Smt. Sampat Devi Vs Sub-Divisional Officer-cum-Prescribed Authority and Others

Court: Madhya Pradesh High Court

Date of Decision: July 19, 2007

Acts Referred: Constitution of India, 1950 â€" Article 226

Citation: (2007) 3 JLJ 301 : (2007) 3 MPHT 462

Hon'ble Judges: Shubhada R. Waghmare, J; Dipak Misra, J

Bench: Division Bench

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Dipak Misra, J.
The acceptability and faultlessness of the order dated 4-9-2006 passed by the learned Single Judge in W.P. No.

2840/2006 is called in question in this intra-Court appeal preferred u/s 2 of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko

Appeal) Adhiniyam, 2005.

2. The appellant-petitioner (hereinafter referred to as "the appellant") invoked the jurisdiction under Article 226 of the Constitution of India

questioning the soundness of the order dated 14-2-2006 passed by the Sub-Divisional Officer-cum-Prescribed Authority, Niwadi, District

Tikamgarh in Election Petition No. 11/A-89/04-05 whereby the Election Tribunal allowed the prayer of the election-petitioner for the purpose of

recount of votes and the order which entailed in declaration of the election petitioner as the returned candidate.

2. The facts which are imperative to be exposited are that the appellant was elected as the Sarpanch of the Gram Panchayat, Makara. The

respondent No. 2 preferred an election petition u/s 122 of the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (for short

"the 1993 Act") before the SDO-cum-Prescribed Authority, Niwadi. She was elected by defeating the second respondent by a margin of six

votes. In the election petition it was averred that certain irregularities were committed in counting of votes in respect of booth No. 130. In the

election petition in Paragraphs 3 to 6 certain allegations were made about the process of counting of votes. The English translation of the said

assertions read as under:

3. At the time of counting of ballot papers of polling booth No. 130 of Village Panchayat, Makara, the Counting Officer had disclosed that the

petitioner had got 98 votes while at the time of. counting of the votes of all the polling centres of the Village Panchayat only 96 votes of the said

polling centre was added which is a gross irregularity and illegality and prays for countermanding of the election.

4. The Counting Officer has committed illegality and partiality openly and in a planned manner during the counting of votes in order to get Smt.

Sampat Devi (respondent No. 1) elected. One of the Counting Officer has declared that the petitioner has been defeated by a margin of 8 votes.

Another counting officer had declared that the petitioner has been defeated by a margin of 6 votes. Thereafter the petitioner made a prayer for

recounting but was told that now nothing could be done in this regard. According to the petitioner, the aforesaid process is wrongful and illegal.

5. Thereafter immediately on 27-1-2005 Shri Pratap Yadav, an agent of the petitioner as well as the agents of the respondent Nos. 2, 3 and 4 had

put froth an application to the Election Officer for recounting and conducting an enquiry about the aforesaid illegality. But the same was not

considered.

6. Looking to the aforesaid attitude of the Election Officer, the petitioner has sent an application by fax to the District Election Commissioner,

Tikamgarh and the State Election Commissioner praying for recounting and further, making an enquiry. However, the application on account of

influence of respondent No. 1 and undue rigidity of the Election Officer was not considered. Therefore, on the aforesaid ground the election should

be countermanded.

3. A reply was filed to the election petition by the present appellant disputing the facts that have been put forth in the election petition.

4. The Prescribed Authority, as is evincible framed three issues. The said issues being translated in English read as under:

(1) Whether during the counting of votes of the Village Panchayat, Makara counting was done in favour of the respondent No. 1 in contravention

of the legal process?

(2) Whether the election petitioner had submitted any application before the Presiding Officer or the Returning Officer and whether the said

application was disposed of in accordance with law?

(3) Whether any legal ground and fact exists for recount of votes?

