
(2008) 05 OHC CK 0055
In the Orissa High Court

Prasanta Nayak

APPELLANT

Vs

B.D.O. and Others

RESPONDENT

Date of Decision : 12-05-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 1, Order 6 Rule 2

Citation : (2008) 2 OLR 226

Hon'ble Judges : A.S. Naidu, J

Bench : Single Bench

Final Decision : Allowed

Judgement

A.S. Naidu, J.—The order dated 12th February, 2008 passed by the learned Civil Judge (JD), Jajpur rejecting the petition of the petitioner for recounting the ballot papers in E.P. No. 1 of 2007 is assailed in this Writ Petition.

2. Shorn of unnecessary details the facts relevant for appreciation of the inter se dispute are as follows:

In consonance with a Notification Issued by the State Government of Orissa, election for the post of Sarpanch, Erbank Grama Panchayat in the district of Jaipur was held on 17th February, 2007. The petitioner as well as opposite parties 2 and 3 filed their respective nominations and contested the election. The petitioner polled 1390 votes whereas opposite party No. 2 polled 1375 votes. Alleging certain illegalities in course of counting and rejection of some valid votes polled in favour of opposite party No. 2 vis-a-vis counting of some invalid votes in favour of the petitioner, a petition was filed for recounting of votes. The said petition was allowed and on recounting, 28 votes which had been rejected were counted in favour of opposite party No. 2, and 8 votes in favour of the petitioner. After recounting, opposite party No. 2 was declared elected.

Alleging certain illegality in the process of recounting of votes, the petitioner had earlier approached this Court in WP(C) No. 2217 of 2007. This Court observing that disputed questions of fact were involved in the matter declined to grant the

relief sought by the petitioner. Thereafter the petitioner filed the aforesaid Election Petition before the Court below challenging the election of opposite party No. 2 in consonance with the Orissa Grama Panchayat Act.

3. In different paragraphs of the Election Petition, the petitioner has specifically alleged the illegalities and irregularities to have been committed in the process of counting of votes. Opposite party No. 2 filed his objection. A copy of the Writ Petition filed earlier by the petitioner was also filed. In course of hearing of the Election Petition the petitioner filed a petition praying for verification and recounting of the used ballot papers. Citing instances of illegalities and irregularities committed during the counting, the petitioner prayed for booth-wise recounting of the used ballot papers. He specifically averred in that petition that the Election Officer had counted some rejected votes cast in some of the Wards in favour of opposite party No. 2 and rejected some valid votes cast in favour of the petitioner.

The said petition was resisted by opposite party No. 2 by filing objection. Relying on the averments made in different paragraphs of the earlier Writ Petition opposite party No. 2 contended that there was a lot of variation between the facts stated therein and the facts stated in the Election Petition which revealed that the petitioner was not sure about the actual facts and was trying a roving enquiry to be made.

4. The Court below after hearing the learned Counsel for the parties and relying upon a decision of the Supreme Court in the case of Sadhu Singh v. Darshan Singh reported in 2006 (II) OLR 569, held that the following factors were to be kept in mind while dealing with a petition for recounting of votes:

- (i) Prima facie case must be established;
- (ii) Material facts must be pleaded stating irregularities in counting of votes;
- (iii) A roving and fishing enquiry shall not be directed by way of an order for recounting of votes;
- (iv) An objection to the said effect should be raised; and
- (v) Secrecy of ballot papers should be maintained.

The Court below thereafter proceeded to compare the averments made in the earlier Writ Petition with that made in the Election Petition and came to the conclusion that there being a lot of variations the petitioner appeared to have taken evasive stand and that the conduct of the petitioner revealed that he wanted a roving and fishing enquiry through recounting of the used ballot papers and accordingly by the impugned order rejected the said petition.

5. Accordingly to Dr. Rath, learned Counsel for the petitioner, the conclusions arrived at by the Court below were not justified and were based on mere surmises and conjectures. He submitted, rather forcefully, that while considering the petition filed by the petitioner for recounting of used ballot papers, the

Court below was required to peruse the facts stated in the Election Petition and that in the petition for recounting and to arrive at a conclusion as to whether a prima facie case was made out or not. Comparing the averments made in the earlier Writ Petition as well as the averments made in the Election Petition, Dr. Rath submitted that the Court below wrongly came to the conclusion that as there were variations and that, the petitioner was not sure of the correct facts and the petition filed by him for recounting of used ballot papers was aimed at making a roving enquiry which was in fact not correct. It was submitted that the petitioner has not made specific pleading but also adduced cogent evidence to make out a prima facie case.

6. Mr. JR. Dash, learned Counsel appearing for opposite party No. 2, on the other hand, submitted that the petitioner was bound by the averments made by him in the earlier Writ Petition. The specific figures given in the Writ Petition with regard to booth-wise irregularities allegedly committed did not tally with the figures given in the Election Petition which clearly revealed that the petitioner was, not sure of the exact facts and such action was nothing but an attempt for roving enquiry. Mr. Das further submitted that the Court below has rightly appreciated the facts and law on the subject and the impugned order may not be interfered with.

7. I have heard learned Counsel for the parties at length and perused the reasonings given in the impugned order. Fact remains, at the very threshold the petitioner had approached this Court in the Writ Petition referred to above. After disposal of the said Writ Petition he preferred the Election Petition. The averments made in the Writ Petition cannot be considered as pleadings so far as the Election Petition is concerned. The Writ Petition having been marked as an exhibit, the evidentiary value of the contents of the Writ Petition has to be considered along with other evidence that will be adduced in course of hearing of the Election Petition. On the other hand, the averments made in the Election Petition have to be considered as pleadings.

8. The word "pleading" has been defined under Order 6, Rule 1 of the CPC to mean "plaint" or "written statement". In consonance with Order 6, Rule 2 of the said Code, every pleading shall contain only material facts and the relief sought and not the law or the particulars of the statute under which the claim is made. While considering as to whether the petitioner has made out a prima facie case or not the Court below was required to peruse the pleadings. At that juncture it will not be open to a Court to adjudge as to whether the facts pleaded in the Election Petition are correct or not. That stage will come only after hearing. That apart, perusal of the deposition of the contesting opposite party who was examined as a witness reveals that he had stated that as per the recounting he secured 1402 votes; whereas the petitioner secured 1398; and 83 votes were rejected. Due to recounting he got 28 more votes. He further stated that the said 28 ballot papers contained seal on "Fish" symbol and seal on other symbols having no candidates. It is further admitted that in booth No. 11, one ballot

paper having seal on "Sun" symbol was counted in his favour. This statement made on solemn affirmation before Court leads to the conclusion that in fact there was illegality during counting, inasmuch some ballot papers which were to be rejected according to rules had been counted.

9. Law is well settled that a Court has to decide a case on the basis of the materials available on record and technicality should not stand in the way of a just decision. It should always be kept in mind that justice must not merely be done but it must always appear to have been done. Considering the facts and circumstances as discussed above, this Court feels that the ingredients necessary for a recount of the ballot papers as laid down by the Supreme Court are also very much satisfied and a prima facie case is made out and that it is a fit case where to arrive at the truth recounting of ballot papers will be very much necessary. For the foregoing discussions, this Court allows the Writ Petition, quashes the impugned order Annexure-1 and directs the Court below to call for the used ballot papers from the authority concerned and recount the same in accordance with law.