
(1996) 03 OHC CK 0021
In the Orissa High Court
Case No : O.J.C. No. 6719 of 1994

Sunakar Raut

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 01-03-1996

Acts Referred:

Citation : (1996) 03 OHC CK 0021

Hon'ble Judges : D. Misra, J;A. Pasayat, J

Bench : Division Bench

Advocate : Madhav Mishra, S.K. Mohanty, S. Barik and Mamta Mishra, for the Appellant; Govt. Advocate, A.S. Naidu, P. Mohanty and A.K. Rath, for the Respondent

Final Decision : Dismissed

Judgement

Pasayat, J.—Petitioner calls in question legality of decision rendered by Member, Co-operative Tribunal, Orissa (in short, "the Tribunal") dismissing his petition questioning, correctness of opposite party No. 5 --Yudhistir Rout's election to the office of President, Radio Service Co-operative Society, Mahakalapara, Kendrapara (in short, "the Society"). The election was held in terms of the Orissa Co-operative Societies (Election to the Committees)" Rules," 1992 (in short, "Election Rules") framed in exercise of powers conferred by Section 134 read with Section 28-A of the Orissa Co-operative Societies Act, 1962 (in short, "the Act).

2. Back ground facts as projected by parties are as follows:

Petitioner Sunakar Rout and opposite party No. 5 Yudhistir were contestants for the office of President of the Society. According to Election Officer (opposite party No. 3) petitioner secured 356 votes while opposite party No. 5 secured 367 votes, and latter was declared elected. Petitioner's stand is that 19 ballots liable to be rejected were counted as valid votes in favour of opposite party No, 5, and on exclusion of those 19 votes, total valid votes polled by opp. party No. 5 would

be 348, which is less than the total valid votes polled by the petitioner. A dispute was raised before the Tribunal functioning u/s 67-B of the Act, in which prayer was made for recounting the ballot papers and for declaration that the petitioner was duly elected. It was pleaded that a prayer was made for recounting which was not heeded to by the Election Officer. The Election Officer (opp. party No. 3), the Society (opp. party No. 4) and opposite party No. 5 disputed the stand of the petitioner and stated that no ballot paper liable to be rejected was counted as valid vote in favour of opposite party No. 5. Stand that prayer was made for recounting was disputed. Taking note of the fact that the petitioner was absent at the time of counting, and in the absence of any material to show that prayer was made for recounting, and absence of details of the so-called invalid votes, the Tribunal rejected the election dispute. Prayer for recounting in the absence of details of any ballot paper which according to the petitioner were invalid constituted, according to the Tribunal, a roving and fishing inquiry which was not to be permitted.

3. According to Mr. Mahadev Misra, learned counsel for petitioner, Tribunal has lost sight of the fact that there was no denial about the prayer for recounting. In any event the number of ballot papers being very small, direction for recounting ought to have been given. It is fairly stated that no application in writing had been filed before the Election Officer, and only an oral prayer was made. Learned counsel for opposite parties on the other hand submitted that even if it is accepted for the sake of argument that an oral prayer for recounting before the Election Officer was made, that does not meet requirements of law. Absence of any material about the so-called invalid ballot papers has rightly weighed with the Tribunal, and there is no scope for interference in this writ application.

4. As the election was held in terms of the Rules, Rules 41, 42 and 45 which are extracted below have relevance so far as the present dispute is concerned.

"41. Scrutiny and rejection of ballot papers-

(1) The ballot papers taken out of each ballot box shall be arranged in convenient bundles of a fix number of ballot papers and scrutinised bundle-wise.