6. The election petitioner examined Raghuvir Singh, Pratap Singh and herself. The appellant examined herself, Ravi Narain Yadav, Murlidhar

Yadav and Anand Singh. The Election Tribunal on the basis of evidence brought on record while answering the first issue came to hold that the

election petitioner has failed to prove that while counting of votes in respect of Gram Panchayat, Makara illegality had been committed. While

dealing with the Issue No. II which pertains to whether an application was preferred before the Returning Officer and the same had been properly

rejected, the Tribunal returned a finding that an application was filed before the Returning Officer and the said authority was under obligation to

deal with the same under Rule 80 of the M.P. Panchayat Nirvachan Niyam, 1995 (hereinafter referred to as "the Rules") but that was not done.

Thereafter the Prescribed Authority addressed himself to the aspect whether there was adequate justification for directing recount. While dealing

with the said issue the Tribunal expressed the opinion the English translation of which reads as under:

Issue No. 3 : Whether there is any ground and fact for the re-counting of the ballot papers?

It is clear from the discussion regarding Issue No. 3 that the Returning Officer of Niwadi has not disposed of the application of the petitioner for

recounting as per law. The same was neither rejected nor allowed, while the petitioner has made a request for recounting. It was expected from the

Returning Officer to dispose of the application for recounting according to the provision of Rule 80(2) and (3) of M.P. Panchayat Election Rules,

1995. But he failed to do so. Therefore, a ground and fact for the recounting arises. From the aforesaid facts, I have come to the conclusion that in

this case, where the difference of ballot papers between the winning candidate and the losing candidate is only of six votes, the recounting of votes

is a must, not only to dispose of the case but to impart effective and complete justice to the parties. So, the relevant record be called from the

Returning Officer, Niwadi and be put up immediately before the Court for the recounting.

7. Thereafter the recount was done whereby on 14-2-2006 in the recounting 17 votes of Booth No. 129 polled in favour of the appellant were

declared invalid. As a result of which the election petitioner was declared elected. The said order was brought before the learned Single Judge as

Annexure P-9. It is worth noting here that the SDO on 14-2-2006 constituted a committee for recount of votes. The said committee consisted of

four members viz., Tehsildar, Niwadi; Revenue Inspector, Niwadi; Senior Agricultural Expansion Officer and Rural Agricultural Expansion Officer

(RAEO).

8. The committee as is manifest, got recounting in respect of all the booths as has been indicated hereinabove and found difference of 17 votes.

9. We have heard Mr. K.N. Agrawal, learned Counsel for the appellant and Mr. Mukesh Agrawal, learned Counsel for the respondent No. 2, the

real contesting party.

10. Mr. K.N. Agrawal, learned Counsel for the appellant has raised the following contentions:

(a) When the Election Tribunal had answered the issue No. 1 in favour of the present appellant that no illegality had been committed in polling of

votes in respect of Gram Panchayat, Makara there was no justification for directing recount of votes.

(b) The Prescribed Authority has not ascribed any cogent and germane reason while directing recount of votes but solely directed so on the

bedrock of the factum that the election petitioner had filed an application for recount under Rule 80 of the Rules but the same was dealt with by the

Returning Officer.

(c) The Prescribed Authority has fallen into grave error by not keeping in mind that a strong case has to be made out for recount as secrecy of

votes has its own sacrosanctity in a democratic polity and further unless acceptable cogent evidence is brought on record a recount cannot be

directed in a routine manner.

(d) If the election petition is scrutinised it will be clearly evincible that there are vague allegations and also such a vague allegations relate to Booth

No. 130 and, therefore, there was no necessity for issue of direction to direct for recount of votes in respect of all the booths.

(e) The constitution of a committee for recount of votes is unknown to law and by taking such a course the Election Tribunal has fallen into an

incurable error.

(g) The learned Single Judge has totally fallen into grave error in appreciating the conception of recount by affirming the order of the Election

Tribunal when no case for recount was made out.

(h) A case of recount is not to be perceived from the hind side inasmuch as a case is not to be thrown overboard on the ground that recount has

already been made.

(i) The small margin of votes by which the candidate gets elected may be a factor for consideration of the prayer for recount of votes but that

cannot be the sole ground or the governing factor.

