

(2009) 03 OHC CK 0019
In the Orissa High Court
Case No : Writ Petition (C) No. 3018 of 2009

Rama Ranjan Mohanty

APPELLANT

Vs

Bijaya Kumar Padhihari and Another

RESPONDENT

Date of Decision : 04-03-2009

Acts Referred:

Orissa Grama Panchayat Election Rules, 1965 — Rule 47, 48, 49, 50, 51

Citation : (2009) CLT 19 Supp

Hon'ble Judges : M.M. Das, J

Bench : Single Bench

Advocate : Asoka Mukharji, G. Mukharji, P. Mukharji, S. Mukharji, S. Patra and Suvalaxmi, for the Appellant; P. Mohanty, D.N. Mohapatra, S. Mohanty, P.K. Nayak, C.R. Nayak and S.N. Dash for O.P. No. 1, Additional Government Advocate for O.P. No. 2, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Das, J.—The Petitioner is the elected candidate to the Office of Sarpanch of Talada Gram Panchayat. It has been averred in the writ application that after completion of election, the ballot papers were counted and it was found that the Petitioner secured 1348 votes and the opposite party No. 1 secured 1349 votes. Immediately before declaration of result, the Petitioner filed an application for recounting of votes and accordingly the Election Officer directed for recounting of the same. Upon such recounting in presence of representatives of the Petitioner and the opposite party No. 1, it was detected that four invalid votes were wrongly counted in favour of the opposite party No. 1. Accordingly, the said four votes were rejected and ultimately the Petitioner was found to have obtained 1345 votes, whereas the opposite party No. 1 obtained 1344 votes. Accordingly, the Petitioner was declared elected. The opposite party No. 1 challenged the election in Election Misc. Case No. 8 of 2007 before the (learned Civil Judge (Jr. Division), Nimapara. The Petitioner, on appearing, filed his written statement. During pendency of the Election Misc. Case, by order dated 05.02.2008, the learned Civil Judge issued direction for recounting of the ballots. The learned Civil

Judge in his order directing recounting recorded that the Petitioner agreed for recounting. As according to the Petitioner he never agreed for recounting and the same was an error of record, the Petitioner immediately filed an application on 07.02.2008 praying for deleting the concession recorded by the learned Court below. As no order was passed thereon, the Petitioner being aggrieved by the order dated 05.02.2008, filed W.P.(C) No. 2175 of 2008 before this Court. This Court by order dated 10.04.2008 holding that the learned Civil Judge has dealt with the issue of recounting in a casual manner without attempting to apply the principle laid down by the Apex Court in the case of Baldev Singh Vs. Shinder Pal Singh and Another, , which the learned Court below could have done, remanded the matter directing the learned Tribunal to rehear the said question of recounting giving liberty to both the parties to raise their contentions in support of their respective cases. The learned Civil Judge took up the Election Misc. Case No. 8 of 2007 for hearing and by judgment dated 02.08.2008 dismissed the Election Misc. Case. Being aggrieved, the opposite party No. 1 preferred Election Appeal No. 9 of 2008 before the learned District Judge, Pur. The learned District Judge by judgment dated 17.02.2009 passed in Election Appeal No. 9 of 2008 set aside the judgment of the learned Election Tribunal holding as follows:

It has since been well settled in law the recounting cannot be made as a matter of course as that would tantamount to making a roving inquiry. Unless it is shown by the party seeking re-counting that the recounting will materially affects the election of the returned candidate and the returned candidate has been declared elected ignoring the mandate of the electors which is sacrosanct to our democratic system of Government, re-counting should not be ordered by Court. The trial Court in this case, as it is seen, has refused to order re-counting inasmuch as the Appellant had not supplied the number of the four rejected ballots and the position marked on the casting ballots which said to have been improperly rejected are not specifically pleaded. According to the trial Court in the absence of the same order for recounting would amount to roving enquiry and as such refused to order for recounting. It has also weighed the mind of the trial Court in refusing the recounting as in the process of recounting made by the Election Officer all the ballots were again re-counted and in the said re-counting it was ascertained that the returned candidate has polled on vote more than the Appellant election Petitioner and if a recounting is made than all the ballots, would have to be recounted as the four ballots could not be ascertained and the same would hamper the secrecy of the ballots papers. It is seen from the record that in this case the Appellant-election Petitioner has specifically stated that four votes polled by him were rejected and that too without assigning any reason. He has specifically in his evidence, as stated earlier, so 16 numbers of rejected ballots shown to have been there is not in dispute. So necessarily, the pleading of the Appellant-Petitioner relates to recounting of those 16 numbers of ballots in which four ballots polled by him said to have accounted for. At the time of counting, when the ballot has been rejected it enjoins the Election Officer to record the reason for which the ballot papers were rejected in a separate paper

