

(2010) 10 UK CK 0005

In the Uttarakhand High Court

Case No : Writ Petition No. 351 (M/S) of 2010

Smt. Rajesh @ Sapna

APPELLANT

Vs

State of Uttarakhand and Others

RESPONDENT

Date of Decision : 07-10-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 4

Citation : (2010) 2 UD 447

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Judgement

Tarun Agarwala, J.—The Petitioner was elected as a member of Nagar Palika Parishad, Haridwar, in the election held in the year 2008 in respect of Ward No. 14, Sharda Nagar, Jwalapur. It transpires that a total of 3244 votes were polled, out of which, 2981 votes were found to be valid and 263 votes were rejected. The Petitioner secured 844 votes, whereas the contesting Respondent No. 3 Smt. Sunita Saini secured 806 votes, and consequently, the Petitioner was declared elected by a margin of 38 votes. Respondent No. 3, being aggrieved by the declaration of the result, filed an election petition u/s 19 of the Municipalities Act. The election was challenged basically on the ground that 125 to 130 ballot papers out of 263 invalid ballot papers were wrongly rejected on the ground that they did not contain the signatures of the Presiding Officer, and that, most of these ballot papers were cast in favour of the Respondent No. 3. This specific allegation has been made in paragraph 7 of the election petition. The Petitioner disputed the averments made in the election petition. Paragraph 7 of the written statement denied the contents of paragraph 7 of the election petition, but, in the additional pleas, the Petitioner has made a general statement that all the 263 ballot papers were rejected after the said ballot papers were shown to all the parties, and that, all the counting agents of the parties were satisfied with the rejection of the ballot papers. The Petitioner contended in the additional pleas that under Instruction No. 18 of the Instructions Book, 2008 of the State Election Commission, State of Uttarakhand, it has been specifically stated that a ballot

paper, which is not signed by the Presiding Officer, could be rejected. In the light of the said instructions, the Petitioner contended that the ballot papers were rightly rejected.

2. In support of the allegation made by the Respondent No. 3, the said Respondent filed an affidavit in evidence-in-chief, as contemplated under Order 18 Rule 4 of the Code of Civil Procedure. In this affidavit, the Respondent reiterated her allegation that 125 to 130 votes were wrongly rejected on the ground that the Presiding Officer had not made his signatures on the said ballot papers. It is contended that the said Respondent was not questioned on this allegation in her cross-examination.

3. The District Judge, after considering the matter, allowed the election petition by an order dated 12th March, 2010 setting aside the election of the Petitioner and directing the Election Officer to recount the votes and take into consideration the 125-130 ballot papers, which were rejected on the ground that they did not contain the signatures of the Presiding Officer. The Petitioner, being aggrieved by the said order, has filed the present writ petition.

4. The District Judge while allowing the petition found that a prima facie case of wrongful rejection of ballot papers was made out by the Respondent No. 3 and such rejection of the ballot papers was a clinching evidence for a direction to recount the votes. The District Judge accordingly allowed the petition and set aside the election of the Petitioner and directed the Election Officer to recount the votes.

5. Heard Sri V.K. Kohli, the learned senior Counsel duly assisted by Sri A.K. Sharma and Sri T.C. Pandey, the learned Counsel for the Petitioner, Sri Sunil Khara, the learned Addl. C.S.C. for the State/Respondent Nos. 1 & 2 and Sri Lok Pal Singh, the learned Counsel for the Respondent No. 3.

6. The learned senior Counsel for the Petitioner contended that the District Judge committed a manifest error in allowing the election petition on surmises and conjectures and in the absence of any clinching evidence. The learned Counsel submitted that only on presumption and in the absence of any clinching evidence, the District Judge committed an error in allowing the petition. The learned Counsel submitted that as per Instruction No. 18 (t) of the Instructions Book, 2008 of the State Election Commission, a ballot paper which does not contain the signature of the Presiding Officer, was bound to be rejected and was rightly rejected, and that, the said ballot papers could not be considered as valid papers nor could it be included for the recounting of the votes. The learned Counsel submitted that the secrecy of the ballot could not be jeopardized on the whims and fancies of the Respondent nor could it be ordered for recounting of the votes based on surmises and conjectures. In support of his submission, the learned Counsel placed reliance upon various case laws, which will be discussed hereinafter.

