

(2003) 03 AHC CK 0073
In the Allahabad High Court
Case No : C.M.W.P. No. 53502 of 2002

Smt. Bhoori

APPELLANT

Vs

Additional Sub-Divisional Magistrate/Election Tribunal and
Others

RESPONDENT

Date of Decision : 07-03-2003

Acts Referred:

Uttar Pradesh Panchayat Raj Act, 1947 — Section 12C

Citation : (2003) 2 AWC 849 : (2003) 2 UPLBEC 1384 : (2003) 2 UPLBEC 1035

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Advocate : Ashok Khare, N.K. Pandey and Sudha Pandey, for the Appellant; K.A. Ansari, Rajiv Sisodia, Ashok Trivedi and Shashi Nandan and S.C., for the Respondent

Final Decision : Dismissed

Judgement

Sunil Ambwani, J.—Heard Sri Ashok Khare, senior advocate, assisted by Sri N. K. Pandey for petitioner and Sri K. A. Ansari and Rajiv Sisodia, advocates for contesting respondent No. 2. With the consent of parties, under the Rules of the Court, this writ petition is being disposed of at the admission stage.

2. The writ petitioner has challenged an order dated 26.11.2002 passed by Election Tribunal/Additional Sub-Divisional Officer, Amroha in pending election petition No. 34/28 of 2000 u/s 12C of the U. P. Panchayat Raj Act, 1947 challenging the election of petitioner Smt. Bhoori as Pradhan of village Hatauwa, Post Diduall, Block-Joya, District Jyotiba Phulenagar by which he had directed recount of votes.

3. This is a seventh writ petition arising out of the same pending election petition. Brief facts of events which have led upto the date when the impugned order dated 26.11.2002 was made by the Election Tribunal are that petitioner was returned as elected Pradhan of Gram Panchayat Hatauwa, Block Joya, district Jyotiba Phulenagar. Respondent No. 2, Smt. Bano, filed an Election

Petition. The first Writ Petition No. 54485 of 2000 filed by the petitioner was dismissed by this Court on 18.12.2000 against the order passed by the Tribunal directing petitioner to file written statement, with a finding that the writ petition was premature and that the order deferring application under Order VI Rule 16, C.P.C. did not suffer from any infirmity or error requiring interference by this Court. Second Writ Petition No. 22272 of 2001 was filed by the petitioner against the order dated 22.5.2001 of the Tribunal observing that an Election Petition is maintainable. It was disposed of by this Court with a direction to the Tribunal to see that all the pleas which had been raised with regard to the maintainability of the petition, and which may require additional issues to be framed, and which go to the root of maintainability of the petition, to be decided as preliminary issues. A third Writ Petition No. 25037 of 2002 filed by the petitioner against the order passed by the Tribunal dated 18.6.2002 calling for certain records for deciding preliminary issues was also dismissed by this Court on the ground that it is not necessary to go into the question at this stage, and that it will be open to the petitioner to challenge the findings on preliminary issues. The Tribunal thereafter framed five additional issues on 12.3.2002 and one more additional issue was framed on 20.5.2002 and that by its order dated 27.6.2002 found that the election petition was maintainable. A fourth Writ Petition No. 26876 of 2002 filed against the order dated 27.6.2002 which was allowed by this Court on 30.7.2002, and while quashing the order, this Court directed the Prescribed Authority/ Election Tribunal to decide issue Nos. 1, 3 and 4 as well as the issue whether the election petition was maintainable to be decided as preliminary issue expeditiously.

4. The petitioner thereafter moved a transfer application before the Collector, Jyotiba Phulenagar for transfer of election petition to some other Sub-Divisional Officer on the ground that three brothers-in-law of the election petitioner are practising in Tahsil Amroha and have considerable influence in the Bar, on account of which the petitioner is not getting any advocate to look after of the case. The Collector found that the petitioner is vigorously defending her case and has filed repeated writ petitions before the High Court in which orders have been passed to expeditiously decide the election petition. The fact, that the petitioner was not getting any advocate was not substantiated inasmuch as she was represented on record.

5. The petitioner thereafter moved an application to allow her to engage some advocate from outside Amroha. The application was rejected by the Tribunal on the ground that no such permission was required, and that the petitioner has a right to be represented by any advocate, practising at any place. The order did not cause any prejudice to the petitioner and did not call for any interference by this Court, and thus a fifth Writ Petition No. 48201 of 2002, was also dismissed on 17.1.2003.

6. The petitioner then filed a sixth Writ Petition No. 48825 of 2002 against the order in the same proceedings, deciding preliminary issues against her. The said

writ petition was also heard and decided against the petitioner.

