

**Civil Revision**

PRESENT:

**The Hon'ble JUSTICE I.P. MUKERJI**

Judgment on 27.08.2010

**C.O. NO.3747 OF 2009**

**With**

**C.O. NO. 3840 OF 2009**

**ABDUR RAHIM BOXI**

**Versus**

**SOUMITRA ROY & ORS.**

Points:

Recounting: Court prima facie satisfied and directed for recounting whether proper-Not objected before the Presiding Officer whether can agitate in Court-Whether strong proof is required for recounting-West Bengal Panchayat Election Act, 2003-S.79,108 -The West Bengal Panchayat Election Rules 2006-Rr. 58,63,65,85,87,91

Facts:

Unsuccessful candidate filed a petition before the Additional District Judge for recounting of all the votes polled for that particular seat and for setting aside such election. If upon such recounting the said opposite party was found to have polled the highest number of votes, he should be declared as elected. Additional District Judge after hearing the parties directed for recounting holding that prima-facie he was satisfied that there was 'overwriting' and 'interpolation'. The successful candidate and the election officer filed revision against the said order.

Held:

When counting of ballot papers is the final remedy sought and the final remedy obtainable, it is quite difficult to understand how this final remedy could have been ordered on prima facie satisfaction. Para 10

Since an election petition has to be tried like a suit, fuller consideration of pleadings and evidence is called for before any order can be passed. Para 23

If the decision of the Presiding Officer is not accepted by a candidate or his agent he or his election agent may apply in writing to the Presiding Officer for a recount of the votes, wholly or partly. If there is no such objection the Presiding Officer is to sign inter alia Form 20. Rule 91(3) inter alia states “.....no demand for recount shall be entertained thereafter”. There is nothing on record to show that the opposite party candidate or his election agent called upon the Presiding Officer to recount the votes. This particular fact was vital for the learned district Judge to determine the election petition. There is no finding at all on this particular fact. Paras 15 -18

Form no. 20 is a summary sheet containing a summary of information regarding counting. This sheet does not even show that the primary documents which are the ballot papers have been forged. Secondly, even if the result of the alleged overwriting, deletions and erasers, which are very minor, are not taken account of still the defeated candidate would not be successful. These facts have not been considered in the judgment at all. Para 18

Any election law whether enacted by the Parliament or the State Legislature, is a special statute. The conduct of election, announcement of results and resolution of disputes arising out of such elections has to be strictly according to such statute. A very important right in a true democracy is not only secret ballot but a certain amount of secrecy, if not total in the counting of votes. Moreover, some importance has to be given to finality of a particular decision. That is why Rule 91 of the above rules provides for immediate objection to be made by the candidate or his agent during the counting of votes. In this case there was no such objection. This was not considered by the learned Judge. Moreover, as the Supreme Court has said in the above decisions due regard must be shown to the secrecy of ballot papers and only in circumstances permitted by law should

counting of votes be ordered. And those circumstances according to the above decisions only exist when very strong proof is adduced that there is an error in the declaration of result.

Para 21

Cases cited:

Ram Sewak Yadav – v – Hussain Kamil Kidwai and others, AIR 1964 SC 1249; Mohinder Singh Gill and another – v – The Chief Election Commissioner, New Delhi and others, AIR 1978 SC 851; Jyoti Basu and others – v – Debi Ghosal and others, AIR 1982 SC 983; Kattinokkula Murali Krishna – v – Veeramalla Koteswara Rao & Ors., AIR 2010 SC 24; Suresh Prasad Yadav – v – Jai Prakash Mishra & Ors., AIR 1975 SC 376; P.K.K. Shamsudeen – v- K.A.M. Mappillai Mohindeen & Ors., AIR 1989 SC 640. In Sasanagouda – v – Dr. S.B. Amarked and others, AIR 1992 SC 1163

For the petitioner  
In C.O. No. 3747 of 2009 : Mr. Asoke Kr. Banerjee  
Mr. Sarojit Sen  
Mr. Tapas Singha Roy

For the State in  
C.O.No. 3747 of 2009 : Mr. Amal Baran Chatterjee  
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For the petitioner in  
C.O. No. 3840 of 2009 : Mr. Amal Baran Chatterjee  
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For the opposite party in  
C.O. No. 3840 of 2009 : Mr. Asoke Kr. Banerjee  
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For the opposite party No.1 : Mr. Jiban Ratan Chatterjee  
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For the respondent No.4 : Mr. Hiranmoy Bhattacharya

For the opposite party No.6 : Mr. Kousik De.

