

CASE NO.:
Appeal (civil) 3993 of 2001

PETITIONER:
MAHENDRA PAL

Vs.

RESPONDENT:
SHRI RAM DASS MALANGER AND OTHERS

DATE OF JUDGMENT: 01/03/2002

BENCH:
M.B. Shah & B.N. Agrawal

JUDGMENT:

Shah, J.

This appeal under Section 116-A of the Representation of the People Act, 1951 (hereinafter referred to as "the Act") is filed against the final judgment and order dated 4.5.2001 passed by the High Court of Himachal Pradesh at Shimla in Election Petition No.1 of 1998.

The election petition was filed by the appellant for setting aside the election of respondent No.1. It is submitted that the appellant contested the election as a candidate sponsored by the Indian National Congress while respondent No.1 contested the election as candidate sponsored by the Bhartiya Janta Party. Appellant secured 11,657 votes and respondent No.1 secured 11,660 votes. Therefore, respondent No.1 was declared elected by a margin of three votes only. It was alleged that the said election result was vitiated because of improper reception of invalid votes in favour of respondent No.1 and improper rejection of valid votes in favour of appellant. It was also contended that many irregularities were committed during the course of counting which had materially affected the result of election insofar as the returned candidate is concerned. It was pointed out that total number of ballot papers which were shown to have been distributed were 35310, but after counting the votes, ballot papers as per Form 20-A were shown to be 35318, which indicated that eight votes which had been counted in excess had been illegally counted in favour of the returned candidate.

Firstly it is to be stated that election petition filed by the appellant was rejected on preliminary issue namely election petition lacks in material facts and particulars and do not furnish a cause of action, as alleged. That order was challenged before this Court in Civil Appeal No.4085 of 1998 and this Court allowed the appeal by judgment and order dated 27.10.1999 {reported as Mahendra Pal v. Ram Dass Malanger and others, [(2000) 1 SCC 261]}, by holding that election petition did contain an adequate statement of material facts on which the allegations of irregularities and illegalities in counting were founded. The Court, therefore, directed the designated Judge to decide the election petition afresh on merits expeditiously.

Learned counsel for the appellant relied upon the observations of this court in said appeal [in paragraphs 30 and 31] and contended

that the High Court ought to have granted application for recount of the votes. The said observations read thus: -

"30. In the present case, it is not disputed, as indeed it cannot be, that in Form 20-A, Ex.P-2, it is recorded that the total number of votes found in the ballot boxes of 82 polling stations pertaining to this constituency were 35,310 whereas a perusal of the statement of "roundwise detailed result of counting", certified copy whereof is Ex.P-3, records that the total number of valid and rejected votes counted for the purpose of declaring the result were 35,318. A difference of 8 votes had been projected in Annexure P-2 and Annexure P-3. The margin of difference between the votes polled by the election petitioner and the returned candidate, in the present case, was only 3 votes. Unless a satisfactory explanation was furnished during the trial about the discrepancy, there would be need to inspect the ballot papers to clarify doubts regarding the excess counting of 8 votes, allegedly in favour of the returned candidate. This was also necessary to dispel doubts about the allegations of irregularity in counting. Had the Returning Officer, instead of rejecting the application for re-count made a test check, soon after the declaration of result, he could have silenced the scepticism and removed all doubts but since that was not done, the learned Designated Judge ought to have considered the matter in its correct perspective.

31. Indeed, re-count of ballot papers cannot be ordered just for the asking but it is equally well settled that while maintenance of secrecy of ballot is sacrosanct, maintenance of purity of election is equally important."

Undisputedly, after remand of this matter, the appellant was required to lead necessary evidence. The appellant has not examined any witness to establish that eight ballot papers which were found to be in excess in ballot boxes of 82 polling stations, were unauthorisedly added by someone. No such exercise was undertaken by the appellant. There was no reason for the appellant not to examine the Returning Officer or such other officer who was at the relevant time Counting Supervisor. In support of his case, it is true that the appellant has examined PW1 Kamlesh Kumar Pant, Deputy Commissioner-cum-District Election Officer. However, he has stated that he was not the Returning Officer at the time when the elections of State Assembly were held in February, 1998. No questions were asked to him whether there was any mistake in total number of 35310 original forms 16-A or original forms 20-A prepared by the Returning Officer. On the contrary, he has stated that two tendered votes which were recorded were not reflected in polling booth nos.10 and 78. Similarly, one tendered vote was also not reflected in Ex.P.83. He has also produced on record original consolidated statement of counting of votes, wherein total number of votes counted (valid and rejected) were 35318. He has also clarified that he was not present at the time of counting and he cannot identify the signatures of the officers on the documents which were produced on record. Thereafter, the appellant has not examined any other witnesses in support of his case except examining himself.

