

(1998) 09 MAD CK 0169

Madras High Court

Case No: Civil Revision Petition No. 2109 of 1998

Dhanalakshmi

APPELLANT

Vs

Muthulakshmi and Another

RESPONDENT

Date of Decision: Sept. 17, 1998

Acts Referred:

- Tamil Nadu Panchayats (Election) Rules, 1995 - Rule 136, 66
- Tamil Nadu Panchayats Act, 1994 - Section 259

Citation: AIR 1999 Mad 126

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

Bench: Single Bench

Advocate: Hema Sampath, for the Appellant; P. Selvaraj, for No. 1 (Caveater), for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

S.S. Subramani, J.

First respondent in Election O. P. No. 78 of 1996, on the file of Principal District Judge, Cuddalore, is the revision petitioner. This Revision is filed under Art. 227 of the Constitution of India. First respondent herein filed the Election O.P. challenging the election of the revision petitioner as President of A. Melmampattu Village, Panruti Taluk, reserved for women.

2. Various allegations raised in the Election Petition are, that the Election Officer (2nd respondent) did not allow the election agent of the petitioner (Muthulakshmi) in spite of requests by election agents as well as the candidate. Even during counting, the agents for the petitioner were being sent out now and then 2nd respondent and his men rejected several valid votes cast in favour of petitioner (Muthulakshmi) and accepted several votes cast in favour of 1st respondent (Dhanalakshmi) improperly, and improperly declared several votes as invalid. At the

time of counting, only 38 votes were set apart as invalid which included two votes without any marking. At the time of declaration, 2nd respondent had declared 51 votes as invalid which included 15 votes without any marking. It is said that the postal votes were not opened in the presence of the agents of the election petitioner. Apart from the postal votes, 2, 363 votes were polled in all the three wards, but only 2348 votes have been accounted for by 2nd respondent and the balance of 15 votes plus 2 postal votes have not been accounted for. In paragraph 9 of the election petition, it is said that when a requisition was given for recounting, 2nd respondent refused recounting. Hence nine telegrams were given to 2nd respondent-Collector of South Arcot-Vallalar District and also to the State Election Commissioner. Subsequently, without conducting recounting, result of the election was declared on 16-10-1996. This, according to election petitioner, is unjust and illegal. It is further said in paragraph 10 that the persons who counted the votes are teachers, and one Kathirvelu who is also a teacher entered the counting hall as agent of one Mrs. Vijayalakshmi, a candidate for Panchayat Union Council, who wielded a lot of influence among the teachers, who counted the votes and influenced the counting personnel. One Thirunavukkarasu is a teacher in the school in which the said Kathirvelu is also working. Kathirvelu was present when the boxes were opened, whereas the agents of the petitioner were not even permitted inside at that time. The presence of Kathirvelu was objected by agents of petitioner. But this was not needed to by 2nd respondent. For these reasons, the election petitioner wanted the declaration of election of 1st, respondent (Dhanalakshmi) as void, and wanted herself to be declared as duly elected candidate.

3. Respondents 1 and 2 in the election petition filed detailed counters separately, denying each and every one of the allegations raised by the election petitioner.

4. In his counter, 2nd respondent-Election Officer has given a vivid picture of what all had transpired. In paragraph 5 of his counter, he has given minute details of the voting, i.e., total votes, total number of valid votes, and also the total number of rejected votes, etc. It is also said that all the postal votes were opened in the presence of the agents. According to him, after counting was over, the voting figures were declared, and counting was done in a systematic manner and most judiciously, and so there was no need for recounting. However, the Collector was requested to issue necessary instructions for recounting. He has further said that after examination of the election records by the Commission, necessary declaration was issued. According to him, there was no irregularity in the election, and everything was done in accordance with law.

5. By the impugned Order, the Election Tribunal (Principal District Judge, Cuddalore) ordered recounting, and the same is challenged in this Revision under Art. 227 of the Constitution of India.

6. No evidence was let in by either side, and the Election Tribunal ordered recounting on the Election petition only on the basis of affidavits.