(2) The Election Officer shall reject a ballot paper if-

(a) it bears any mark of writing by which the voter can be identified; or

(b) no voter is recorded thereon; or

(c) votes are given on it in favour of more than one candidate where only one candidate is to be elected; or

(d) the voter has recorded on the ballot paper more marks than he is required to make where more than one candidate is to be elected; or

(e) the mark indicating the vote thereon is placed in such manner as to make it doubtful to which candidate the vote has been given; or

(f) it is a spurious ballot paper; or

(g) it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established; or

(h) it, bears a serial number, or is of a design, different from the serial numbers or, as the case may be, design of the ballot papers authorised for use at the polling station; or

(i) it does not bear mark and signature which it should have borne under the provisions of Sub-rule (3) of Rule 25.

Provided where the Election Officer is satisfied that any such defect as is mentioned in Sub-clause (h) or (i) has been caused by any mistake or failure on the part of the Presiding Officer or the Polling Officer, the ballot paper shall not be rejected merely on the ground of such defect:

Provided further that a ballot paper shall not be rejected merely on the ground, that the mark indicating the vote is not distinct or made more than once, if the intention that the vote shall be for a particular candidate clearly appears from the way the paper is marked.

(3) Before rejecting any ballot paper under Sub-rule (2) the Election Officer shall allow each candidate and this Election and Counting Agent present, a reasonable opportunity to inspect the ballot paper.

(4) The Election Officer shall record on every ballot paper which he rejects the letter "R" and the grounds of rejection in abbreviated form either in his own hand, or by means of a rubber stamp.

(5) All ballot papers rejected under this rule shall be bundled together.

42. Procedure for counting votes-- (1) Every ballot paper which is not rejected under Rule 41 shall be counted as one valid vote for the candidate for whom it has been recorded in the ballot paper:

Provided that where more than one candidates are required to receive votes from the ballot paper used by a voter in a situation envisaged in Rule 27, the votes recorded in such ballot papers not so rejected, shall be counted as valid votes of the candidates in favour of whom they have been so recorded respectively:

Provided further that no cover containing tendered ballot papers shall be opened and no such ballot papers shall be counted.

(2) After the counting of all ballot papers, contained in all the ballot boxes used at all polling stations has been completed, the Election Officer shall make the entries in a result sheet in Form XII and announce the particulars. (3) The valid ballot papers shall [thereafter be bundled together and kept along with the bundle of rejected ballot papers in a separate packet, which shall be sealed and on which shall be recorded the following particulars, namely:

- (a) the name of the constituency;
- (b) the particulars of the polling station where the ballot papers have been used; and
- (c) the date of counting.

XXX XXX - XXX XXX

45. Recount of votes-- (1) After the completion of the counting, the Election Officer shall record in the result sheet in Form XII, the total number of votes polled by each candidate and announce the same:

Provided that, when an equality of votes is found to exist between any candidate and the addition of the vote will entitle any of the candidate to be declared elected, the determination of the person or persons to whom such an additional vote shall be deemed to have been given shall be made by lots to be drawn in the presence of the Election Officer, and the candidates who may desire to be present, and in such manner as the Election Officer may determine.

(2) After such announcement has been made, a candidate or, in his absence, his Election Agent may apply in writing to the Election Officer for a recount of all or any of the ballot papers already counted stating the grounds on which he demands such recount.

(3) On such an application being made, the Election Officer shall decide the matter and may allow the application whole or in part or may reject it if it appears to him to be frivolous or unreasonable.

(4) Every decision of the Election Officer under Sub-rule (3) shall be in writing and contain the reasons therefor.

(5) If the Election Officer decides under, Sub-rule (3) to allow an application either in whole or in part, he shall-

- (a) count the ballot papers again in accordance with his decision;
- (b) amend the result sheet in Form XII to the extent necessary after such recount; and
- (c) announce the amendment so made by him. "

(6) In case no application for recount under Sub-rule (2) is made or after disposal of such application made, if any, in the manner specified under Sub-rules (3), (4) and (5), the Election Officer shall sign the result sheet in Form XII and no application of any further recount shall be entertained thereafter."

