
(2008) 04 PAT CK 0062
In the Patna High Court
Case No : CWJC No. 12456 of 2007

Smt. Nagma Khatoon

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 11-04-2008

Acts Referred:

Bihar Panchayat Raj Act, 1947 — Section 137

Citation : (2008) 3 PLJR 87

Hon'ble Judges : Ajay Kr. Tripathi, J

Bench : Single Bench

Advocate : Sanjeev Nikesh, Y.V. Giri and Raju Giri, for the Appellant; S.N.P. Sharma, Rabindra Kumar Singh and Jitendra Kumar Singh for Respondent No. 7 and Mr. Abhinay Raj for the State, for the Respondent

Final Decision : Allowed

Judgement

Ajay Kr. Tripathi, J.—Heard counsel for the parties. Petitioner the returned candidate on the post of Mukhiya of Gram Panchayat Raj, Bikrampur within Kuchaikote Block in the District of Gopalganj is aggrieved by the order dated 12.9.2007 passed in Election Petition No. 18/2006 by the learned Munsif, Gopalganj, who has directed production of all ballot boxes of the said Gram Panchayat for the election held in the year 2006 for the purpose of recounting. The order impugned is contained in Annexure-3 to the writ application.

2. Contention of the petitioner is that the said decision of recounting ordered by the learned Munsif is in the teeth of several pronouncements both of this High Court as well as of the Hon'ble Supreme Court. His primary submission is that in absence of any application having been filed under the mandatory provision of Rule 79 of the Bihar Panchayat Election Rules, 2006 (hereinafter referred to as the Rules) recounting cannot be ordered as a routine exercise. He further submits that the pleadings in the election petition seeking such declaration is in absence of material facts stating irregularities and it is more in the nature of roving and fishing enquiry without a prima facie case having been made out in

the election petition. He relies on a recent decision rendered by a Single Bench of this Court in the case of Vijay Kumar Chaudhary Vs. The State of Bihar and Others, and the case of Chandrika Prasad Yadav Vs. State of Bihar and Others, in support of his submissions.

3. Some basic facts are that the petitioner contested for the post of Mukhiya of Gram Panchayat Raj, Bikrampur in the District of Gopalganj, election was held on 15.5.2006, counting was done on 16.6.2006 and since the petitioner secured 1040 votes out of 2892 valid votes, she was declared as the returned candidate. A certificate in this regard was also handed over to her and she was administered oath to the post of Mukhiya on 24.6.2006. Respondent No. 7 got 1036 votes. She being aggrieved by the said declaration of result filed an Election Case No. 18/2006 in terms of Section 137 of the Bihar Panchayat Raj Act. Her primary contention in the election petition was that her 140 valid votes were not counted by the Returning Officer despite objections having been raised in this regard and the result declared. The election petition filed by respondent no. 7 has been brought on record as Annexure-1 to the writ application.

4. Petitioner filed her written statement and raised several objections to the maintainability of the election petition. Her stand is that the election petition does not contain any material facts, the allegations are bald and general in nature. No steps were taken by her in terms of the mandatory requirement of Rule 79 of the Rules, which could give her the basis for praying for recounting, which is a condition precedent as has been held by the Hon"ble Supreme Court as well as this Court.

5. Learned Senior Counsel appearing on behalf of the petitioner has drawn the attention of this court to the election petition contained in Annexure-1 in support of what have been urged by the petitioner in her written statement as well as the legal submissions made at the Bar in the present writ application. No doubt statement has been made in paragraph 5 that 140 valid votes of the respondent no. 7 had been kept out of counting by the official respondents with a motive but there is nothing in the election petition to show that any steps were taken either by her or her agent under Rule 79 of the Rules, which relates to recounting of votes. There is some averment that a kind of complaint was lodged before the District Magistrate-cum-District Returning Officer as well as the State Election Commissioner, but there is no assertion that any objection was filed before the Returning Officer in this regard.

6. The Court has perused the election petition and the submission of the petitioner in this regard does not seem to be misplaced. There is no categorical assertion that the requirements of Rule 79 had been followed, based on which her recounting can be demanded in the election petition. Further, there is an omnibus allegation with no specifics given as to how 140 votes of which booth or booths as a whole were kept out of the consideration during counting as well as what is the specific role played by the various respondents in facilitating such act to the detriment of her interest.