7. After framing issues, and 5 additional issues on 12.3.2001, and thereafter a further issue about maintainability of the petition on 28.5.2002 in pursuance of the direction, as above, given by this Court, the Tribunal fixed the matter of evidence. Several dates were fixed for leading evidence but the petitioner did not avail an opportunity. She did not appear or submitted any written submission, and thus the Tribunal proceeded to decide issue Nos. 1, 2, 6 to 10. 11, 12 and 5 and by his order dated 6.11.2002, the Tribunal has directed recount of votes. Issue Nos. 1 and 2 with regard to the validity of the voters list has been returned against the election petitioner on the ground that the electoral list has become final and cannot be questioned in election petition. Issue No. 2 related to corrupt practices adopted by the officers and employees deputed for election. This issue has been decided in favour of election petitioner in view of the oral evidence. Issue Nos. 3 to 10 were treated to be related to each other regarding corrupt practices adopted by petitioner. The Tribunal found that petitioner has stated that at the time of counting, only her election agent was allowed to enter the chamber whereas Smt. Bhoori was present along with her counting agent. Her counting agent made complaint about the manner in which bundles were prepared and her votes were reduced from 367 to 343 and the votes of returned candidate Smt. Bhoori were increased from 342 to 402 but no action was taken. An application was made for recount on 27.6.2000 to the Returning Officer. It was proved by Naim Ahmad Khan and Sadiq Hussain but the same was not disposed of by the Returning Officer. He further found that election return prepared in Schedule-IV were not signed by Returning Officer or Assistant Returning Officer. It was only signed by the Counting Supervisor which is a serious irregularity. Issue No. 11 relating to recount of votes was decided in favour of the election petitioner Smt. Bano on the basis of the findings on the aforesaid Issues, affidavit of counting agent of petitioner, and his statement, as well as written statement of respondents 2, 3, 7 and affidavits of their counting agents.

8. Sri Ashok Khare has challenged the order of recount on the ground that order can be passed only in case election petitioner makes out the case by making specific averments containing material particulars supported by evidence produced during trial of election petition. He submits, relying upon a Full Bench decision of this Court in Ram Adhar Singh v. District Judge, Ghazipur and Ors. 1985 UPLBEC 317 that law with regard to recount of votes as regards to the elections u/s 12C of the Act, is the same as in the case applicable in an election petition filed u/s 80 of the Representation of People Act, 1951, and the Conduct of Election Rules, 1961. In the present case, the pleadings are wholly vague, and fail to provide material particulars. The serial number of ballot papers in respect of which allegations have been made, are missing. Rule 104 (f) of the U. P. Panchayat Raj (Election of Members, Pradhan and Up-Pradhan) Rules, 1994 (in short Rules of 1994) gives reasonable opportunity to counting agents to inspect all valid papers without allowing them to handle the same. Where the election

agent questions the correctness of rejection of any valid ballot paper, the Election Officer is required to record briefly the ground of his rejection. He has relied upon the decision of *Raifaqat Husain v. Rama Shanker Kaushik and Ors.* 1986 ALJ 1446 and *Ramji Pandey Vs. Vikramaditya and Others*, in respect of his submission that the serial numbers of the valid papers constitute material particulars to be pleaded and proved in the election petition. According to Sri Ashok Khare, there is no provision under the Rules of 1994 for recount as provided in Rule 1963 of the Conduct of Election Rules, 1961 framed under Representation of People Act, 1951, and thus there was no occasion to dispose of the application for recount. Challenging the last finding of the Tribunal, he submits that the result sheet came from proper custody. A Returning Officer/ Assistant Returning Officer may be appointed for more than one panchayat area, and that unless there is pleading and proof that the result sheet has been changed, the fact that it was not signed by the Returning Officer or the Assistant Returning Officer appointed under the Rules 4 and 5 cannot be a ground for recount. Rule 4 (3) provides that the State Election Commission may, if it so considers expedient, order that the powers of Election Officer may be exercised or discharged by the Polling Officer. He submits that where the document has come from proper custody, its validity cannot be doubted and has relied upon the judgment of *Vadiuelu v. Sundaram and Ors.* AIR 2000 SC 3230.

9. Sri Ansari on the other hand, supporting the order of recount submits that this Court has already held in Writ Petition No. 48825 of 2002 between the parties that the allegations in the election petition are neither general nor vague, and that these allegations are concise and pleadings set out material facts and that the evidence adduced cannot be discarded at this stage. Petitioner has absented from the proceedings and has not led any evidence. She has also refused to cross-examine the witnesses and is avoiding to join the issue with regard to corrupt practice. The election agent of the election petitioner had pointed the illegalities in counting and had made application for recount. It was incumbent upon the Returning Officer to have disposed of the application. Even if there is no provision of recount, the protest should have been, at least, registered. There is nothing on record to show that the duties of Election Officer were delegated and that under Rule 107 unless the election return is prepared and certified by the Election Officer, it could not have been declared. He has tried to distinguish the facts of this case from the case in *Vadivelu v. Sundaram* (supra) where due to some mistake or inadvertence, the Presiding Officer did not sign the valid papers. In the present case, the election return has not been signed by the competent authority. With regard to the submission of serial numbers of valid papers, Sri Ansari submits that allegation in para 17 contains sufficient particulars. It was specifically stated that instead of making bundle of 50 votes, 45 votes were kept in one bundle and 47 votes in each of two bundles in favour of defendant No. 1, and that in two bundles made in respect of votes of petitioner, 52 votes were kept in each bundle, and counted. Twenty ballot papers which were stamped on the election symbol of the petitioner were wrongly rejected, and that one bundle