7. After extracting Rule 66 of the Tamil Nadu Panchayats (Elections) Rules, 1995, the Court below found that the Election Officer should not have ascertained the advice of the Collector when a request was made for recounting. The Election Officer has not exercised his discretion properly and so recounting should be ordered, is the reason mentioned by the Election Tribunal. According to it, it is for the Election Officer to decide either to order recounting or reject the request for recounting.

8. Heard learned counsel on both sides.

9. Rule 66 of the, Rules reads thus :--

"Recount of votes. -- (1) After the completion of the counting and recording in Form 22 the total number of votes polled by each candidate under Sub-rule (2) of Rule 64, the Returning Officer shall announce the same. After such announcement, and before the declaration of the result of the election, a contesting candidate or in his absence his election agent, may apply in writing to the Returning Officer for a recount of all or any of the votes already counted stating the grounds on which he demands such recount.

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

"(3) Every decision of the Returning Officer under Sub-rule (2) shall be in writing and contain the reasons therefor.

(4) If the Returning Officer decides under Sub-rule (2) to allow an application either in whole or in part, he shall--

(a) count the votes again in accordance with his decision ;

(b) amend the result sheet in Form 22 to the extent necessary after such recount, and

(c) announce the amendments so made by him.

(5) After the total number of votes polled by each candidate has been announced under Sub-rule (1) or under Sub-rule (4) of this rule, the Returning Officer shall complete and sign the result sheet in Form 22 and no application for a recount shall be entertained thereafter;

Provided that no step under this sub-rule shall be taken on the completion of the counting until the candidates or the election agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by Sub-rule (1)."

Similar is Section 94 of the Representation of the People Act, where also there is a provision for recounting. The circumstances under which recounting could be ordered and what should be the pleadings in such cases have been decided by the

Honourable Supreme Court in a very recent decision reported in 1995 Suppl (2) SCC 101 1995 AIR SCW 156 M.R. Gopalkrishnan v. Thachady Prabhakaran. Paragraphs 16 and 17 are relevant for our purpose. They read thus:--

"After a cursory glance of the relevant provisions discussed above, it is thus abundantly clear that the rules provide adequate opportunity to a candidate, his election agent and counting agent to have a watch over the counting process before the result is declared and if they raise any objection as to the validity or otherwise of any ballot paper and if the said objection is improperly rejected, the candidate, his counting and election agent are well informed of the nature of the objection that was raised with regard to the ballot papers and make a concise statement of material facts in the election petition in relation thereto. It is for these reasons that this Court has repeatedly held that the secrecy of the vote has to be maintained and a demand of re-count should not ordinarily be granted unless the election petitioner makes out a "prima facie case with regard to the errors in the counting and is able to show that the errors are of such magnitude that the result of the election of the returned candidate is materially affected. The election petitioner, in order to seek an order of re-count, has to place material and make out a prima facie case on the threshold and before an order of re-count is actually made. The demand of a defeated candidate for re-count of votes has to be considered keeping in view that secrecy of the ballot is sacrosanct in a democracy and, therefore, unless the election petitioner is able not only to plead and disclose the material facts but also substantiate the same by means of evidence of reliable character that there existed a prima facie case for the re-count, no tribunal or Court would be justified to directing the re-count.

This Court in [Bhabhi Vs. Sheo Govind and Others](#), , while dealing with the question of direction for inspection and re-count, on a close and careful consideration of various authorities of this Court laid down certain guidelines and conditions which are imperative before a Court can grant inspection of the ballot papers. The said conditions and guidelines are set out below: (SCC pp. "693-94 : (at P. 2123 of AIR) para 15)

"(I) That 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) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;

(3) The Courts must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;

(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;

(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and

(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for re-count, and not for the purpose "of fishing out materials."

