

(2006) 09 MP CK 0001

In the Madhya Pradesh High Court

Case No : Writ Petitions No. 7633, 9419 of 2005 and 3422 of 2006

Rafik Khan

APPELLANT

Vs

Sub-Divisional Officer-cum-Prescribed Authority and Others

RESPONDENT

Date of Decision : 04-09-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 15, 128(1), 94
Conduct of Elections Rules, 1961 — Rule 93
Madhya Pradesh Panchayat Nirvachan Niyam, 1995 — Section 122

Citation : (2008) 1 JLJ 244

Hon'ble Judges : K.K. Lahoti, J

Bench : Single Bench

Advocate : Umesh Trivedi, K.L. Pandey, Awadhesh Gupta, for the Appellant;
Sanjay Sharma, Ravindra Bisen, Rahul Jain and Sunita Verma, for the Respondent

Judgement

K.K. Lahoti, J.—This batch of Petitions is decided by this order as the question involved in all the cases is common. All the Petitions are being filed on the ground that in the election Petition filed against the returned candidate, whether a recounting may be directed without recording evidence and satisfaction of the Election Tribunal that recounting is justified. Or where the recounting has been held in compliance of the order passed by the Tribunal in the aforesaid circumstances, and the result of election has changed, whether the order which has been passed without recording evidence and satisfaction of the Tribunal may be interfered in writ jurisdiction.

2. In WP No. 7663/2005 (Rafik Khan v. Sub-Divisional Officer, Waraseoni and Ors.), Petitioner Rafik Khan has challenged order dated 30.7.2005 by which the Election Tribunal directed recounting. The Petitioner was proceeded ex parte as he has failed to appear before the Election Tribunal after receiving the notice. Thereafter, the Election Tribunal by order dated 19.7.2005 after proceeding ex parte against the Petitioner considered the pleadings, record and found that recounting appears to be necessary and directed recounting. The recounting was held on 25.7.2005, the result of election changed and the Petitioner who was a

returned candidate, his election was declared as void and Respondent No. 2 Jameel Ahmad declared as the returned candidate by a margin of 3 votes for the office of Panch of Ward No. 18, Gram Panchayat Pandharwani.

3. In WP No. 3422/2006 (Sevan Shah v. State of MP. and Ors.) Petitioner Sevan Shah has challenged the order dated 22.2.2006 of Election Tribunal-cum-Sub-Divisional Officer, Amarwada in Election Petition No. 6-A-89(21) 2004-05. In this case the Election Tribunal after receiving the reply filed by the returned candidate considered the matter on the basis of pleading and documents and directed the returning officer to remain present alongwith record of election. Thereafter recounting was held and in the recounting, Petitioner Sevan Shah who was a returned candidate, his election was set aside and Respondent Ravikar Shah was declared as a returned candidate with a margin of 5 votes.

4. In WP No. 9419/2005 (Brijlal v. Shri Man Singh and Ors.), Petitioner Brijlal has challenged order dated 22.8.2005 by the Election Tribunal-cum-Sub-Divisional Officer, Naihar, District Balaghat Annexure P-4, by which the Election Tribunal after serving notice of the election Petition to Respondents sent for the record of the election. The returned candidate filed the reply. The Election Tribunal considered the reply of Petitioner and other Respondents and on the basis of pleadings and documents filed by the parties directed recounting of votes. In compliance of order passed by the Election Tribunal the recounting was done and the Petitioner Brijlal who was a returned candidate, his election was set aside and Respondent Man Singh was declared as a returned candidate with a margin of 12 votes. In the recounting the result of election was changed.

In all the cases no evidence was recorded by the Election Tribunal and the case was decided on the basis of pleading and documentary evidence produced by the parties.