and sos also endorsed his signature on such ballot papers as seen from conjoint reading of Rules 47 and 51 of Orissa Gram Panchayat Election Rules. As stated earlier the Appellant-Petitioner has pleaded and proved through his evidence prima facie that without assigning reasons four votes polled by him have been accounted for in the rejected ballot paper account. So prima facie the Petitioner has made out a case that there was improper rejection of four ballots polled in his favour. When the election Petitioner has prima facie made out such a case and rejection of such four ballots, if found to have been cast in favour of the Election Petitioner, there being no manner of doubt that the same shall materially affect the election of the returned candidate, the trial Court should not have refused to order to recount the ballot papers assigning untenable reasons. The reasons assigned for refusal appears to be untenable inasmuch as it was very difficult to say the number of rejected ballots and also the position in which the vote mark are there. The reason of the hampering of secrecy also appears to have been stretched too far as by ordering the recounting of the rejected ballots, it is not understood how the secrecy of the ballot is going to be affected and the same would also amount to a roving enquiry as the Petitioner is very specific in his case that four ballots polled by him i.e. two in ward No. 1, one each in ward Nos. 8 and 10 to have been rejected. So the trial Court finding in this regard refusing to order recounting is unsustainable.

In view of the aforesaid there is no manner of doubt that the Appellant-election Petitioner has made out a case of recounting of rejected ballots and as such the finding of the trial Court in this regard in this issue is unsustainable and deserves to be set aside and as such the same stands set aside. When the finding on the said issue is set aside, the finding on the other issues being dependent on the said issue also could not be sustained, When the findings are set aside the matter is required to be remitted back with direction to the trial Court to take up recount the rejected ballot in accordance with law and accordingly render its finding on this issue basing on the result of such recounting and dispose of the election petition in its own merit.

I would, therefore, allow this appeal on contest. Consequently the impugned judgment and order of the trial Court are set aside and the matter is remitted back to the trial Court with a direction to dispose of the same after recounting of the rejected ballots by rendering its finding on the basis of the same on the issues in accordance with law. However, in this circumstances there shall be no order as to cost. parties are directed to appear in the trial Court on 5th of March 2009 to receive further instruction.

2. Mr. Mukherji, learned Counsel for the Petitioner submits that the only ground on which the appellate Court has interfered with the judgment of the Election Tribunal in the Election Misc. Case, is that, the provisions of Rule-47 and Rule-51 of the Orissa Gram Panchayat Election Rules, 1965 (hereinafter referred to as "the Rules") has not been followed. Mr. Mukherji submits that the settled position of law being that the election-Petitioner has to prove his case the election-

Petitioner has not brought any material to record showing that the Election Officer while ordering a recount and rejecting the ballot papers has not assigned any reason as required under the aforesaid Rule-51. According to him none of the ingredients as specified in the judgment of the Apex Court in the case of Baldev Singh Vs. Shinder Pal Singh and Another, and M. Chinnasamy Vs. K.C. Palanisamy and Others, exists for the Court below to direct recounting of ballots papers.

