Kailashi Vs Smt. Bharosi Bai and Others

None

Court: Madhya Pradesh High Court (Gwalior Bench)

Date of Decision: Jan. 23, 2008

Citation: (2008) ILR (MP) 1586 : (2008) 5 MPHT 204 : (2008) 2 MPJR 386 : (2008) 2 MPLJ 218

Hon'ble Judges: Subhash Samvatsar, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Subhash Samvatsar, J.

This matter was placed before me due to conflicting judgments delivered in the present case by Hon"ble Shri Justice Abhay Gohil and Hon. Shri

Justice P.K. Jaiswal. On account of difference of opinion, the Division Bench has formulated following two questions for opinion by this Court:

Whether as per Proviso to Rule 12 of the Rules of 1995, without any application and without any prayer either by the parties, directions can be

made in the writ appeal for examination of Returning Officer, and to call the Returning Officer in evidence?

Whether in view of direction made by the Learned Single Judge with regard to opening of tendered votes afresh after giving opportunity of leading

evidence to the parties and after following the procedure laid down by the Apex Court in the case of Wilfred D"souza Vs. Francis Menino Jesus

Ferrao, , any interference is warranted in this writ appeal ?

Brief facts of the case are that elections for the post of Sarpanch of Gram Panchayat Zaida Tehsil and District Sheopur were held on 16-1-2005.

In the said elections, petitioner Kailashi and private respondents were contesting parties. Counting of the votes took place on 28-1-2005. In the

initial counting, both Kailashi and Shrimati Bharosi Bai obtained 244 votes each. Other candidates could get lesser votes. Hence, an application

was filed by petitioner Kailashi for recounting of votes for Ward Nos. 169, 170 and 171. Shrimati Bharosi Bai had also filed an application for

recounting of entire constituencies. Her application was rejected and therefore, she left the place. Prayer of the petitioner was accepted and votes

were recounted for three constituencies and it was found after recounting that there is no different in votes. After this, polling recounting was done

and votes of all the constituencies were recounted and it was found that the petitioner secured two votes more than Shrimati Bharosi Bai and was

declared vide document annexed with the writ petition as Annexure P-4. This election result was challenged by Shrimati Bharosi Bai on the ground

that second recounting was done behind her back and is, therefore, violative of principles of natural justice, by filing an election petition before the

Sub Divisional Officer.

Sub Division Officer, before whom the election petition was filed framed issues and ultimately came to the conclusion that in the present case,

election results be declared on the basis of tendered votes. This order dated 23-3-2006 annexed as Annexure P-l with the writ petition was

challenged by the present petitioner by filing writ petition. The learned Single Judge after hearing both the parties held that opening of tendered

votes is permissible in view of the judgment of the Apex Court in the case of Wilfred D''souza Vs. Francis Menino Jesus Ferrao, . The learned

Single Judge further held that before opening the tendered votes, the procedure prescribed by the Apex Court in the case of Dr. Wilfred D''Souza

(supra) be followed. As per the aforesaid judgment of the Apex Court, before opening tendered votes, two points must be proved; viz. (a) the

Court would exclude the vote initially cast by the person other than the genuine voter from the number of votes of the candidate in whose favour its

was caste; and (b) that the Court would further take into account the tendered ballot paper in favour of the candidate in whose favour it is duly

marked. It may also be mentioned that the proper occasion for scrutinising the tendered ballot papers would normally arise only when the

difference between the number of votes polled by the candidate declared elected and his nearest rival is so small that there is a possibility of that

difference being wiped out and the result of election being thus materially affected if the Court takes into account the tendered ballot papers and

excludes from consideration the corresponding votes which were cast by persons other than the genuine voters.

Thus, it is clear that tendered votes can be opened, if it is established on evidence that the person casting the tendered vote was a genuine voter.

As the learned Single Judge found that there is no evidence to that effect, he remanded the matter back to the Sub Divisional Officer and directed

to open the tendered vote after taking evidence that the person casting the tendered vote was a genuine voter.

This order passed by the learned Single Judge was challenged by the petitioner by filing present writ appeal before Division Bench. Division Bench

heard the appeal and after hearing the appeal, the Judges delivered their separate judgments and after formulating the aforesaid two questions, the

matter was placed before me.