Heard on: 15.06.2010, 16.06.2010, 17.06.2010, 18.06.2010, 16.07.2010,

30.707.2010,13.08.2010

Judgment on: **27.08.2010**

**I.P. MUKERJI, J.**

Election for one seat in Malda Zilla Parishad in the State of West Bengal is under challenge. Two applications have been filed under Article 227 of the Constitution of India. One by the successful candidate and the other by the Block Development Officer, Ratua – I and election officer for the above constituency.

2. In the above election the petitioner candidate won by a margin of only 59 votes. He belongs to the party R.S.P. The opposite party No.1, in C.O. 3747 of 2009, Soumitra Roy, is a Congress party candidate.

3. It is quite important at this stage to know the law. Article 243 ZA of our Constitution deals with elections to municipalities. Sub-section 2 says that the legislature of a state may make law with regard to elections to municipalities. The West Bengal legislature has enacted the West Bengal Panchayat Election Act, 2003. The West Bengal Panchayat Election Rules 2006 were made in exercise of powers under the said Act.

4. Under this Act, more particularly Section 79 thereof, a petition challenging such election may be filed by any one who is entitled to vote in such election

before inter alia the District Judge of the District. The District Judge has the power to decide election disputes in elections to Zilla Parishad.

5. Under Section 79, the said opposite party filed a petition before the learned Additional District Judge at Malda being Misc. Case No. 13 of 2008. The relief claimed in that petition was for recounting of all the votes polled for that particular seat and for setting aside such election. If upon such recounting the said opposite party was found to have polled the highest number of votes, he should be declared as elected. It appears that in accordance with the said Act and Rules which enjoins the judge to try such petitions like suits, the petition was made ready by disclosure of documents, as in a suit. Thereafter, oral evidence was also taken. On completion of evidence arguments were also advanced.

6. The learned judge records, "I have heard arguments of the contesting parties spreading over several days". There is no doubt in my mind that this application became extremely contested before the learned Judge. It was also equally contested before me.

7. Now, after the filing of pleadings, taking of evidence and hearing of arguments, the learned Judge proceeded to deliver a judgment and order on 23<sup>rd</sup> November 2009 by which he ordered recounting of 749 ballot sheets. To implement his order he directed the Block Development Officer and Election

Officer to produce the ballot sheets which would be counted on 25<sup>th</sup> November 2009 in the presence of the registry officials of the court.

8. Aggrieved by this judgment and order the respective petitioners in the above civil revisional applications have invoked the jurisdiction of this court under article 227 of the Constitution.

9. Before proceeding further with this application the impugned judgment and order of the Additional District Judge, 3<sup>rd</sup> Court Malda dated 23<sup>rd</sup> November 2009 has to be examined. He begins by reciting that he had “scrutinized” the pleadings and oral and documentary evidence adduced by the parties. He places reliance on two documents, namely, form No. 20 and 22. Form No. 20 was the counting sheet. He notes that the said counting sheet was for Hall no. 8, Table No. 41. He noticed “overwriting” and “interpolation”. Further according to him this “overwriting” and “interpolation” has not been authenticated by the counting officer. Then he observes that prima facie inspection of the ballot papers was required, relying on **Ram Sewak Yadav – v – Hussain Kamil Kidwai and others, reported in AIR 1964 SC 1249** and **Mohinder Singh Gill and another – v – The Chief Election Commissioner, New Delhi and others reported in AIR 1978 SC 851**. He proceeds to record that prima facie he was satisfied that there was “overwriting” and “interpolation”. Hence, the order for recounting.