5. The Petitioners have challenged the order passed by the Election Tribunal on the ground that the Tribunal without considering the pleading, recording the evidence directed recounting, which order is not sustainable under the law. It is submitted that the legal position has been settled by the apex Court that without recording satisfaction by the Election Tribunal that too after considering the pleading, the evidence and material on record, the recounting shall not be directed. On the aforesaid grounds the Petitioners challenged the impugned order passed by the Election Tribunal.

Per contra, learned Counsel for Respondents/election Petitioners supported the order passed by the Election Tribunal on the ground that infact there was serious illegality and irregularity in the counting process and the Election Tribunal considering the allegations made in the Petition and material produced before it has rightly directed for recounting. After passing of the order of recounting in the matter, recounting has been held, in which the result of election has substantially changed. The result of recounting reflects that infact there was serious illegality in the counting, which has been corrected by the Election Tribunal by passing the

impugned order. It is submitted that there is no jurisdictional error in the impugned order warranting interference of this Court. Even if there is some procedural irregularity, then it cannot be looked into after the result of recounting has come on record.

6. The parties in support of their contention have placed reliance to the following judgments of apex Court :

1. Ram Sewak Yadav Vs. Hussain Kamil Kidwai and Others, ;
2. H.D. Revanna Vs. G. Puttaswamy and Others, ;
3. Mahendra Pal Vs. Ram Dass Malanger and Others, ;
4. Vadivelu Vs. Sundaram and Others, ;
5. P.H. Pujar Vs. Kanthi Rajashekhar Kidiyappa and Others, ;
6. Sohan Lal Vs. Babu Gandhi and Others, ;
7. T.A. Ahammed Kabeer Vs. A.A. Azeez and Others, ;
8. Jibontara Ghatowar Vs. Sarbananda Sonowal and Others, ;
9. Hohila Tiwari v. State of Bihar and Ors. (2005) 12 SCC 342;

Following judgments of this Court:

1. Gayatri Bai (Smt.) v. Alka Sharma 1997(II) MPWN 98;
 2. Chandrawati (Smt.) v. Smt. Vijay Rajkumari and Ors. 2003 (2) JLJ 232;
 3. Mubarak Master Vs. Hansraj Tanwar and Others, ;
7. Before proceeding further it will be appropriate to refer certain provisions of M.P. Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as "Act" for short), and M.P. Panchayat Nirvachan Niyam, 1995 (hereinafter referred to as "Nirvachan Niyam" for short). The relevant section of "Act" is Section 122, which is reproduced as under:
122. Election Petition - (1) An election under this Act shall be called in question only by a Petition presented in the prescribed manner :
- (i) in case of Gram Panchayat or Gram Sabha to the Sub-Divisional Officer (Revenue);
 - (ii) in case of Janpad Panchayat to the Collector; and
 - (iii) in case of Zila Panchayat to the Divisional Commissioner and not otherwise.
- (2) No such Petition shall be admitted unless it is presented within thirty days from the date on which the election in question was notified.
- (3) Such Petition shall be inquired into or disposed of according to such procedures as may be prescribed.

The relevant rules under "Nirvachan Niyam" are as under :

77. Counting of votes - (1) Every ballot paper which is not rejected under Rule 76 shall be counted :

Provided that no cover containing tender ballot papers shall be opened and no such ballot paper shall be counted.

(2) After the counting of votes in respect of a polling station has been completed, the Returning Officer or such other officer authorised by him, shall make the entries in result sheet in Form 16 for Panchas and in Part one of the result sheet in Form 17, 18 and 19 for Sarpanch, Members of Janpad Panchayat and Zila Panchayat respectively and announce the total number of votes polled by each candidate.

(3) All valid ballot papers shall be bundled together and kept along with the bundle of rejected ballot papers in a separate packet which shall be sealed and on which shall be recorded the following particulars, namely :

(a) the number of the ward and name of Gram Panchayat in case of election of Panch, the name of Gram Panchayat in case of election of Sarpanch, the number of constituency of Janpad Panchayat or Zila Panchayat as the case may be, in case of election of Member of Janpad Panchayat or Zila Panchayat;

(b) the number and name of the polling station where the ballot papers have been used; and

(c) the date of counting.

