

(1988) 05 AHC CK 0059

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 5974 of 1988

Ranveer Singh

APPELLANT

Vs

Sub-Divisional Magistrate and Others

RESPONDENT

Date of Decision : 19-05-1988

Acts Referred:

Uttar Pradesh Panchayat Raj Act, 1947 — Section 12(2)

Citation : (1988) 2 AWC 957

Hon'ble Judges : R.K. Gulati, J;K.C. Agrawal, J

Bench : Division Bench

Advocate : A. Kuamr, for the Appellant;

Final Decision : Allowed

Judgement

R.K. Gulati, J.—Aggrieved by an interlocutory order dated 16th March, 1988, passed by Sub-Divisional Magistrate, Sadar, Agra (Respondent No. 1) granting inspection of ballot papers and recount of votes on the application of Respondent No. 3 pending trial and decision of the arbitration petition, the Petitioner Ranvir Singh has filed this writ petition. The Petitioner has sought a writ of certiorari, seeking quashing of the impugned order and a writ of mandamus directing the Respondent No. 1 not to proceed with the inspection of ballot papers and recounting of votes which had been fixed for 2nd April, 1988.

2. While admitting the petition on 28-3-1988 a Division Bench of this Court passed the following interim order:

Issue notice. Meanwhile proceedings before the sole Arbitrator may go on but the ballot papers shall not be reopened and counting not done in pursuance of the order dated 16-3-1988 (Annexure 5 to the writ petition).

3. Briefly stated, the facts giving rise to this writ petition are : there is a co-operative society known as Kshetriya Sahkari Samiti Ltd. Midhakur, which is registered under the provisions of the U.P. Co-operative Societies Act, 1965 (for short "the Act"). The election of the members of the Committee of Management

of the aforesaid Society was held on 26-12-1987. The Petitioner Ranvir Singh, and Respondents No. 3 to 5, namely, Rajendra Singh, Bhagwan Singh and Udaivir Singh respectively were candidates for the office of Committee of Management from Midhakur Constituency. The Petitioner secured 190 votes whereas Respondent No. 3 secured 177 votes while Bhagwan Singh and Udaiveer Singh got 93 and 54 votes respectively.

4. Sri Rajendra Singh (Respondent No. 3) filed an arbitration petition u/s 70/71 of the Act read with Rules 229, 230 and 444-C of the Co-operative Societies Rules, 1968 (hereinafter referred as "the Rules") challenging the election which had gone in favour of the Petitioner. The arbitration petition was transferred for trial and decision by the District Magistrate, Agra, to the Sub-Divisional Magistrate, Sadar, Agra, the Respondent No. 1 (hereinafter referred as the Arbitrator). The Petitioner contested the arbitration petition and filed his written statement before the Arbitrator. After the oral evidence of Rajendra Singh, Udaivir Singh and one Gulab Rai had been recorded, the Arbitrator issued summons to Election Officer for recording his statement fixing 15th February, 1988 as the date for that purpose. It appears, after the statement of Election Officer had been recorded, Respondent No. 3 on the same day made an application before the Arbitrator for summoning the marked copy of the voter list and the sealed ballot papers in connection with the election in question and further prayed that the same may be inspected and recounting of votes may be done. The Petitioner objected to the summoning of the election record and recounting of votes, by his application dated 8-3-1988. The Arbitrator, however, allowed the application for inspection and recount, by his order dated 16-3-1988, directing that the recounting of the ballot papers shall be done on 2-4-1988. It is against this order, the present writ petition has been filed and as already stated, the operation of the said order was stayed by this Court by its order dated 28-3-1988.

5. We have heard the learned Counsel for parties and have perused the impugned order, from which it is evident that the Arbitrator ordered for recount because there were discrepancies between the total number of votes polled when compared with marked electoral roll, according to which 508 voters exercised their right to vote whereas the return filed by the Election Officer indicated that 532 ballot papers had been issued to the voters. At the time of counting of votes, besides one ballot paper which had been cancelled by the Election Officer and sealed separately, 523 ballot papers were found in the ballot box. Thus, out of 532 ballot papers which were issued, 524 ballot papers were used by the different voters in casting their votes. There is no dispute between the parties on the facts and figures set out above.