10. When counting of ballot papers is the final remedy sought and the final remedy obtainable, it is quite difficult to understand how this final remedy could have been ordered on prima facie satisfaction. Secondly, it needs to be examined by this court assuming that such prima facie finding is to be taken as final finding, whether on the evidence discussed in the judgment this order was warranted. Thirdly, whether it was incumbent upon the court to provide more detailed reasons based on evidence before passing this final order.

11. Learned counsel for each party has taken me very extensively through the factual details. This application was heard, almost like a suit. Each and every pleading was shown, oral evidence placed and documentary evidence analyzed during the hearing of this application.

12. Mr. Amal Baran Chatterjee, learned counsel for the Block Development Officer and Election Officer has taken me through the Act and the Rules in the minutest of details. Each and every relevant rule was placed. Two submissions of Mr. Chatterjee have appealed to me. First is the requirement in the Act and the Rules to maintain secrecy during the process of election and declaration of its results. (see Section 108 Rules 58, 63, 65, 85). He has also cited judgments in support of this proposition which I will discuss later.

13. Secondly, there is a procedure for counting of the votes. Rule 89 provides a detailed procedure for counting. Rule 90 says that counting is to be continuous. This Rule 91 is the crucial rule. Rule 91 is inserted below:

**“91. Recount of votes polled. – (1) After the completion of the counting, the Presiding Officer shall record in the counting sheets in Forms 19, 19A and 20 the total number of votes polled by each candidate, and announce the same.**

**(2) After such announcement has been made, the Presiding Officer shall give a little pause when a candidate or in his absence, his election agent or his counting agent may apply in writing to the Presiding Officer for a recount of the votes either wholly or in part stating the grounds on which he demands such recount.**

**(3) If there is no demand for recount from anybody present during the aforesaid pause, the Presiding Officer shall sign the completed counting sheets in Forms 19, 19A and 20 as the case may be and no demand for recount shall be entertained thereafter.**

**(4) On such an application for recount being made the Presiding Officer shall decide the matter and may allow the application wholly or in part or may reject it in toto if it appears to him to be frivolous or unreasonable.**

**(5) Every decision of the Presiding Officer under sub-rule (4) shall be in writing containing in brief the reasons thereof and shall be final.**

**(6) If the Presiding Officer decides under sub-rule(5) to allow a recount of votes either wholly or in part, he shall, –**

**(a) do the recounting in accordance with rule 89,**

**(b) amend the counting sheets in Form 19, 19A and 20, as the case may be, to the extent necessary after such recount, and**

**(c) announce the amendments so made by him.**

**(7) After the total number of votes polled by each candidate has been announced under sub-rule (1) or sub-rule (6), the Presiding Officer shall complete and sign the counting sheets in Forms 19, 19A and 20, as the case may be, and no application for a recount shall be entertained thereafter:**

**Provided that after an announcement under sub-rule (3) of rule 86 and sub-rule (3) of rule 89, a reasonable**

**opportunity shall be given to a candidate, and in his absence, any election agent or his counting agent for making an application in writing to the Presiding Officer for re-count of votes, if any dispute is raised regarding the results of the counting.”**

14. Form 20 is the bone of contention in this application. Rule 91 says that the Presiding Officer shall record inter alia in form 20 the total number of votes polled by each candidate and announce the same. Now, before proceeding further Rule 87 is to be noticed. It provides for opening the ballot boxes in the presence of the candidates or their election agents. Rule 84 provides for admission of the candidate or his election agent to the place for counting.

15. Now, I come to Rule 91 once again. If the decision of the Presiding Officer is not accepted by a candidate or his agent he or his election agent may apply in writing to the Presiding Officer for a recount of the votes, wholly or partly. If there is no such objection the Presiding Officer is to sign inter alia Form 20. Rule 91(3) inter alia states “.....no demand for recount shall be entertained thereafter”.

16. There is nothing on record to show that the opposite party candidate or his election agent called upon the Presiding Officer to recount the votes.