78. Counting to be continuous - The Returning Officer or such other officer authorised by him, shall as far as practicable, proceed continuously with the counting of votes and shall, during any intervals when the counting has to be suspended, keep the ballot papers, packets and other papers relating to the election sealed with his own seal and the seals of such candidates or their election or counting agents as may be desirous of affixing their seals and shall cause adequate precautions to be taken for their safe custody during such intervals.

80. Recount of votes - (1) After an announcement has been made by the Returning Officer or such other officer authorised by him, of the total number of votes polled by each candidate under Sub-rule (2) of Rule 77, a candidate or, in his absence, his election agent or his counting agent may apply in writing to the Returning Officer or such officer authorised by him, for a recount of all or any of the votes already counted, stating the grounds on which he demands such recount.

(2) On such an application being made the Returning Officer or such other officer authorised by him shall decide the matter and may allow the application in whole or in part or may reject it in toto if it appears to him to be frivolous or unreasonable.

(3) Every decision of the Returning Officer or such other officer authorised by him, under Sub-rule (2) shall be in writing and contain the reasons therefor.

(4) If the Returning Officer or such other officer authorised by him, decides under Sub-rule (2) to allow an application either in whole or in part, he shall :

(a) count the ballot papers again in accordance with his decision;

(b) amend the result sheet to the extent necessary after such recount; and

(c) announce the amendment so made by him.

(5) After the total number of votes polled by each candidate has been announced under Sub-rule (2) of Rule 77 or Sub-rule (4) the Returning Officer or such other officer authorised by him shall complete and sign the result sheet and no application for a recount shall be entered thereafter :

Provided that no step under this Sub-rule shall be taken on the completion of the counting until the candidates and election agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by Sub-rule (1).

(6) The counted ballot papers shall be bundled and kept in the manner mentioned in Sub-rule (3) of Rule 77.

(7) Result sheets in Form 16, 17, 18 and 19 for Panch, Sarpanch, Member of Janpad Panchayat and Member of Zila Panchayat respectively, prepared by such other officers as are authorised by the Returning Officer, shall be submitted by them, in separate envelopes to the Returning Officer for compilation and tabulation of votes polled by each candidate.

(8) The Returning Officer on receipt of result sheets under Sub-rule (7) shall enter or cause to be entered the total number of votes polled by each candidate contesting for a seat of Sarpanch, Member of Janpad Panchayat or Member of Zila Panchayat at each polling station of the concerned constituency in subsequent part of parts of form 17,18 and 19 respectively and complete and sign the result sheet.

8. Now the law laid down by the apex Court is to be referred. In Ram Sewak Yadav (supra), the apex Court held that the Election Tribunal is having power for the production of ballot papers and their inspection, but the aforesaid power is to be used on certain condition to be fulfilled. The apex Court held thus :

An election Petition must contain a concise statement of the material facts on which the Petitioner relies in support of his case. If such material facts are set out the Tribunal has undoubtedly the power to direct discovery and inspection of documents with which a civil Court is invested under the CPC when trying a suit. But the power which the civil Court may exercise in the trial of suits is confined to the narrow limits of Order 11. Code of Civil Procedure. Inspection of documents under Order 11 CPC may be ordered under Rule 15, of documents

which are referred to in the pleadings or particulars as disclosed in the affidavit of documents of the other party and under Rule 18(2) of other documents in the possession of power of the other party. The Returning Officer is not a party to an election Petition and an order for production of the ballot papers cannot be made under Order 11 Code of Civil Procedure. But the Election Tribunal is not on that account without authority in respect of the ballot papers. In a proper case where the interests of justice demand it, the Tribunal may call upon the Returning Officer to produce the ballot papers and may permit inspection by the parties before it of the ballot papers; that power is clearly implicit in Sections 100(1)(d) (iii), 101, 102 and Rule 93 of the Conduct of Election Rules, 1961. This power to order inspection of the ballot papers which is apart from Order 11 CPC may be exercised, subject to the statutory restrictions about the secrecy of the ballot paper prescribed by Sections 94 and 128(1).