7. On the other hand, the learned Counsel for the Respondents submitted that a

specific allegation was made by the Respondents with regard to the rejection of the ballot papers on the ground of non-signature of the Presiding Officer. The learned Counsel submitted that this specific allegation was not specifically denied by the Petitioner, and further, the affidavit in relation to the evidence-in-chief was also not specifically controverted or touched in the cross-examination, and consequently the said allegation remained unrebutted, and that, by itself, was a valid ground to order for the recounting of the votes. The learned Counsel further submitted that Instruction No. 18 (t) of the Instructions issued by the State Election Commission was only directory in nature and was not mandatory, and that, in the absence of any allegation that the ballot papers were snatched from the Presiding Officer or in the absence of any allegation that more ballot papers were found in the box than issued by the Presiding Officer, the mistake committed by the Presiding Officer, if any, in not signing the ballot papers could not be a ground to reject the ballot papers, which had been cast by a bonafide voter.

8. Having heard the learned Counsel for the parties on the question of recounting of the votes, the position of law has now been crystallized by the Supreme Court in a large number of decisions. In the case of *Bhabhi Vs. Sheo Govind and Others*, , the Supreme Court held as under:

- (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 materials 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 as to enable the applicant to indulge in 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 purpose of fishing out materials.

9. In *Vadivelu Vs. Sundaram and Others*, , the Supreme Court after analyzing various judgments, held that a recount of votes could be ordered only on rare occasions and on specific allegation raised in the election petition to the effect that an illegality or irregularity was committed while counting and that the election Petitioner who seeks recounting of the votes, should allege and prove

that there was improper acceptance of the valid votes or improper rejection of the valid votes and if the Court was satisfied about these allegations only then the Court could order recounting of the votes. The Supreme Court observed that the secrecy of the ballot was sacrosanct in a democratic process of the election and that it cannot be disturbed on mere allegation of illegality or irregularity in the counting of votes. The Supreme Court further observed that the election Petitioner must prove that the purity of elections was tarnished and that the result of the election was materially affected which could only be cured by the recounting of the votes.

10. Similarly, the Supreme Court in *Tanaji Ramchandra Nimhan Vs. Swati Vinayak Nimhan and Others*, , held that an order for recounting should not be made as a matter of course, unless there was clinching evidence to support the case set up by the election Petitioner.

11. In *P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen and Others*, , the Supreme Court held as under:

13. Thus the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from hindsight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election Petitioner on the threshold before an order of recount of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or court should not order the recount of votes.

12. In *Kattinokkula Murali Krishna Vs. Veeramalla Koteswara Rao and Others*, , the Supreme Court held as under:

15. Before examining the merits of the issues raised on behalf of the parties, it would be appropriate to bear in mind the salutary principle laid down in the election law that since an order for inspection and re-count of ballot papers affects the secrecy of ballot, such an order cannot be made as a matter of course. Undoubtedly, in the entire election process, the secrecy of ballot is sacrosanct and inviolable except where strong prima facie circumstances to suspect the purity, propriety and legality in the counting of votes are made out. The importance of maintenance of secrecy of ballots and the circumstances under which that secrecy can be breached, has been considered by this Court in several cases.

16. It would be trite to state that before an Election Tribunal can permit scrutiny of ballot papers and order re-count, two basic requirements viz. (i) the election petition seeking re-count of the ballot papers must contain an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded, and (ii) on the basis of evidence adduced in support of the allegations, the Tribunal must be, prima facie, satisfied that in order to decide the dispute and to do complete and effectual justice between the parties, making of such an order is imperatively necessary, are satisfied. Broadly stated, material facts are primary or basis facts which have to be pleaded by the election Petitioner to prove his cause of action and by the Defendant to prove his defence. But, as to what could be said to be material facts would depend upon the facts of each case and no rule of universal application can be laid down.

