votes were counted in the night and respondent No. 3 was declared elected by 16 votes. When the election-petitioner learnt about it, he raised objections and requested for recounting, but recounting was refused.

There is nothing in the election-petition that application for recount was filed by the election petitioner under Rule 80 of the M.P. Panchayat Election Rules, 1995. In the absence of such practice, recount could not be ordered.

Even otherwise, on going through the order-sheets recorded by the Prescribed Authority i.e. the Sub-Divisional Officer, it discloses that he has not followed the procedure prescribed under the law. He has not cared to see that election officer of the Janpad Panchayat, Sheopur and Election Officer of Gram Panchayat Sirsod are not necessary parties in the election petition. Rules are specific and it provide parties to election petition. Returning Officer or Election Officer are not necessary parties and the tribunal should have ordered for deletion of their names, but instead of deleting the names of respondent Nos. 1 and 2, the Prescribed Authority directed after filing of the petition for noticing Chief Executive Officer of the Janpad Panchayat. On 20-2-2000 again further directions were given to send fresh letter to Chief Executive Officer. On 15-3-2000 record was not received from the Chief Executive Officer, therefore, he was further ordered to send the records. On 6-4-2000, it is mentioned that counsel for the parties were present and records from the Tehsildar Sheopur were not received, hence memo be sent to him and the respondents be noticed. On 24-5-2000 it is mentioned that the election records were received from the Tehsildar but respondent No. 2 is not

served. On 22-6-2000 it is mention that the Presiding Officer respondent No. 2 and H.L. Dhaulpariya were present. They were supplied copies of the election petition and they have submitted their reply. Then orders were passed for recording evidence. On 28-6-2000 the case was again adjourned for evidence and notices were issued for evidence. On 29-7-2000, present petitioner's counsel moved an application alongwith Vakalatnama and time was granted to file written-statement. Written statement was filed and immediately after filing of the written-statement without framing issues evidence of election-petitioner's witnesses was recorded and the witnesses were discharged. Then the case was adjourned from time to time. Respondent was not appearing and lateron his right to cross-examine the witnesses and adducing evidence was closed and arguments were heard. After hearing the arguments, the Presiding Officer has directed recounting.

There is nothing on record to demonstrate that application was filed by the election-petitioner before the counting officer praying for recounting. In the absence of such application, normal procedure followed by the Authority itself demonstrates that there was no application of mind by the Authority in directing re-count. In the case of Uday Singh (supra) it is held that after the reply is filed, issues must be framed and after framing issues the tribunal shall decide the election petition. In the present case, the case was fixed for evidence without directing the parties to file written-statement. On the contrary the Prescribed Authority has directed the counting officer to remain present in Court, which could not be ordered by him. The counting officer could be called as witness by either of the parties. Immediately after filing of the written-statement evidence was recorded the very same day without considering the objections raised in the written-statement. The procedure followed by the Prescribed Authority i.e. the Sub-Divisional Officer discloses that he has already made up his mind to determine the issue. He has not cared to see whether necessary parties are impleaded and proper opportunity is provided to the returned candidate. He has also not cared to examine the petition whether it is in conformity with Rules 3 and 7 of the Rules. Rule 8 of the Rules provides that on failure to comply with Rules 3 and 7 the petition shall stand dismissed. There was no direction by the election officer for inspection of rejected ballot papers yet a conclusion was drawn that number of rejected ballot papers is such which requires recounting. If the petitioner was declared elected by 16 votes the election cannot be set aside only on the ground that the counting was conducted in the light of petromax and tractor's light. None of the counting officers was examined to prove that the light was insufficient for counting Petitioner himself has mentioned that when he learnt that the counting of votes is going on, he reached the spot and prayed for recounting, but there is no application on record that any recounting, was prayed. The Prescribed Authority has called for the records, but he has not cared to see the records before ordering re-count.

Records of the election petition have been called by this Court and on perusal of the order-sheets, it appears that after filing of the election petition, directions

were given to serve the respondents through Chief Executive Officer, Janpad Panchayat and for requisitioning the records of the election. Then the case was adjourned from time to time and record was received on 24-5-2000. It was further recorded that the respondent No. 2 is not served and fresh notice be issued. Respondent No. 2 Could not be served then again fresh notices were directed to be issued through Chief Executive Officer to respondent No. 2. Election Officer, Gram Panchayat, Sirsod. On 22-6-2000 Polling Officers of the Polling Booth were present but the election officer did not appear. Some reply was filed by them and there after notices were issued for adducing evidence by the parties. Thus from entire order-sheets, it is found that there was no direction to file written-statement to the returned candidate. Even otherwise, election petitioner has claimed that he should be declared elected, in that event, all the candidates who have contested the elections were necessary parties to the election petition. But there is nothing on record that petitioner and respondent No. 3 alone have contested the elections. The Prescribed Authority has not assigned any reason and has not even cared to see the election rules. If the election rules are not followed which is mandatory requirement and application for recount was not filed, recount cannot be ordered as held in the case of Ram Rati (Smt.) (supra). Though the recounting has been done and the elections have been set aside, but any improper order contrary to law without following the procedure of law is bad in law and cannot be upheld.

Before parting with the order, it is necessary to mention that this Court is finding in number of cases that the Prescribed Authority is directing recount as a matter of course, which is not permissible under the law. Secrecy of the ballot is sacrosanct and it has to be maintained. Thus, the Government should appoint officers who are well versed with law, or should train the officers with the rules of election petitions, rules pertaining to elections and the Panchayat Act. It is seen that the Prescribed Authority trying the election petitions are shirking its responsibility by ordering recount ignoring the basic principle of democracy that secrecy of the ballot is sacrosanct. In the democracy, orders for recount cannot be passed lightly; it is to be ordered in rare cases to the satisfaction of the Prescribed Authority that recount is necessary. Unless application for recount is filed before the returning officer and it is rejected or no orders are passed, recount cannot be ordered. The Supreme Court in the case of Ram Rati Smt. (supra) has considered the provisions of Rule 76 of the M.P. Panchayat Elections Rules, 1994. The language of Rule 76 of the M.P. Panchayat Election Rules, 1994 is identical to the language of Rule 80 of the M.P. Panchayat Nirvachan Niyam, 1995. As such in the light of the judgment of the Supreme Court in the case of Ram Rati Smt. (supra) recount could not be ordered.

In the result, the petition succeeds and is allowed with costs. The order passed by the Sub-Divisional Officer, Sheopur is set aside. Counsel's fee as per schedule.