First question raised by Shri M.P.S. Raghuvanshi, learned Counsel for the appellant is that the tendered vote cannot be opened at all. In support of

his argument, he has referred to Rule 64 of the Madhya Pradesh Panchayat Nirvachan Niyam, 1995 (hereinafter, referred to as ""Rules""). Rule 64

deals with tendered votes. Sub-rules (5) of Rule 64 provides that separate cover shall be used for keeping the tendered ballot papers for election

to the offices of Panch, Sarpanch and Member of Janpad Panchayat and Zila Panchayat. Rule 77 provides for counting of votes and Sub-rule (1)

provides that every ballot paper which is not rejected under Rule 76 shall be counted provides that no cover containing tender ballot papers shall

be opened and no such ballot paper shall be counted. Thus, according to the learned Counsel for the appellant, that is a bar for opening the

tendered vote and in such circumstances, counting or opening of tendered vote is not permissible.

Counsel for the appellant invited attention of this Court to the case of Dr. Wilfred D''Souza (supra), and submitted that the said judgment was

pronounced by the Apex Court with the agreement of the parties, hence, it has no binding effect. He invited attention of this Court to Para. 14 of

the judgment to support his argument. Said para reads as under:

14. Learned Counsel for the parties are, however, agreed that such tendered ballot papers, even though excluded from consideration at the time of

counting of votes after the poll, can be taken into account in proceedings to challenge the validity of the election of the returned candidate provided

certain conditions are fulfilled. We agree with the learned Counsel for the parties in this respect, and find that this position of law is supported by

two English decisions, Borough of St. Andrews, 4 Omelly and Hardcastle 32 and the Stepney Division of the Borough of Tower Hamlets, 4

Omelly and Hardcastle 34 as also by two Indian decisions. Kalicharan Singh v. Ramcharitar Rai Yadava (1953) Ele LR 98 (Ele. Tri.-Pat.) and

A.K. Subbaraya Gounder v. G. Palanisami Gounder (1995) 11 Ele LR 251 (Ele. Tri.-Coimbatore). Before, however, a tendered ballot paper can

be taken into account during the proceedings of election petition evidence would have to be led on the following two points:...

The Apex Court, though recorded agreement between the parties, but has further stated that this position of law is supported by two English

decisions, referred to in the said paragraphs. Thus, it cannot be said in the present case that the law laid down by the Apex Court in the aforesaid

decision is totally based on the agreement between the parties and is therefore has no binding effect.

Moreover, in the present case, I find that both the learned Judges of the Division Bench have held that the tendered votes can be opened. Hon.

Shri Justice P.K. Jaiswal by his judgment has affirmed the judgment of the learned Single Judge and dismissed the writ appeal without any

interference, while Hon. Shri Justice Abhay Gohil after holding that the tendered votes can be opened has held that before opening the tendered

votes, the Specified Officer should examine the Returning Officer; he is fully empowered under suo motu power to call for the Returning Officer

and after recording his evidence should find out whether he has passed any order of recounting or any recounting was done in pursuance of his

order.

Thus, both the Judges of the Division Bench have held that tendered vote can be opened and there is no divergent opinion on the said question. In

such a situation, in the light of Full Bench decision of this Court in the case of Ladhuram v. Krishi Upaj Mandi Samiti, Shivpuri 1997 MPLJ 641,

this Court cannot go into the question whether tendered vote can be opened or not.

The only question which is required to be decided by this Court is whether the Specified Officer should examine the Returning Officer in its suo

motu powers to find out whether he has passed any order of recounting or not and whether any recounting has been done by him or not.

Rule 80 of the Rules provides of recount of votes. Sub-rule (3) of Rule 80 provides that every decision of the Returning Officer or such other

officer authorised by him under Sub-rule (2) shall be in writing and contain the reasons therefor. Thus, as per this rule, every order passed by the

Returning Officer for recounting must be in writing. The Returning Officer, on the basis of recounting, has to declare the results in Form Nos. 16,

17, 18 and 19. Thus, entire action of the Returning Officer is required to be reduced in writing and in the absence of any written order, it cannot be

said that he has passed any order for recounting. Thus, the question of examining the Returning Officer for proving whether or not he has passed

any order for recounting and has done any recounting in pursuance of the said order can be determined only from the written order passed by him,

and therefore, question of examination of Returning Officer is not necessary.

In such a situation, in my opinion, the view taken by Hon. Shri Justice Abhay Gohil in directing to examine the Returning Officer by the Specified

Officer in suo motu powers for deciding whether he has passed any written Older or not is not necessary and can be established by filing copy of

the order.

Hence, I agree with the judgment delivered by Hon. Shri Justice P.K. Jaiswal, J. and hold that the appeal filed by the appellant deserves to be

dismissed with costs.

Now the appeal be placed before appropriate Bench for pronouncing the judgment in accordance with the aforesaid opinion.