Sakharam Jagtap Vs Tukaram Raikar and others

Court: Bombay High Court (Aurangabad Bench)

Date of Decision: Oct. 1, 1997

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1
Constitution of India, 1950 â€" Article 226
Representation of the People Act, 1951 â€" Section 81, 83

Citation: (1998) 1 ALLMR 1 : (1998) 2 BomCR 588

Hon'ble Judges: S.S. Dani, J

Bench: Single Bench

Advocate: S.B. Deshmukh, for the Appellant; K.B. Chaudhari, A.G.P., V.D. Hon and K.S. Bhore, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

S.S. Dani, J.
Loni Vyanknath is a Constituency of Shrigonda Taluka Panchayat Samiti, District Ahmednagar. An election of this

constituency took place on 2-3-97. The petitioner, respondent No. 1 and respondents No. 5 to 8 were the contesting candidates. The counting

was done on 3-3-1997 by about 7 p.m. and the Returning Officer respondent No. 3 declared the present petitioner as elected by 23 votes. The

present respondent No. 1 had applied for recounting of the votes but, it came to be rejected by the respondent No. 3. The present respondent

No. 1 then approached the District Court, Ahmednagar and filed Election Petition No. 1 of 1997 challenging the election of the present petitioner.

During the pendency of the election petition, the respondent No. 1 filed an application (Exh. 16) for calling the used Voters" list and other election

record on 14-3-1997 which came to be granted by order of the District Court on 29-3-1997. The petitioner then took up the matter to this Court

in Writ Petition No. 1578/1997 and by an order dated 24-4-1997, this Court directed the lower Court to decide the applications on hearing both

the parties. The respondent No. 1 then filed an application (Exh. 37) on 19-4-1997 for recounting of the ballot papers and for that purpose, to

appoint Court Commissioner. Both these applications came to be resisted on behalf of the petitioner. The respondent No. 1 then passed a pursis

(Exh. 61) waiving all the challenges to the election except that of improper counting of votes. The District Court by an order dated 30-7-1997

allowed both these applications (Exh. 16 and 37) and on holding that it was necessary to recount the ballot papers to decide the dispute directed

recounting through Commissioner whose name was to be suggested by both the parties to the Court within 15 days from the said order. It is this

order dated 30-7-1997 that is being challenged in the present writ petition.

2. Shri Hon, learned Counsel for the respondent No. 1 initially raised a question of maintainability of this writ petition. It is submitted that

admittedly, the writ petition is against the interim orders passed on Exh. 16 and 37 and inasmuch as, the election petition is yet to be decided on its

own merits, this Court should not interfere under Article 226 of the Constitution of India, with such interlocutory orders. In support of this

submission, Shri Hon, learned Counsel for respondent No. 1 placed reliance on the decisions in P. Kunju Raman Vs. V.R. Krishna Iyer, and C.

Achutha Menon Vs. Election Tribunal, Trichur, wherein it is ruled that the High Court will not ordinarily interfere in writ petition under Article 226

with an interlocutory order and especially when it is not such as can be said it would go to the root of the election proceedings. In these two cases,

admittedly, recount was ordered at the initial stage and there were various challenges in those election petitions and one of the challenges was in

respect of counting of the votes. It is on these facts that it has been held in these two cases that interference by the High Court under Article 226

ordinarily should not be there in respect of such interlocutory orders passed in the course of the election proceedings. It may however be noted

that in the said rulings, itself, it has been further ruled that interference can be made against the decisions and interlocutory orders if the orders go to

the very root of the case, or a reversal of the order is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the

case.