11. Mr. Mukesh Agrawal, learned Counsel appearing for the respondent No. 2 supporting the order passed in the writ petition submitted as

follows:

(i) The order passed by the learned Single Judge is in consonance with the law of recount and hence, affirmation of the order of the Tribunal by him

is absolutely flawless.

(ii) Scanning of Rule 80 of the Rules and appreciation thereof by the learned Single Judge regard being had to the fact that the application filed by

the election petitioner before the Returning Officer for recount was not considered, cannot be held to be erroneous and thereby conferral of stamp

of approval on the order passed by the Prescribed Authority is totally presentable.

(iii) When the Election Tribunal had directed recount of votes on the basis of material brought on record and when after recount the result of the

election has been changed there was no scope for interference in the writ petition and the learned Single Judge has rightly not interfered with and,

therefore, the said order deserved to be concurred with in this intra-Court appeal.

12. Before we proceed to deal with the aforesaid submissions raised at the Bar, it is seemly to refer to certain citations in the field relating to

recount of votes.

13. In P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen and Others, , it has been held as under:

15. Mr. Padamanabhan also contended that the purpose and object of the election laws is to ensure that only that person should represent the

constituency who is chosen by the majority of the electors and that is the essence of democratic process, and this position has been observed by a

Bench of this Court in their order of reference of the case of N. Gopal Reddy Vs. Bonala Krishnamurthy and Others, and hence, it would be a

travesty of justice and opposed to all democratic canons to allow the first respondent to continue to hold the post of the President of the Panchayat

when the recount disclosed that he had secured 28 votes less than the petitioner. We are unable to sustain this contention because as we have

stated earlier an order of recount of votes must stand or fall on the nature of the averments made and the evidence adduced before the order of

recount is made and not from the results emanating from the recount of votes.

13. In Vadivelu Vs. Sundaram and Others, , a three Judge Bench of the Apex Court after referring to the decisions rendered in the cases of

Satyanarain Dudhani v. Uday Kumar Singh 1993 Supp (2) SCC 82; Shri Jitendra Bahadur Singh Vs. Shri Kirshna Behari and Others, ; D.P.

Sharma Vs. Commissioner and Returning Officer and Others, ; P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen and Others, ; Ram Sewak

Yadav Vs. Hussain Kamil Kidwai and Others, ; S. Raghbir Singh Gill Vs. S. Gurcharan Singh Tohra and Others, ; R. Narayanan Vs. S. Semmalai

and Others, ; and M.R. Gopalakrishnan Vs. Thachady Prabhakaran and Others, expressed the view as under:

16. The result of the analysis of the above cases would show that this Court has consistently taken the view that re-count of votes could be

ordered very rarely and on specific allegation in the pleadings in the election petition that illegality or irregularity was committed while counting. The

petitioner who seeks re-count should allege and prove that there was improper acceptance of invalid votes or rejection of valid votes. It only the

Court is satisfied about the truthfulness of the above allegation, it can order re-count of votes. Secrecy of ballot has always been considered

sacrosanct in a democratic process of election and it cannot be disturbed lightly by bare allegations of illegality or irregularity in counting. But if it is

proved that purity of elections has been tarnished and it has materially affected the result of the election whereby the defeated candidate is seriously

prejudiced, the Court can resort to re-count of votes under such circumstances to do justice between the parties.

14. In Chandrika Prasad Yadav Vs. State of Bihar and Others, , the Apex court has laid down the following norms:

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

(i) Aprima 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 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.

15. In the case at hand the learned Single Judge has referred to Rule 80 of the Rules which deals with recount of votes by the Returning Officer.

Emphasis has been laid on Sub-rules (2) and (3). There can be no shadow of doubt, the Returning Officer should decide the matter and may allow

the application, if circumstances so warrant. But, an eloquent and fertile one, non-entertaining of such an application can never be the sole and the

singular factor for issue of a direction for recount of votes. The Election Tribunal is required to apply its own mind to the pleadings and the

evidence brought on record to satisfy that there is requisite and necessity for recount of votes. As the factual position would show, the Election

Tribunal has answered the Issue No. 1 in favour of the returned candidate. We have reproduced the reasonings ascribed by the Tribunal for issue

of a direction for recount of votes. As is evincible, the Tribunal has been totally guided by the non-compliance of the Rules and the small margin of

votes. Further he has taken recourse to the conception of doing an effective and complete justice. The said grounds, in our considered opinion, are

absolutely not germane or cogent for directing recount of votes. As has been held by the Apex Court, the small margin of votes cannot be the sole

ground for directing recounting. If we permit ourselves to say so, no evidence was adduced warranting a recount and in fact, the Tribunal has failed

to appreciate the factual scenario in proper perspective and directed for recount of votes.