5. Rule 45 deals with recount of votes, Sub-rule (2) thereof provides that after announcement has been made on completion of counting, a candidate or, in his absence, his Election Agent may apply in writing to the Election Officer for a recount of all or any of the ballot papers already counted stating the grounds on

which he demands such recount. As noted supra, no prayer in writing was made for recounting in the present case. Sub-rule (3) of Rule 45 provides that on an application being made, the Election Officer shall decide the matter and may allow the application in whole or in part or may reject it, if it appears to him to be frivolous or unreasonable. Decision under Sub-rule (3) is to be made in writing and has to contain the reasons therefor. Rule 45 of the Rules is almost in pan materia "with Rule 63 of the Conduct of Election Rules, 1961 framed under the Representation of the People Act, 1951. Undisputed position being that there was no application in writing, question of any recount by the Election Officer did not arise. Tribunal has noticed that apart from the absence of recourse to Sub-rule (2) of Rule 45, no material was brought on record to show that even any oral prayer was made for such recount to substantiate the stand taken in the election petition. It is significant to note here that details of not even one ballot out of the so-called vulnerable 19 ballots has been indicated by the petitioner.

6. Right to elect and right to be elected are statutory rights. In order to exercise such right, certain formalities as enunciated in the concerned statute are to be strictly complied with. The statutory requirements of election law are to be strictly observed. Election contest is not an action at law or a suit in equity, but is a purely statutory proceeding unknown to Common Law. As observed by the apex Court, in the context of the Representation of the People Act, 1951, in *Jyoti Basu and Others Vs. Debi Ghosal and Others*, , and *Rama Kant Pandey Vs. Union of India*, a right to elect, fundamental though it is to democracy, is anomalously enough, neither a fundamental right nor a Common Law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside the statute, there is no right to elect, no right to be elected and no right to dispute an election. An election petition is not an action in Common Law, nor in equity. It is covered by a special jurisdiction which, as is the case with all proceedings in such a jurisdiction, has always to be exercised in accordance with the statute creating it, Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. As observed by the Apex Court in *F.A. Sapa Etc., Etc., Vs. Singora and others*, , Election Law being statutory in character must be strictly complied with since an election petition is not guided by over changing common law principles of justice and notions of equity. An oral request for recounting cannot be a substitute for written application as obligated under Rule 45(2) of the Rules. There can be no record of such a prayer, unless it is shown that on such prayer being made, any action was taken. That, however, is an academic question in the case at hand. That also does not meet requirements of law.

7. The residual question is about acceptability of the plea that the number of ballots, and margin of votes separating success and failure being very small, recount should have been done in the interest of justice. As observed by the Apex Court in *Charan Dass v. Surinder Kumar and Ors.*, , the mere fact that the margin was very small does not provide justification to order recounting. Even if the margin is small, basis has to be indicated as to why recounting is warranted.

Following pre-requisites have, to be ensured in the matter of recount and/or inspection of the ballot papers.

(1) 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) Before inspection is allowed, the allegations made against the elected candidate, must be clear and specific and must be supported by adequate statement of material facts.

(3) The Court/Tribunal must be prima facie satisfied on the materials produced before it regarding truth of the allegations made for recount.

(4) The Court/Tribunal must come to a conclusion that order to grant prayer for inspection is necessary and imperative to do full justice between the parties,

(5) The discretion conferred in the Court/ Tribunal should not be exercised in such a way so as to enable the applicant to indulge in a roving enquiry with a view to fish out material to substantiate its case.

8. It is to be noted that the defeated candidate has ample opportunity to examine ballot papers before they are counted. The basic defect if any in any ballot paper is supposed to be known to the candidate or his election agent. The basic materials relating to such defects are to be indicated for considering a prayer for recount or inspection.

9. As indicated above, details of defects in ballots, which according to the petitioner were invalid, were not indicated in the election petition. In that view of the matter, the mere fact that there was small margin of votes separating success and failure is of no consequence. The Tribunal was justified in not accepting the prayer for recounting, and dismissing the election petition.

The writ application fails and is dismissed. No costs.

D. Mishra, J.

10. I agree.