An order for inspection may not be granted as a matter of course; having regard to the insistence upon the secrecy of the ballot papers, the Court would be justified in granting an order for inspection provided two conditions are fulfilled :

- (i) that the Petition for setting aside an election contains an adequate statement of the material facts on which the Petitioner relies in support of his case; and
- (ii) the Tribunal is 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.

But an order for inspection of ballot papers cannot be granted to support vague pleas made in the Petition not supported by material facts or to fish out evidence to pleas. The case of the Petitioner must be set out with precision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the Petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection.

It must be remembered that the rules framed under the Representation of the People Act, 1951, set up an elaborate machinery relating to the stage of counting of votes by the Returning Officer, and provide ample opportunity to the candidate who has contested the election or his agents to remain present and to keep an eye on any improper action which may be taken by the Returning Officer. Rule 53 provides for the admission of only certain classes of persons to the place fixed for counting and amongst such persons are expressly included candidates, their election agents and counting agents, who may watch the counting subject to the directions which the Returning Officer may give. Rule 55 deals with the procedure for scrutiny and opening of ballot boxes. The Returning Officer has to satisfy himself that "none of the ballot boxes has in fact been tampered with" and before any ballot box is opened at the counting table, the counting agents present at that table are allowed to inspect the seal affixed thereon and to satisfy

themselves that it is intact. If the Returning Officer is satisfied that any ballot box has in fact been tampered with, he is prohibited from counting the ballot papers contained in that box and he has to follow the procedure prescribed in that behalf in S.58, Clause (1) of Rule 56 provides for the scrutiny and rejection of ballot papers. Clause (2) sets out detailed provisions relating to cases in which the Returning Officer shall reject a ballot paper. By Clause (3) it is provided that before rejecting any ballot paper under Sub-rule 2, the Returning Officer shall allow each counting agent present a reasonable opportunity to inspect such ballot papers. The Returning Officer has then to record on every ballot paper which he rejects the grounds of rejection. All the rejected ballot papers are required to be put in one bundle, Rule 57 deals with the counting of vote. Each ballot paper which is not rejected is counted as one valid vote. The Returning Officer has to make the entries in a result sheet in Form 20 after counting of the ballot papers contained in all the ballot boxes used at the polling stations. Clause 3 of Rule 57 enacts an elaborate set of rules about the entries to be made in respect of the counting and scrutiny of the ballot papers. By Rule 60 counting has to be continuous, and Rule 63(1) provide that after the completion of the counting, the Returning Officer shall record in the result sheet in Form 20 the total number of votes polled by each candidate and announce the result. By Clause (2) of Rule 63 it is provided that after such announcement is made, a candidate or his election agent may apply in writing to the Returning Officer for a recount of all or any of the ballot papers already counted stating the grounds on which he demands such recount. The Returning Officer must decide the application and record his reasons in support of his decision and he may allow the application in whole or in part or may reject it if it appears to him to be frivolous or unreasonable. After the total number of vote polled by each candidate has been announced, the Returning Officer must complete and sign the result sheet in Form 20 and after such form is completed no application for recount may be entertained. Under Rule 64 the declaration of the result of the election is made by declaring elected a candidate who has secured the largest number of valid votes, and the Returning Officer is required to complete and certify the return of election.

The apex Court held that recounting may be directed considering the nature of allegations made in the election Petition. The Tribunal would be justified in refusing an order where inspection is claimed with a view to fish out materials in support of a vague plea in the case set out in the Petition. There must be a concise statement of material facts on which the election Petitioner relies and to make out a case for recount, but if the material facts are not stated in the election Petition, the election Petitioner cannot be permitted to make out a case by fishing out the case by inspection of ballot paper.