16. We cannot be oblivious of an another interesting aspect that has cropped up in this case. The Election Tribunal has innovated a new procedure

by constituting a committee of persons, namely, Tehsildar, Niwadi; Revenue Inspector, Niwadi; Senior Agricultural Expansion Officer and Rural

Agricultural Expansion Officer. There is no provision for constitution of such kind of a committee. There is nothing on record to say that the

Election Tribunal had seen the ballot papers. Mr. K.N. Agrawal, learned Counsel appearing for the appellant has commended us to the decision

rendered in Asim Saha v. Collector, Kanker and Ors. 2001(1) M.P.H.T. 6 wherein it has been held that it is paramount duty rather pious duty of

the Tribunal to itself count and recount the votes and it cannot delegate the power to the third party as it is the duty of the Tribunal, which it must

discharge in accordance with law. We concur with the view expressed in the aforesaid decision, for in the absence of any such provision we are of

the considered opinion that delegation of such power of recount to a committee and non-verification of the ballot papers by the Tribunal itself is

unmistakably illegal and impermissible.

17. Mr. Mukesh Agrawal, learned Counsel appearing for the respondent No. 2 has invited our attention to Paragraphs 28 and 29 of the decision

rendered in T.A. Ahammed Kabeer Vs. A.A. Azeez and Others, . In this context we may refer with profit to the decision rendered in M.

Chinnasamy v. K.C. Palanisamy and Ors. AIR 2004 SC 541, wherein the Apex Court after referring to Paragraphs 27 and 28 in the case of TA.

Ahmad (supra), expressed the opinion as under:

43. With respect we are not in a position to endorse the views taken therein in its entirety. Unfortunately, the decision of a Larger Bench of this

Court in Dr. Jagjit Singh Vs. Giani Kartar Singh and Others, had not been noticed therein. Apart from the clear legal position as laid down in

several decisions, as noticed hereinbefore, there cannot be any doubt or dispute that only because a recounting has been directed, it would be held

to be sacrosanct to the effect that although in a given case the Court may find such evidence to be at variance with the pleadings, the same must be

taken into consideration. It is now well-settled principle of law that evidence adduced beyond the pleadings would not be admissible nor any

evidence can be permitted to be adduced which is at variance with the pleadings. The Court at a later stage of the trial as also the Appellate Court

having regard to the rule of pleadings would be entitled to reject the evidence wherefor there does not exist any pleading.

44. Furthermore, the High Court has not arrived at a positive finding as to how a prima facie case has been made out for issuing a direction for

recounting. It is well-settled that prima facie case must be made out for scrutiny and recounting of ballot papers where it is of the opinion that the

errors are of such magnitude as to materially affect the election. See M.R. Gopalakrishnan Vs. Thachady Prabhakaran and Others, .

Apart from the above enunciation of law, the decision rendered in T.A. Ahmad (supra), is not applicable to the case at hand inasmuch as there was

no justifiable ground to direct for recount of votes.

18. In the present case, as we have held that the direction for issue of an order of recount was totally without application of mind and was directed

as the Tribunal so felt. That apart, the manner in which the recount has been done by the committee is also impermissible.

19. In view of our preceding analysis, the writ appeal is allowed and the order passed by the learned Single Judge is set aside, As a sequitur, the

writ petition is allowed and the order passed by the Prescribed Authority declaring the respondent No. 2 as the elected candidate is quashed. The

appellant, who has been unseated, is directed to hold the post of Sarpanch of the Gram Panchayat, Makara forthwith. There shall be no order as

to costs.