6. In the petition for arbitration and in the application for inspection as well as before us the case of the Respondent No. 3 had been that the excess number of ballot papers representing the difference between marked electoral roll and the return filed by the Election Officer, were surreptitiously polled with the

connivance of the Election Officer.

7. On the other hand, the Petitioner it was contended that the Arbitrator acted illegally in directing the inspection and recount of votes, inasmuch as there was absolutely no material before him which could justify such a direction. It was urged that no objection regarding surreptitious or improper voting was raised before the Election Officer during the period poll continued or at the time of signing of final result sheet, or before the announcement of Election Result. In other words, the contesting Respondent was satisfied as to the accuracy of previous count. Further, in the arbitration petition, no specific instance of improper counting was averred. Referring to the discrepancy about the number of ballot papers issued and entries ticked in the Electoral Roll, it was argued that it could not be a ground for granting a general inspection of ballot papers and recount of votes. It was explained, the discrepancy of the type in dispute could be for the reason that the Election Officer or the person handling the electoral roll forgot to mark all the entries.

8. In the alternative, it was argued that the impugned order was not liable to be sustained as the Arbitrator had passed the impugned order without affording any opportunity to the Petitioner to lead his evidence in rebuttal after the oral evidence of the contesting Respondent had been led. In other words in order to judge whether a prima facie case for inspection and recount was made out or not, the evidence of both the parties should have been recorded before any order could be passed in that behalf. Thus, according to the Petitioner the impugned order was made in violation of principle of natural justice which cannot be sustained.

9. Chapter XIX of the U.P. Co-operative Rules, 1968, sets out the procedure for holding elections. The election of the members of Committee of Management is to be held in accordance with the provisions of the Act and Rules. Sub-rule (4) of Rule 443 says, the ballot paper shall be serially numbered and shall also bear the seal of the society and initials of the Election Officer Polling Officer of the concerned polling station. Sub-rule (5) provides that the voting shall be by secret ballot, the voter shall put a cross-mark (X) against the name of candidate for whom he desires to vote and then put the ballot paper into the ballot box with secrecy. Rule 444 provides for counting of votes, scrutiny and rejection of the ballot papers and announcement of the result etc. It interalia provides that the Election Officer shall announce the result of election as soon as the counting is completed indicating the number of votes secured by each candidate. The Election Officer shall display a list of elected candidates on the notice board of the Society and also at such public place as he may deem fit and a copy of the list shall be sent to the District Assistant Registrar concerned or the officer authorised under Sub-rule (2) of Rule 440 and also to the Secretary/Managing Director of the Society concerned. Sub-rule (8) provides that used ballot papers and other records pertaining to election shall be put in a cover or container and shall be sealed by the Election Officer/Polling Officer. Any candidate may also

affix his seal thereon, if he so desires, The cover or container so sealed shall be entrusted by the Election Officer/Polling Officer to the Secretary/Managing Director of the Society who shall acknowledge the receipt and be responsible for its safe custody for two months, if no dispute to election is referred to the registrar.

10. Rule 444-C enumerates the grounds on which an election in a Co-operative Society may be questioned. Sub-rule (1) of Rule 444-C reads as under:

(1) The election in a cooperative society shall not be called in question either by arbitration or otherwise except on the ground that-

(a) the election has not been a fair election by reasons and corrupt practice, bribery or undue influence has extensively prevailed at the election, or

(b) the result of the election has been materially affected-

(i) by improper acceptance or rejection of any nomination, or

(ii) by improper reception, refusal or rejection of votes, or

(iii) by gross failure to comply with the provisions of the Act, Rules and the bye-laws of the society.

Expiation--For the purpose of this Rule corrupt practice or bribery or undue influence shall be assigned the same meaning as provided in Sub-section (2) of Section 12(c) of the U.P. Panchayat Raj Act, 1947.

11. The above Rule makes its obligatory on a person questioning the election to specify the grounds on which the election Petitioner seeks to challenge the election. It is also implicit in it, that the applicant must briefly give the summary of circumstances which provide a justification for questioning the election.

12. No provision under the Act or Rules was brought to our notice under which inspection of ballot papers or marked copy of the Electoral Roll could be demanded by any party to the Arbitration petition or by any person challenging the election.