In H.D. Revanna (supra), the apex Court considering the case where the recounting was directed by the Returning Officer, held thus :

As regards the second contention of learned Counsel for the Appellant, the

question whether the Returning Officer was justified in ordering recounting in the circumstances of the case and whether such recounting fell within the scope of Rule 63 has to be decided at the trial. No opinion can be expressed at this stage on that question before the parties adduce evidence in that regard.

There is no merit in the contention that the election Petition does not set out any illegality committed at the time of recounting. The various averments in the Petition are to the effect that the order directing recount was itself an illegality vitiating the result of the election and also that in the course of such recounting, several illegalities were committed whereby the result of the election was materially effected. It is specifically averred in the Petition that a large number of ballot papers which were invalid and were liable to be rejected were counted as valid votes in favour of the Appellant. The attempt of the learned Counsel for the Appellant is to divide the election Petition into two separate compartments, one dealing with recounting and the other with corrupt practices. It is not possible to dissect the election Petition in that manner. The allegations regarding invalid votes no doubt find a place in paragraph 3 but they have to be read together with averments relating to recounting.

In *Mahendra Pal* (supra), the apex Court considering the scope of recounting of votes in the election Petition held, that the Petitioner should specifically aver the total number of votes issued to the voters, total number of votes polled and counted, particulars of irregularity in counting votes also be spelt out, only then recount of ballot papers can be ordered. The apex Court held thus :

In the present case, it is not disputed, as indeed it cannot be, in Form 20-A, Ex.P-2, it is recorded that the total number of votes found in the ballot boxes of 82 polling stations pertaining to this Constituency were 35310 whereas a perusal of statement of "roundwise detailed result of counting", certified copy whereof is Ex.P-3, records that the total number of valid and rejected votes counted for the purpose of declaring the result were 35318. A difference of 8 votes had been projected in Annexure P-2 and Annexure P-3. The margin of difference between the votes polled by the election Petitioner and the returned candidate, in the present case, was only 3 votes. Unless a satisfactory explanation was furnished during the trial about the discrepancy, there would be need to inspect the ballot paper to clarify doubts regarding the excess counting of 8 votes, allegedly in favour of the returned candidate. This was also necessary to dispel doubts about the allegations of irregularity in counting. Had the Returning Officer, instead of rejecting the application for recount made a test check, soon after the declaration of result, he could have silenced the scepticism and removed all doubts but since that was not done, the learned designated Judge ought to have considered the matter in its correct perspective.

Indeed, recount of ballot papers cannot be ordered just for the asking but it is equally well settled that while maintenance of secrecy of ballot is sacrosanct, maintenance of purity of election is equally important.

Our perusal of various paragraphs of the election Petition and particularly of the averments contained in paragraphs 10 to 13, 16 and 20, go to show that sufficient material facts, to provide a cause of action, for trial of the election Petition have been provided in the election Petition. In various sub-para of paragraph 11 of the election Petition, particulars of irregularities have also been spelt out. The non-mention of serial numbers of the improperly counted ballot papers, keeping in view the averment made in paragraph 16 of the Petition, could not be a ground to non-suit the election Petitioner at the threshold, without trial more particularly because of the discrepancy between Ex.P-2 and Ex.P-3. Pleadings have to be read as a whole to ascertain their true import. It is the substance and not merely the form, which is required to be looked into for construing the pleadings. The intention of the party needs to be gathered from the tenor and terms of his pleadings taken as a whole. These well settled principles appear to have been lost sight of by the learned designated Judge. Construed reasonably, the averments in the election Petition, in our opinion, do make out a case for the Petition proceeding to trial. Whether or not a case is eventually made out to justify recount/inspection would depend upon the evidence led by the parties in support of their pleadings at the trial.