Coming to the facts involved in the case at hand, it may be noted that even though the present respondent No. 1 - Election petitioner challenged

the election of the present petitioner on various grounds, a pursis (Exh. 61) (Exh. H to the writ petition) was filed by the present respondent No. 1

on 30-7-1997 waiving and withdrawing the allegations raised in the election petition except that of recounting of votes. It is, therefore, clear that it

is only on the ground of recounting of votes that the election petition is to be decided and disposed of. In view of this, the impugned orders of the

lower Court directing the recounting of the ballots cannot, therefore, be treated and styled as interlocutory one inasmuch as, they go to the root of

the election petition. The submissions made on behalf of the respondent No. 1 in respect of maintainability of the writ petition cannot, therefore, be

upheld.

3. Before considering the rival submissions and the case law as settled by the Apex Court, it would be proper to refer to certain admitted facts.

4. The present respondent No. 1 preferred these two applications for calling the ballot papers and the election record and for recounting of the

ballots, and it is pleaded that while counting the ballot papers, as many as 426 votes were declared invalid and according to the respondent No. 1,

32 votes have been wrongly given in favour of the present petitioner though they are in favour of the election petitioner. It is, therefore, pleaded in

these applications that if such votes are properly recounted and considered, the difference of 23 votes between the votes polled by the petitioner

and the respondent No. 1 would be wiped off and the election petitioner (present respondent No. 1) would get elected. As per the directions of

the Court, both the parties filed affidavits of their witnesses in support of their respective contentions but, the trial Court has found that the

allegations in the affidavits are against each other and as such, the correctness of the facts could not be ascertained unless the ballot papers are

opened and counted. It is on the basis of this that the trial Court has allowed both these applications and has directed the recount of the ballot

papers. It is on the background of these facts and circumstances, the rival submissions as well as case law in to be considered and appreciated.

5. Shri Deshmukh, learned Counsel for the petitioner submitted that the recounting of votes is to be ordered only on giving satisfactory grounds for

such recounting. It is further submitted that it is only after the Court or Tribunal is satisfied on the basis of the averments made and the evidence

adduced that the recounting is to be ordered. It is further submitted by Shri Deshmukh, learned Counsel for the petitioner that the recounting of the

votes is not to be derived from the result of the election and it is necessary for the election petitioner to place sufficient material and also evidence

for asking the relief of recounting of votes. Shri Deshmukh, learned Counsel for the petitioner placed reliance on the rulings of the Apex Court in

Smt. Ram Rati v. Saroj Devi and others, 1997 (6) SCC 6 , and R. Narayanan Vs. S. Semmalai and Others, . It is ruled by the Apex Court in

these rulings that if counting of the ballots are interfered with by too frequent and flippant recounts, a new system will be introduced and the

secrecy of the ballots is exposed. Summarizing the law laid down by the Apex Court in Bhabhi v. Sheo Govind, 1975 Supp. S.C.R. 202, the

Court laid down three circumstances which would justify an order of recount of ballot papers. It is observed thus, -

The Court would be justified in ordering a recount of the ballot papers only where -

1) the election petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are

founded;

2) On the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a

mistake in counting; and

3) the Court trying the petition is prima facie satisfied that the making of such an order Is imperatively necessary to decide the dispute and to do

complete and effectual justice between the parties.

It is finally ruled that it is only on consideration of the principles deduced from the authorities mentioned above and the evidence led, it has to be

considered whether a recount should be ordered or not. The Supreme Court in the case of Smt. Ram Rati v. Saroj Devi & others 1997 (6) Su 6

further ruled that in rare cases, the tribunal or the Court is required to order recount, that too on giving satisfactory grounds for recounting. It is

further ruled that it is an essential condition precedent that an application in writing should be made giving the reasons in support thereof while

seeking recounting. It is on the background of the settled position of law the case at hand is to be considered and decided.