13. Section 109 of the Act inter alia confers powers of Civil Court to Arbitrators and others in certain matters. It inter alia provides, while deciding a dispute or, making an enquiry or inspection, or investigating any claim, the Registrar, the Arbitrators, the Board of Arbitrators etc. shall have all the powers of a Civil Court while trying a suit under the Civil Procedure, in respect of the following matters, namely-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of any document ;

(c) proof of facts by affidavit; and

(d) issuing commissions for examination of witnesses.

14. Thus, when an arbitration petition challenging the election u/s 70/71 of the Act read with Rule 444-C is presented for decision before an authority or person authorised to deal with it, such authority or person in an appropriate case where the interest of demand, it may call upon the Election Officer/Returning Officer, to produce the ballot papers and may permit inspection by the parties before him of the ballot papers. Such a power in our opinion, is incidental to the power of deciding and dealing with Arbitration petition challenging the election on the grounds contemplated under Rule 444-C of the Rules. At the same time, in our opinion, the power to order inspection of ballot and recount is not an unlimited and unguided power which is to be exercised sparingly subject to the statutory restriction about the secrecy of ballot papers, envisaged under the relevant provisions of the Act and Rules, in that behalf. Considering the utmost importance and insistency to maintain the secrecy of ballot which is sacrosanct Under Rule 443 and 444 of the Rules and which is one of the fundamentals of the elections contemplated under the Act, an order for inspection may not be granted as matter of course. It would not be act for the concerned authority either to look into or permit the inspection on mere asking or on vague and indefinite allegations. The exercise of such powers would also not be permissible in order to permit a party to fish out materials for declaring the election void or to launch a roving inquiry. It is in this sense the powers of the Arbitrator ordering inspection of ballot papers and recount are not unlimited. Though no hard and fast rule specifying the circumstances in which recount is to be held, can be laid, but in our opinion, much guidance can be taken from various decisions of the Supreme Court which have been rendered in the cases arising under the provisions of the representation of the People Act. The guidelines and the tests laid down in those cases shall apply with equal force in determining the question of inspection of ballot papers and recount in the matters arising for decision under the Act, with which we are concerned.

15. In Ram Sewak Yadav Vs. Hussain Kamil Kidwai and Others, , it was pointed out that 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 ballot papers is necessary. But an order for inspection of ballot papers cannot be granted to support vague plea made in the petition not supported by material facts or fish out evidence to support such 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.

In *Beliram Bhalaik Vs. Jai Beharilal Khachi and Another*, , the Supreme Court observed:

Since an order for a recount touches upon the secrecy of the ballot, it should not be made lightly or as a matter of course. Although no cast iron rule of universal application can be or has been laid down yet from a bead-roll of the decisions of this Court two broad guidelines are discernible; that the Court would be justified in ordering a recount or permitting inspection of the ballot papers only where (i) all the material facts on which the allegations of irregularity or illegality in counting are founded, are pleaded adequately in the election petition and (ii) the Court/Tribunal 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.

16. We may refer to one more decision of the Supreme Court in *Bhabhi Vs. Sheo Govind and Others*, where the court noticed a large number of cases on the subject decided by it earlier, and formulated certain tests as imperative conditions which should be taken into account by the Court before making an order for inspection of ballot papers and recounting of votes could be granted. It was pointed out that if the Judge is satisfied that those conditions are fulfilled in a given case, the exercise of discretion would undoubtedly be proper. These conditions are:

- (1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;
- (2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;
- (3) The Court must be *prima facie* satisfied on the material produced before the Court regarding the truth of the allegations made for a recount;
- (4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;
- (5) That the discretion conferred on the Court should not be exercised in such a way so to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and
- (6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the *prima facie* satisfaction of the Court regarding the truth of the allegations made for a recount and not for the purposes of fishing out materials.

17. Bearing in mind the principles stated by the Supreme Court, when we revert to the controversy on which inspection of ballot papers and recount of votes was

granted in the instant case, we find that the impugned order cannot be sustained.