of 49 rejected ballot papers were counted in favour of the defendant No. 1, by putting one valid vote on the top of the bundle and that by this manipulation, the votes in favour of defendant No. 1 were increased from 342 to 402, and that 367 votes In favour of election petitioner were reduced to 343 votes.

10. In Writ Petition No. 48825 of 2002 Smt. Bhoori v. Additional Sub-Divisional Officer, Amroha, decided on 24.1.2003, after considering the averments made In paragraphs 7, 8, 10, 11, 16 and 17, I have already held that these allegations cannot be treated as general or vague. The aforesaid allegations have been held to be concise and specific pleadings setting out material facts on which evidence may be adduced and that these cannot be struck off under Order XVI Rule 6. The substance of the allegations in the present case for recount of votes is Irregularities committed at the time of counting of votes, refusal to entertain and dispose of the application for recount, and the fact that the election returns were not prepared and certified by the Election Officer in accordance with Rule 107. The judgment in Raifaqat Hussain (supra) and Ramji Pandey (supra) considered the allegation with regard to improper acceptance and rejection of votes and in the context of the Section 83(1) of the Representation of People Act, it was held that the allegations must disclose serial number of ballot papers, names of the counting agents, number of counting tables, names of counting supervisor, round number etc. In Ram Sewak Yadav Vs. Hussain Kamil Kidwai and Others, Supreme Court held that for setting aside the election petition, petitioner has to make precise allegation of material facts which having regard to the elaborate rules are or must be deemed to be within his knowledge. The nature of allegations must of course depend upon facts of each case. If the material facts are not stated, he cannot be permitted to make out a case by fishing out the evidence from an inspection of the ballot papers. A pointed reference was made relating to Rules 53, 55, 56. 57 and 63 of Conduct of Election Rules, 1961 and the conclusions were drawn as follows :

"There can, therefore, be no doubt that at every stage in the process of scrutiny and counting of votes, the candidate or his agents have an opportunity of remaining present at the counting of votes watching the proceedings of the returning officer, inspection of any rejected votes and to demand a recount. Therefore, a candidate who seeks to challenge an election on the ground that there has been Improper reception, refusal or rejection of votes of acquainting himself with the manner in which the ballot boxes were scrutinized and opened and the votes were counted. He has also opportunity of inspecting rejected ballot papers, and of demanding a recount. It is in the light of the provisions of Section 83(1) which require a concise statement of material facts on which the petitioner relies and to the opportunity which a defeated candidate had at the time of counting, of watching and of claiming a recount that the application for inspection must be considered."

11. In the present case, the substance of allegations are with regard to gross Irregularities in counting of votes. The allegations are with regard to making

bundles alleged to be of 50 ballots each, whereas three bundles of the ballot papers in favour of Smt. Bhoori are alleged to contain 45 and 47, 47 ballots each and that the two bundles of election-petitioner of 52 ballots each, and that in respect of one bundle containing 49 rejected votes one valid vote in favour of Smt. Bhoori was kept in the bundle and the entire bundle was counted in her favour. Even if we ignore the allegations with regard to improper rejection of 20 ballot papers, these are specific allegations with regard to making of bundles. The evidence adduced by election petitioner including statement of the counting agent of petitioner prima facie makes out a case in favour of election petitioner for recount of votes.

12. Rule 107 of the Rules of 1994 relating to the election of Pradhan provides preparation of election certificate by the Election Officer. The return was summoned and it was found that it was signed only by Counting Supervisor. There was no averment or evidence led by the petitioner that the Election Officer was either supervising any other election or that the Counting Supervisor was authorised by the State Election Commissioner under Rule 4 (3) to exercise and discharge the powers of the Election Officer. The documents may have come from proper custody but that since it was not certified by the Election Officer, the declaration of result raises a strong doubt about the validity of the return, on the basis of which the result was declared. At least, it goes to show that the counting was not supervised by the Election Officer. It cannot be treated as a mere irregularity as in the case of *Vadivelu v. Sundaram* (supra), but a gross violation of rules, which is a strong circumstance supporting the averments of irregularities in counting of votes.

13. For the aforesaid reasons, the Court does not find any ground to interfere with the order of recount of votes. The seventh writ petition arising out of the same election petition is dismissed.