13. In the light of the aforesaid, it is clear that secrecy of the ballot, which is sacrosanct, must be maintained and should not be violated on frivolous and vague allegations, and that, an order for inspection or for recounting should only be passed where the court is prima facie satisfied on the materials produced before the court regarding the truth of the allegations for a recount, and that, the allegations must be specific and supported by clinching evidence. Further, the Tribunal must come to a prima facie satisfaction on the basis of the material evidence on record to order recounting of the votes and to do complete and effectual justice between the parties.

14. In the light of the aforesaid, the Court is required to see as to what was the allegation and the evidence led by the parties. The Respondent in paragraph 7 of the claim petition has specifically averred that 125 to 130 votes had been rejected on the ground that the Presiding Officer had not made his signatures on the said ballot papers. It has also come on record that the election was conducted fairly and peacefully, and that, no untoward incident had taken place. It has also come on record that no ballot papers were snatched from the Presiding Officer, and that, 3244 ballot papers were issued and 3244 votes were polled, out of which, 263 ballots papers were rejected on various grounds and, one of them, was that 125-130 ballot papers did not contain the signatures of the Presiding Officer.

15. Under Instruction No. 18(t) of the Instructions issued by the State Election Commission, it is indicated that a ballot paper could be rejected in the event the Presiding Officer's signature was not available on that ballot paper. In the light of these Instructions, the 125 to 130 ballot papers were alleged to have been rejected.

16. The rejection of 125 to 130 ballot papers on the ground of non-availability of the signatures of the Presiding Officer has not been disputed by the parties. The District Judge while considering the aforesaid evidence observed and concluded that a bonafide voter had cast his vote and such vote should not be rejected for no fault of his, especially where the fault, if any, lay upon the Presiding Officer. The court below further found that there was no allegation of extra ballot papers

being cast and there was no allegation that the ballot papers were snatched from the Presiding Officer. The court below consequently found that 3244 ballot papers were validly issued by the Presiding Officer, which were used by the voters who had cast their votes, and consequently such ballot papers, which, by an error, did not contain the signatures of the Presiding Officer, could not be rejected. The court below further found that Instruction No. 18(t) of the Instructions issued by the State Election Commission, was only advisory and directory in nature and was not mandatory. The court below concluded that in the absence of any fraud being played or any mischief being played by any party, and in view of the fact that the election was conducted peacefully without any untoward incident, it was not proper to reject the ballot papers which were validly cast.

17. In my opinion, such findings given by the court below is based on a proper appreciation of the evidence that was led by the parties and such evidence gave a prima facie opinion for the court below for recounting of the votes with regard to the ballot papers which were wrongly rejected on the ground of non-availability of the signatures of the Presiding Officer. In the opinion of the Court, the finding given by the court below for the recounting of votes was based on clinching evidence and proper appreciation of the evidence brought on the record. In the opinion of the Court, recounting of votes will reinforce the transparency in the process of the election, particularly when the margin of votes is narrow. In the present case, the Petitioner was elected by a margin of 38 votes, whereas 125 to 130 ballot papers were wrongly rejected. In view of the aforesaid, this Court does not find any error in the order of the court below directing the Election Officer to recount those ballot papers, which did not contain the signatures of the Presiding Officer.

18. The Court is, however, constrained to observe that the court below committed an error in allowing the election petition and setting aside the election on this ground. In the opinion of the Court, once the court below finds that certain ballot papers were wrongly rejected, the court could only issue a direction for the recounting of the votes, but could not set aside the election. In the opinion of the Court, the order of recount is not a final order, but is a step to the process of the final decision of the election petition. Even after the votes are recounted, certain objections could be taken with regard to the procedure and validity of those votes which are counted either way, and consequently, the election petition could only be finally decided one way or the other after the recounting of votes.

19. Consequently, the order of the court below allowing the petition and setting aside the election of the Petitioner to that extent is incorrect and is set aside. The Court consequently remits the matter to the court below to pass final orders after hearing the parties and after the recounting of votes as directed in the impugned order.

20. In view of the aforesaid, the writ petition is partly allowed. The order of the District Judge, Haridwar, dated 12.03.2010 is set aside to the extent as stated

aforesaid. In the circumstances, the parties shall bear their own costs.