7. Respondent No. 7 has appeared before this Court and has submitted in favour of the impugned order. Contention on her behalf is that the Election Tribunal of learned Munsif, Gopalganj has passed the" order after detailed reasoning given therein. He has dealt with various evidence to reach the conclusion which she has in favour of recounting. She further contends that the election petition broadly states the facts and evidence have come during trial in support of her averments, if that is the factual position then there is no occasion to stop recounting.

8. Similar dispute with regard to the provisions of Rule 79 traveled from Patna High Court to the Hon"ble Supreme Court and the Apex Court in a detailed decision in the case of Chandrika Prasad Yadav (supra) held as under:--

"20. It is well settled that an order of recounting of votes can be passed when the following conditions are fulfilled:

- (i) a prima facie case;
- (ii) pleading of material facts stating irregularities in counting of votes;
- (iii) a roving and fishing inquiry shall not be made while directing recounting of votes; and
- (iv) an objection to the said effect has been taken recourse to."

"21 The requirement of maintaining the secrecy of ballot papers must also be kept in view before a recounting can be directed. Narrow margin of votes between the returned candidate and the election petitioner by itself would not be sufficient for issuing a direction for recounting."

"25. Rule 79 as noticed hereinbefore enables a candidate to file , an appropriate application for recounting of votes. Rule 79 unlike rules framed by other States does not say that such an application would not be maintain-able after declaration of the votes polled by the parties or prior thereto. Such an application, therefore, can be filed at any point of time. The very fact that sub-rule (3) of Rule 79 provides for amendment of the result relating to the votes polled by the respective candidates and as such amended result is required to be announced in the pre scribed form under sub-rule (2) of Rule 79, the same itself is a pointer to the fact that even after announcement of result an application for recounting would be maintainable. It may be true that only because such an application had not been filed before the Returning Officer by itself may not preclude the Election Tribunal to go into the question of requirement of issuing a direction for recounting but there cannot be any doubt whatsoever that Rule 79 serves a salutary purpose. Counting of ballot papers in terms of the rules takes place in presence of the candidate or his counting agent. When an agent or a counting agent or the candidate himself notices improper acceptance or rejection of the ballot papers, he may bring the same to the notice of the prescribed authority. As noticed hereinbefore, in a given case, an application for recounting either before announcement of the result or thereafter, would be maintainable.

Once an application is filed by an agent or a counting agent or the candidate himself pointing out the irregularities committed by the officers appointed for counting the ballot papers, immediate redressal of grievances would be possible. As indicated hereinbefore, while filing such an application the basis for making a request for recounting of votes is required to be disclosed. The Returning Officer is statutorily enjoined with a duty to entertain such an application, make an inquiry and pass an appropriate order in terms of sub-rule (2) of Rule 79 either accepting in whole or in part such request or rejecting the same where for he is required to assign sufficient or cogent reasons. In the event such an application is allowed either in whole or in part, he is statutorily empowered to amend the results also."

"26. Ordinarily, thus, it is expected that the statutory remedies provided for shall be availed of. If such an opportunity is not availed of by the election petitioner; he has to state the reasons therefor. If no sufficient explanation is furnished by the election petitioner as to why such statutory remedy was not availed of, the Election Tribunal may consider the same as one of the factors for accepting or rejecting the prayer for recounting. An order of the prescribed authority passed in such application would render great assistance to the Election Tribunal in arriving at a decision as to whether a prima facie case for issuance of direction for recounting has been made out."

9. In view of the settled proposition of law in this regard, this Court comes to a conclusion that the averments made in the election petition as well as any categorical pleadings to show that the requirements of Rule 79 has been followed in the present case, no amount of reasoning given by the learned Munsif, Gopalganj can allow him to order a recounting in the matter. The mandate of law laid down by the Apex Court as well as this High Court has to be honoured as well as to be treated as a binding precedent in matters of such adjudication.

10. The Court, therefore, comes to a conclusion that the order of recounting passed by the Munsif Court, Gopalganj as contained in impugned Annexure-3 is an illegal order and fit to be interfered with. The impugned order is accordingly quashed with a liberty, however, to the Tribunal to proceed in the matter if any other triable issues formulated in this regard need to be adjudicated upon by Court below.

11. The writ application stands allowed. Office is directed to return the original records of Election Case No. 18/2006, which was requisitioned in terms of the Court order within two weeks by special messenger.