18. The discrepancies by themselves do not make out a case for directing a recount of votes. An order directing recount has serious implication and it cannot be allowed unless a prima facie case is made out. It has consistently been stressed in the cases noted earlier that a proper foundation must be laid in the election petition, indicating the precise material on the basis of which it could be urged with some substance that there has been either improper reception of invalid votes in favour of the elected candidate or improper rejection of valid votes in favour of the elected candidate which had been cast in favour of the defeated candidate. In the arbitration petition or in the application for inspection there is no allegation about the improper rejection of valid votes, which were cast in favour of the contesting Respondent. The dispute between the parties centered around that there was a discrepancy in the number of ballot papers issued and the entries ticked in the electoral roll. No numbers of ballot papers are mentioned in the Arbitration petition or in the application for inspection. An Election Petitioner cannot claim general recount and scrutiny of all ballot papers as of right. Sub-rule (6) of Rule 443 provides that every voter shall have as many votes as there are persons to be elected but no voter shall give more than one vote to any one candidate. Sub-rule (7) of the said rule provides ample opportunity to the candidate, who has contested the election or his agent to remain present and to keep watch on any improper action that may be taken by the Election Officer/Returning Officer. It says any contesting candidate or his authorised agent may challenge the identity of the voter before the issue of the ballot paper on payment of fee of Rs. 1/- for each challenge to the Election Officer. Sub-rule (8) thereof states that the Election Officer shall make a summary enquiry of the challenge and if after such enquiry, he is of the opinion that the challenge is established, he shall give to the person (sic) the ballot paper which shall be endorsed on the back with words "challenged vote" by the Election Officer in his own hand-writing and signed by him. Likewise Sub-rule (11) says if a person representing himself to be a particular voter named in the voters' list applies for a ballot paper. After another person has already voted as such voter, he shall on satisfying his identity to the Election Officer be supplied with a ballot paper which shall be endorsed on the back with words "tendered ballot paper" by the Election Officer in his own hand-writing and signed by him. The votes polled as "challenged votes" and "tendered votes" under the Sub-rules (10) and (11) are to be placed in a cover specifically kept for the purpose. Admittedly, during the period poll continued no such objection was taken by the contesting Respondent or even at the time when ballot papers were counted under Rule 444, Now, even if by some process all the ballot papers were made to tally with the ticked entries in the electoral roll, then it could be ascertained with some amount of precision as to which voter voted for whom, but then it would not be without putting the secrecy of voting to jeopardy, which is the very fundamental of election process under the Act and Rules. Quite apart, what has been just observed, a question may still survive for consideration of the

Arbitrator, subject to the pleadings and other rights of the parties, whether the election is liable to be set aside on the discrepancy of the type relied upon by the contesting Respondent, without anything more, namely, there is a difference in number of ballot papers issued and those ticked on the electoral roll. At the present, we are not seized of that question, inasmuch as the trial and final decision of the arbitration petition is still pending before the Arbitrator.

19. The only question for our consideration is whether on facts, the allegation made in the arbitration petition, the Arbitrator was justified in making the impugned order. To us it appears, that the said order was passed in order to fish out some material on which on an off chance the disputed election may be declared as invalid. Except for bald assertion there is no material in the Arbitration petition or in the application for inspection which was moved after the recording of oral evidence of the contesting Respondent that there was improper voting. By allowing a general inspection the secrecy of the ballot papers is bound to be affected, which cannot be permitted. Whether there was improper voting or not, is a matter of evidence, which the parties may adduce during the trial to vindicate their respective stand. The learned Counsel for the Respondent was unable to satisfy us in what manner the inspection and recount of votes granted by the Arbitrator, would improve upon the question which may ultimately arise for decision before the Arbitrator or would achieve the desired result, when there is no dispute on the number of ballot papers issued, the entries ticked in the electoral roll and the votes found in the ballot box.

20. In passing the impugned order, the Arbitrator made no attempt to apply the principles on which a valid order for inspection and recount of votes could be made of which mention has been made earlier. He failed even to record his satisfaction that on the material brought on record, he was prima facie satisfied that a granting of inspection of ballot papers and recount of votes was necessary in order to do full justice between the parties.

21. For the reasons given above, the discretion exercised by the Arbitrator in granting the recount and inspection of ballot papers was not according to the sound and sacrosanct principles and was exercised in an arbitrary manner which cannot be sustained.

22. We consequently, quash the impugned order and make the interim order dated 28th March, 1988 passed by this Court, as an absolute order.

23. In view of our above findings, it is not necessary to deal with the alternative contentions of the Petitioner.

24. The writ petition succeeds and is allowed with costs.