

(2005) 10 OHC CK 0007
In the Orissa High Court
Case No : Writ Petition (C) No. 13017 of 2003

Sunadhar Kakari	Vs	APPELLANT
B.V. Rabana Murty and Others		RESPONDENT

Date of Decision : 07-10-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 480, 482
Orissa Panchayat Samiti Act, 1959 — Section 44A, 44B, 44C, 44D, 44E
Orissa Zilla Parishad Act, 1991 — Section 32 , 32(1)
Panchayat Samiti Election Rules — Rule 31(7)

Citation : (2005) 100 CLT 635 : (2005) 2 OLR 731

Hon'ble Judges : P.K. Tripathy, J;A.K. Parichha, J

Bench : Division Bench

Advocate : N.C. Pati, S. Mishra, S.K. Bal, N. Singh, A.K. Das and B. Das, for the Appellant; C.A. Rao, A.K. Rath and P. Diva, for the Respondent

Final Decision : Allowed

Judgement

A.K. Parichha, J.—Petitioner has challenged the order dated 27.11.2003 passed by learned District Judge, Koraput in Election Dispute Case bearing M.J.C. No. 48 of 2002 allowing the prayer of the election petitioner, i.e., Opp. Party No. 1 in the present Writ Petition, for recounting of ballots of the election which was held for the 13 Mithili-II Zilla Parishad Zone on 19.2.2002. In the impugned abnormally lengthy order, learned District Judge has held that for the circumstances indicated therein with respect to votes being cast in the names of dead persons and persons substituting real voters, recounting of ballot is essential.

2. Mr. N. C. Pati, Learned Counsel for the petitioner submitted that the impugned order is legally unsustainable as the same is contrary to the provisions laid down in the Orissa Zilla Parishad Act and Rules. According to him, the procedure and circumstances for recounting have been clearly enumerated in Rule 31, Sub-rule 7 of the Panchayat Samiti Election Rules, which applies mutatis mutandis to the election for Zilla Parishad and the facts and circumstances of the present case do not come within the parameter of the said provision. He also claimed that the

grounds indicated in the impugned order do not justify for recounting of the ballots.

3. Mr. C. A. Rao, Learned Counsel appearing for Opp. Party No. 1, on the other hand, argued that on the face of clear evidence of voting manipulation, error in counting etc., there was no alternative for learned District Judge, Koraput than to order recounting of ballots. He reiterated instances of irregularities and manipulation as noted in the impugned order.

4. The relevant portion of Section 32 of the Zilla Parishad Act, 1991 reads as follows :

"32. Election disputes : (1) No election of a person either as a member or as the President or Vice-President of a Parishad held under this Act shall be called in question except by an election petition presented before the District Judge having jurisdiction over the place at which office of the Parishad is situated.

(2) For the purpose of Sub-section (1), the provisions contained in Chapter - VI-A (hereinafter referred to in this Sections as the said Chapter) of the Orissa Panchyat Samiti Act, 1959 shall mutatis mutandis apply except as hereunder provided :

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5. In view of the provisions contained in Sub-section 2 of Section 32, the provisions contained in Chapter-VI-A of the Orissa Panchayat Samiti Act, 1959 are to be followed in an election dispute relating to Zilla Parishad. Chapter-VI-A of the Panchayat Samiti Act contains Sections 44-A to 44-Q. Section 44-H speaks about the procedure before the Election Commissioner (in the present case, District Judge). Section 44-H reads thus :

"44-H Powers of Election Commissioner: The Election Commissioner shall have the powers which are vested in a Court under the Code of Civil Procedure, 1908 (5 of 1908) when trying a suit in respect of the following matters, namely;

- (a) discovery and inspection;
- (b) enforcing the attendance of witnesses and requiring the deposit of their expenses;
- (c) compelling the production of documents;
- (d) examining witnesses on oath;
- (e) granting adjournments;
- (f) reception of evidence taken on affidavit; and
- (g) issuing commissions for the examination of witnesses,

and may summon and examine suo motu any person whose evidence appears to it to be material; and shall be deemed to be a Civil Court within the meaning of

Sections 480 & 482 of the Code of Criminal Procedure, 1898 (5 of 1898)."

The aforesaid Section, therefore, gives power to the Election Commissioner/ District Judge to make discovery and inspection and compel production of documents. Thus, such power includes compelling production of documents like ballot papers for scrutiny. The next question is under what circumstances such power can be exercised. On many occasions this Court and the Apex Court have ruled that order for inspection of ballot papers, may not be granted as a matter of course and that scrutiny and recounting of ballot papers should only be directed in extreme and compelling circumstances. [See *Kishore Mohanty v. Birendra Chandra Pandey and Ors.*, 1999 (II) OLR-78].

6. The grounds on which learned District Judge ordered for recounting as noted earlier, cast of votes in the name of dead persons enlisted in the voters' lists and cast of vote by impersonation. Such aspect cannot be ascertained on recounting of votes. On the other hand, such issues can properly be decided on the basis of assessment of evidence. Thus, we find that learned District Judge has committed illegality by improper exercise of jurisdiction while ordering for recounting of ballots.

7. For the above noted reasons, we find the impugned order un-sustainable and accordingly quash the same. The Writ Petition is allowed accordingly.

P.K. Tripathy, J.

8. I agree.