6. As stated above, after the matter was remanded by this Court by order dated 24-4-1997 in Writ Petition No. 1578 of 1997 direction the trial

Court to hear both sides before passing order, the election petitioner (present respondent No. 1 to this writ petition) filed affidavits of Zumbar

Gaikwad, Daryabapu Kale and Dattatraya Mhaske (Exh. 48 to 50). The present petitioner also filed affidavit of one Ganpat Kakade at Exh. 55. It

is to be noted at this juncture that none of these witnesses were offered for cross-examination by the other side. It has been observed by the trial

Court that the witnesses of the present respondent No. 1 stated about some irregularities committed at the time of counting of the votes and have

further averred that some ballot papers were wrongly mixed and tied in the bundles of the present petitioner. These averments made by the

witnesses of the present respondent No. 1 are denied by the witness of the present petitioner who filed his affidavit (Exh. 55). It is pertinent to note

that in view of this situation the trial Court came to the conclusion that there are allegations made against each other and as such, this evidence was

not considered as enough to decide the correctness of the facts. As stated above, the trial Court in paragraph 17 of the judgment has observed

that it is only by the recounting of ballot papers that the correctness of the facts and circumstances of the case can be successfully ascertained. It, is

therefore, clear that the trial Court directed recounting of the ballot papers not on considering the evidence but, because it was the only way to

ascertain the correct situation. The witnesses who filed the affidavits on behalf of the present petitioner and the respondent No. 1 have admittedly

not been cross-examined by other side, and as such, the evidence adduced by these witnesses in the shape of their affidavits cannot be considered

to be an evidence. Except the affidavits of these witnesses, who have not been offered for cross-examination by the other side, there is admittedly,

no record before the trial Court and, therefore, it appears that the trial Court thought it fit to ascertain the correctness of the facts only by way of

recounting the ballots. In the absence of satisfactory grounds and evidence requiring recounting, the order of recounting has not only been quashed

and set aside but, also deprecated by the Apex Court in series of judgments. It has been held that an order of recounting of votes has to stand on

the nature of averments and evidence adduced before the Court before the order of recounting and not from the results emerging from the

recounting of the votes. In this connection, an useful reference may be made to a decision of the Apex Court in N. Narayan v. S. Semmalal

referred to above wherein it is ruled thus, -

It is well settled that such allegations must not only be clearly made but also proved by cogent evidence. The fact that the margin of votes by

which the successful candidate was declared elected was very narrow, though undoubtedly an important factor to be considered, would not by

itself vitiate the counting of votes or justify recounting by the Court.

In the case of Chanda Singh Vs. Choudhary Shiv Ram Verma and Others, , the Supreme Court has ruled that Victory by a very few votes may

certainly be a ground to fear unwitting error in count but, if the counting of ballots are interfered with by too frequent and flippant recounts by

courts, the secrecy of the ballots becomes exposed.

7. Coming to facts involved in the case at hand, it may be reiterated that the trial Court considered that there is very narrow margin in the votes

secured by the present petitioner and the respondent No. 1 and as large number of ballot papers were declared as invalid, it was necessary to

order recount. It is, therefore, clear that the trial Court considered this margin of 23 votes between the elected and defeated candidates as a

circumstance sufficient to order recount and as stated above, there is no evidence inasmuch as, the persons who filed affidavits for the present

respondent No. 1 have not been cross-examined by the present petitioner. The position boils down to this that in the case at hand there is neither

evidence nor any circumstance, sufficient to order recount and the trial Court has passed the impugned order only because of small margin of votes

between the elected and defeated candidates. In view of this, and applying the principles laid down by the Apex Court, as stated above, the

impugned order of the trial Court directing the recount of the ballot papers is, therefore, required to be quashed and cannot be sustained and

upheld. The writ petition is therefore, required to be allowed and the impugned order of the trial Court will have to be quashed and set aside.

8. In the result, Writ Petition No. 3297 of 1997 succeeds. The order dated 30-7-1997 of the IIIrd Addl. District Judge, Ahmednagar on Exh. 16

and 37 in Election Petition No. 1 of 1997 directing the recount of ballot papers, is hereby quashed and set aside. Rule made absolute in the above

terms with no order as to costs.

9. Petition dismissed.