17. This particular fact was vital for the learned district Judge to determine the election petition.

18. I am afraid there is no finding at all on this particular fact. Secondly, the learned District Judge has relied upon the entry in form No. 20 to come to his decision. I find from examination of the records that in such form NO. 20 there is an eraser of the number of votes recorded as secured by one Lalbarali. The initial figure has been obliterated beyond recognition. It is replaced by 37. There is also slight overwriting against the votes which are five in number polled by one Dasrath Yadav. First of all, form no. 20 is a summary sheet containing a summary of information regarding counting. This sheet does not even show that the primary documents which are the ballot papers have been forged. Secondly, even if the result of the alleged overwriting, deletions and erasers, which in my opinion are very minor, are not taken account of still the defeated candidate would not be successful. These facts have not been considered in the judgment at all.

**19. Jyoti Basu and others – v – Debi Ghosal and others, reported in AIR 1982 SC 983** is a landmark decision in election law. In a wonderful passage Hon'ble Justice Chinnappa Reddy delivering the judgment of the Supreme Court said that the right to elect was fundamental to democracy. Yet, it was not a fundamental right. The right is statutory. So is the right to be elected. The entire election process commencing from issuance of the notification for election, the election, declaration of result and resolution of the dispute arising out of such election is covered by statute. In that case it was held that the Representation of the People Act, 1951 was a complete Code.

20. Therefore, the right to elect or to be elected or to challenge an election has to be exercised according to the language of the respective statute. The submission of Mr. Chatterjee that secrecy of ballot has to be respected finds support in **Kattinokkula Murali Krishna – v – Veeramalla Koteswara Rao & Ors., reported in AIR 2010 SC 24.** In paragraph 11, it is said that counting and recounting affects the secrecy of the ballot. An order for recounting should be based on very strong evidence. That case followed two other earlier decisions of the Supreme Court in **Suresh Prasad Yadav – v – Jai Prakash Mishra & Ors., reported in AIR 1975 SC 376** and **P.K.K. Shamsudeen – v- K.A.M. Mappillai Mohindeen & Ors., reported in AIR 1989 SC 640.** In **Sasanagouda – v – Dr. S.B. Amarked and others, reported in AIR 1992 SC 1163,** the order for production of ballot papers was held to be based on insufficient evidence.

21. Therefore, what appears from the above decisions is that any election law whether enacted by the Parliament or the State Legislature, is a special statute. The conduct of election, announcement of results and resolution of disputes arising out of such elections has to be strictly according to such statute. A very important right in a true democracy is not only secret ballot but a certain amount of secrecy, if not total in the counting of votes. Moreover, some importance has to be given to finality of a particular decision. That is why Rule 91 of the above rules provides for immediate objection to be made by the candidate or his agent during the counting of votes. In this case there was no

such objection. This was not considered by the learned Judge. Moreover, as the Supreme Court has said in the above decisions due regard must be shown to the secrecy of ballot papers and only in circumstances permitted by law should counting of votes be ordered. And those circumstances according to the above decisions only exist when very strong proof is adduced that there is an error in the declaration of result. The decision **Ram Sewak Yadav – v – Hussain Kamil Kidwai and others, reported in AIR 1964 SC 1249** mentioned in the body of the order of the Learned Judge holds that the tribunal trying an election petition has to be prima facie satisfied that inspection of ballot papers is necessary. The learned District Judge has also relied upon **Mohinder Singh Gill and another – v – The Chief Election Commissioner, New Delhi and others, reported in AIR 1978 SC 851** which deals with the powers of such tribunal, deciding an election dispute.

22. For the reasons above, the evidence relied upon by the learned Additional District Judge does not disclose, in my opinion, sufficient grounds to order recounting of votes in the subject election.

23. Therefore, this order of the learned Additional District Judge dated 23<sup>rd</sup> November 2009 is set aside. Since an election petition has to be tried like a suit, fuller consideration of pleadings and evidence is called for before any order can be passed. Therefore, I remit this matter back to the Additional District Judge to come to a reasoned decision on the pleadings and evidence before him and upon

rehearing the parties within a period of eight weeks from the date of communication of this order.

24. Urgent certified photocopy of this judgment and order, if applied for, to be provided upon complying with all formalities.

**(I.P. MUKERJI, J.)**