In *Vadivelu (supra)*, the apex Court reiterated the law and held that recounting cannot be ordered on the basis of general and bald allegations. An election Petition should contain details regarding illegality or irregularity alleged to have been committed. The election Petitioner who is seeking recounting should allege and prove that there was improper acceptance of invalid votes or improper rejection of valid votes. The Tribunal can order recount only after its satisfaction about the truthfulness of the allegations. The apex Court, held thus :

The result of the analysis of the above cases would show that this Court has consistently taken the view that recount 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.

From the above pleadings, it is evident that the Appellant has not set forth material facts or particulars required for recount of votes. To justify his contention that there was irregularity or illegality in the counting, except making some general and bald allegations, no other details are given. Though an allegation is made that electoral roll contained the names of dead persons, that

the 1st Respondent took advantage of the same, and that some persons had impersonated and cast votes in his favour, no details are given as to who committed such irregularity. The Appellant has also not mentioned as to how many such votes had been cast in favour of the 1st Respondent. So also, the Appellant has not alleged the nature of the illegality or irregularity said to have been committed by the counting officers. How and in what manner there was improper acceptance of invalid votes and improper rejection of valid votes, also is not explained by the Appellant. In short, the election Petition is bereft of all details and the Appellant, while examined as PW1, could not supplement anything by way of evidence.

The Appellant-election Petitioner in this case has not stated as to when did he file the application for recount. He has stated that he had given an application to the Returning Officer for recounting of votes and the request for recounting was not accepted. At the time of the evidence also, the Appellant has not stated as to when did he file the application. In cross-examination, he stated that at about 10:00 p.m. on 14.10.1996, it was announced through loudspeaker that the 1st Respondent was elected and he denied the allegation that the application for recount was made at 11:45 p.m. The 1st Respondent was examined as RW1. He deposed that the result of the election was declared at 10:30 p.m. and in all probability, the Appellant filed an application for recount after the result of the election was declared. Therefore, the application for recount was not filed in accordance with Rule 66 of the Tamil Nadu Panchayats (Elections) Rules, 1995.

In P.H. Pujar (supra), the apex Court reiterated the law that the recount of votes could be ordered very rarely and on specific allegations in the the owner or it is confined to the properties of the vehicle owner."

In Dhanraj v. New India Assurance Co. Ltd. and Anr. (supra), the Supreme Court considered a policy which covered "own damage" and held that under the policy of insurance in that case under the heading "own damage" words "premium on vehicle and non-electrical accessories" appear and on the terms and conditions of the said policy held that the premium that was paid was towards damage to vehicle and not for injury to the person of the owner. Thus, the expression "own damage" will have to be read along with the express terms and conditions of the insurance policy and if on a reading of the terms and conditions of the insurance policy, it is found that the premium that is paid for "own damage" covers only damage to the property of the insured and not to injury to the person of the owner or life of the owner, then obviously the insurer would not be liable for compensation for injury or death of the owner, but if on a reading of the terms and conditions of the insurance policy it is found that additional premium has been paid not only for damage to property but also for injury or death of the owner then the insurance company will also be liable for compensation for injury or death of the owner in addition to loss of property. Accordingly, we answer question No. (d), referred to us by the Division Bench of saying that it will ultimately depend upon the terms and conditions of the insurance policy and the

premium or additional premium paid and the purpose for which premium or additional premium has been paid for coming to the conclusion whether "own damage" would cover damage to the person of the owner or will be confined to the properties of the vehicle owner.

9. Before we part with this case, we would like to record our appreciation for the assistance rendered by Mr. S.K. Rao, Senior Advocate and Mr. Sanjay Agrawal, Advocate, Amicus Curiae, Mr. Ashok Lalwani, Advocate who appeared for the Appellant in MA No. 246/2004, Mr. Anoop Nair, Advocate for the Respondent and Mr. Subodh Kathar, Advocate for the Appellant in writing this judgment on very intricate questions of law.

10. This MA will now be placed before the appropriate Bench for hearing on merits.