In a recent decision in [Satyanarain Dudhani Vs. Uday Kumar Singh and Others](#), this Court again reiterated the similar view by observing that the secrecy of the ballot papers cannot be permitted to be tinkered with lightly and an order of re-count cannot be granted as a matter of course. It is only when the High Court is satisfied on the basis of material facts pleaded in the petition and supported by the contemporaneous evidence that re-count can be ordered. When there is no contemporaneous evidence to show any irregularity or illegality in the counting, ordinarily it would not be proper to order re-count on the basis of bare allegations in the election petition."

10. If this is the principle that has to be applied, I do not think that the first respondent is successful enough in requesting for a recounting, nor was the Election Tribunal justified in ordering the same. I have already narrated the pleadings in the Election Petition. It does not give the details and reasons for recounting, excepting for a request for recounting, to fish out some evidence. It is settled law that secrecy of the ballot is to be maintained, and only in exceptional circumstances, recounting is to be ordered. For the said purpose, apart from the basic materials, petitioners must have also proved by evidence that this is a fit case where recounting has to be ordered. Court must satisfy itself that a case has been made out by the petitioner for ordering recounting of votes, on the basis of evidence let in dehors the pleading. In this case, that is absolutely lacking. Even the petitioner has not entered the box.

11. On the basis of Rule 66 (extracted above), a finding has been entered by the Election Tribunal, i.e., the Election Officer himself should have decided the matter without ascertaining the opinion of the District Collector, and when the Election Officer has not exercised his discretion, that is a ground for ordering recounting of votes.

12. Before passing the Order in question, the Election Tribunal should have considered Section 259 of the Tamil Nadu Panchayats Act, 1994 and also Rule 136 of the Tamil Nadu Panchayats (Election) Rules, 1995. Section 259(1)(d) (in) and (iv) reads thus:--

"Subject to the provisions of Sub-section (2) if the District Judge is of opinion --

(d) that the result of the election in so far as it concern a returned candidate has been materially affected --

(iii) by the improper acceptance or refusal of any vote or reception of any vote which is void; or

(iv) by the non-compliance with the provisions of this Act or of any rules or orders made thereunder, the Court shall declare the election of the returned candidate to be void."

13. Coupled with the above, it must be further proved that the result of the election has been materially affected. Without proof of any of these facts, directing a recounting merely on the ground of violation of Rule 66 was most improper.

14. A reading of Rule 66 makes it clear that a refusal to pass an order is itself not a ground for ordering recount. At the most, it could be said that the Election Officer has acted against the law which comes u/s 259 (1) (d) (iv). Even in such cases, the petitioner will have to prove that the result of the candidate is materially affected. Merely because the Election Officer has sought the opinion of the District Collector, that cannot be a ground for ordering recount. In fact, the Election Officer has even disputed that he made such a request. The finding of the Election Tribunal that the Election Officer should have passed the Order without consulting the Collector also cannot have any legal basis. The District Collector is the Chief Election Commissioner. As per the Panchayat Act, the Election Officers in the District are under his control. In this case, the Election Officer has a doubt and he consulted the District Collector. It is the case of the second respondent that the entire matter was perused by the District Collector and thereafter necessary declaration was issued. It was also said that there was no necessity for recounting and only because the petitioner was insisting for recounting, the Collector was addressed for issuing necessary directions. So long as there is no evidence against this statement of the Election Officer, merely because some allegations have been made in the Election Petition, the Election Tribunal should "not have suo motu passed the impugned Order.

15. Even in paragraph 9 of the petition, first respondent (election petitioner) has not said when the requisition was made and the details of the said request. She has only said that when a request was given for recounting, 2nd respondent refused recounting. When the 2nd respondent has already informed that recounting is not necessary, unless grounds are made out, Court cannot suo motu order recounting, as has been done in this case. The impugned Order is perverse and the same is quite against the settled legal principles.

16. In the result, the Civil Revision Petition is allowed with costs. The impugned Order is set aside. Election O.P. No. 78 of 1996, on the file of Principal District Judge, Cuddalore, shall stand dismissed. Advocate's fee Rs. 2,500/- (Rupees Two thousand five hundred only). C.M.P. No. 10436 of 1998 for stay is also dismissed consequently.