3. Learned Counsel for the opposite party No. 1 on the contrary submits that the learned District Judge after taking note, of the respective contentions of the parties recorded that the election-Petitioner has specifically stated that four votes, which were cast in his favour have been rejected illegally and that too without assigning any reasons. Learned District Judge has further stated in the judgment (as quoted above) that the opposite party No. 1 (election-Petitioner) specifically stated in his evidence that the number of ballots papers, which have been rejected are 16, which necessarily means that the 4 disputed rejected ballot papers are included within those 16 rejected ballot papers. The learned District Judge further taking note of Rules-47 and 51 of the Rules, held that a conjoint reading of the said Rules requires the Election officer to record the reason for which the ballot papers are rejected, in a separate paper and so also endorse his signature on such ballot papers and that the election-Petitioner pleaded and proved through his evidence, *prima facie*, that without assigning reasons 4 valid votes polled in his favour have been rejected. Therefore, he held that the election-Petitioner has *prima facie* made out a case that there was improper rejection of 4 ballot papers polled in his favour.

4. Rule-47 of the Rules provides that counting shall be made in presence of the candidates and their polling agents, who may be present at the polling station. In the course of counting, the polling officer shall carefully scrutinize the ballot papers and a ballot paper shall be liable to be rejected on one or more grounds as mentioned in the said Rule.

Rule-48 provide that the result of counting of ballot papers in respect of Ward Members shall be recorded in Form No. 8 and Presiding Officer shall announce the votes polled by each contesting candidate.

Rule-49 provides that after recording the results in Form No. 8 under Rule-48, the Presiding Officer shall proceed to count the ballot paper relating to the office of Sarpanch of the Grama Panchayat in accordance with the procedure laid down in the previous Rules.

Rule-50 provides that the result of counting of ballot papers in case of a Sarpanch shall be recorded in Form No. 8-A and the Presiding Officer may announce the votes polled by each contesting candidate.

Rule-51 prescribes the method to be adopted after closure of counting with regard to segregation of papers, reports and unused ballot papers. On the date fixed for declaring the result of the election, the Election Officer is to carefully

total the election result received from different Presiding Officers and count the ballot papers contained in the sealed packets received under Rule-92-G in the presence of the candidates concerned, their polling agents and declare the result in Form No. 8-B after recording in a separate report the total number of votes polled by each contesting candidates. It further provides that the candidates securing largest number of votes shall be declared duly elected. It is only after declaration of such results under Rule-51(2), provision is made that a candidate or in his absence, his polling agent may apply in writing to the Election Officer to recount the votes either wholly or in part stating the grounds of such recounting. Sub-Rule-(3) provides that on such an application being made the Election Officer shall take a decision and may allow the application either in part or in toto or may reject it in toto if it appears to him to be frivolous and unreasonable. Sub-Rule-(4) prescribes, every decision of the Election Officer under Sub-Rule (3) shall be in writing containing the reasons there for. In sub-Rule-5 it is provided that if the Election Officer decides under Sub-Rule (3) to allow recounting of votes either wholly or in part, he shall proceed to allow recounting of the votes either wholly or in part and make such recounting in accordance with Rule-47.

5. As has been already stated Rule-47 prescribes the conditions when a ballot paper may be rejected as invalid. From the above provisions, it is therefore, clear that an application for recounting can only be made after declaration of results and, therefore, the application for recounting made by the Petitioner earlier was under Sub-Rule (2) of Rule-51. The said application, as is admitted by the parties, was allowed and recounting of the ballot papers was undertaken which reversed the initial result declared, declaring the opposite party No. 1 elected, upon finding that the Petitioner has secured one vote more.

6. The learned District Judge is, therefore, correct in holding that it was a mandate on the Election Officer to record the reasons for rejecting the 16 ballot papers in a separate paper as recording of such reasons would have clarified as to why the 4 disputed votes were declared invalid and rejected. The learned District Judge is also correct in holding that there is sufficient material produced by the election-Petitioner making out a case for recounting the rejected ballot papers.

7. I, therefore, find no error in the impugned judgment dated 17.02.2009 passed by the learned District Judge, Puri in Election Appeal No. 9 of 2008, which has been called in question in the present writ application. The learned Election Tribunal is, therefore, directed to proceed in accordance with the remand order passed by the learned District Judge in the afore-mentioned Election Appeal No. 9 of 2008.

8. The writ application is, therefore, dismissed being devoid of merit.