In his deposition, appellant has stated that he was personally present at the time of counting; there were six tables for counting of votes and all ballot boxes pertaining to 82 polling booths were brought to the hall; after separating the ballot papers, counting of the total ballot boxwise was carried out and thereafter form 16-A was prepared. It was his say that the staff deployed for counting of votes

of the Parliamentary Constituency had also crossed over to the tables set up for counting of votes of Assembly Constituency. The other persons who were working in the offices had also entered the counting hall and to that he had objected but his protest was not acceded to by the Returning Officer. It is his say that it appeared to him that some bungling might have taken place during such time resulting into the difference in total number of votes by eight in order to favour respondent no.1. He has also produced on record a copy of application for the purpose of recounting of votes given to the Returning Officer. In cross-examination, he has admitted that he had appointed two polling agents each in all the booths and that he had received complaint from polling agents only in respect of three fake votes having been cast i.e. one each at polling booth no.10, 76 and 78. He admits that he was not remembering as to who were his polling agents at booth number 10. He also admits that no written complaint was made by him to the authorities with regard to the fake votes having been cast at booth no.10. Similar is the statement for booth nos.76 and 78. He also admitted that he has not stated aforesaid facts in his election petition or in the rejoinder. He pertinently admitted that no objection was raised by him with the Returning Officer during the course of any of the counting and the fact regarding the differences of votes was also not mentioned by him in his application for re-counting. It is his say that he had come to know about the difference of votes only after he had obtained the certified copy of the various statements and that he claimed re-counting only on the ground of small margin of victory of respondent no.1. No other irregularity in the counting was pointed out by him in such counting. Further, it is admitted by him that he has not filed any complaint against any member of election staff either before or after declaration of result. Finally, he also admitted that all the votes polled were counted in six rounds in presence of his counting agents and during the course of counting no objection was made by him with regard to number of votes found in each bundle either less or more. He denied the suggestion that total number of votes polled and found in counting were 35318 and a mistake was committed in mentioning a total as 35310 in Ex.P.83.

As against this, respondent has led his evidence and stated that counting was in accordance with set procedure and no objection or complaint was made by any of the candidates during the course of counting. There was no dispute with regard to the correctness of the note prepared by the counting staff. It is his say that the appellant filed application for recounting after about half an hour of counting and that was rejected by the Returning Officer there and then after due consideration by a detailed order.

From the aforesaid evidence, it cannot be held that there was any irregularity or illegality in counting of votes. The appellant has not even stated in his deposition that eight ballot papers were illegally inserted at the time of counting of votes. It is for the appellant to establish his case of irregularities or illegalities in counting of votes. If there is no evidence, in our view, the High Court rightly rejected the application for recounting.

However, learned counsel for the appellant submitted that as there was discrepancy of eight ballot papers issued as per form 16-A and votes polled, it should be held that this was a fit case for recounting, particularly in the present case where difference of votes secured by the appellant and respondent was only by three votes.

In our view, this submission cannot be accepted. Section 100 (1)(d)(iii) of the Representation of the People Act, 1951 inter alia provides that in such cases petitioner has to establish

(a) election has been materially affected;

(b) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void.

From the evidence on record, there is nothing even to suggest that there was reception of any invalid or void vote. No foundation or evidence is led by the appellant that there was improper reception, refusal or rejection of any vote nor there is any submission made by him that any vote which was void was taken into consideration in favour of the respondent.

The law on this aspect is well settled. While dealing with similar contention, this Court in *R. Narayanan v. S. Semmalai and others* [(1980) 2 SCC 537] held that election, being a technical matter, the authorities choose experienced persons to do the counting and took every possible care to see that the members of the staff do not commit any error. Moreover, the relief of re-counting cannot be accepted merely on the possibility of there being an error. The Court observed, "it is well settled that such allegations must not only be clearly made but also proved by cogent evidence." The Court also held that the margin by which the appellant succeeded was very narrow. This was undoubtedly an important factor to be considered but would not by itself vitiate the counting of votes or justify re-counting by the court. Thereafter the Court referred to earlier decisions and held (in para-26) thus:

"The court would be justified in ordering re-count 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."

The aforesaid law is well settled and it does not require further elaboration. In *D.P. Sharma v. Commissioner and Returning Officer and others* [1984 (Supp.) SCC 157] the Court dealt with the discrepancy as regards finding of less ballot papers from the ballot boxes than what had been issued and used by the voters as well as the discrepancy which pertains to finding of excess ballot papers from the ballot boxes over and above those which had been issued and used by the voters and on the facts of that case observed that these discrepancies are insignificant in character and could be safely attributed to accidental slip or clerical or arithmetical mistakes that must have been committed at the time of counting and preparation of the statements in Forms 16 and 20. The Court pertinently further observed that these discrepancies by themselves do not make out a case for directing a recount of votes and that it is well established that in order to obtain re-count of votes a proper foundation is required to be laid by the election petitioner indicating the precise material on the basis of which it could be urged by him with some substance that there has been either improper reception of invalid votes in favour of the elected candidate or improper rejection of valid votes in favour of the defeated candidate or wrong counting of votes in favour of the elected candidate which had in reality been cast in favour of the

defeated candidate. In P.K.K. Shamsudeen v. K.A.M. Mappillai Mohindeen and others [AIR 1989 SC 640] this Court in para 15 held that 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. In Satyanarain Dudhani v. Uday Kumar Singh and others [1993 Supp. (2) SCC 82] this Court observed that an order of recount cannot be granted as a matter of course and unless the High Court is satisfied on the basis of material facts pleaded in the petition and supported by contemporaneous evidence, recount cannot be ordered. Similarly, in Vadivelu v. Sundaram and others [(2000) 8 SCC 355], this Court (in para 16) held that re-count of votes could be ordered very rarely and the petitioner who seeks re-count should allege and prove that there was improper acceptance of invalid votes or improper rejection of valid votes. If only the court is satisfied about the truthfulness of the allegation, it can order re-count of votes. 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. In V.S. Achuthanandan v. P.J. Francis and another [(2001) 3 SCC 81], the Court held that the election petitioner cannot be permitted to make out a case for re-count of ballot papers on a ground for which there is no foundation laid by him, not even a whisper, in the pleadings and which does not appear to have a ring of truth, even prima facie.

In view of the aforesaid discussion, as the appellant has not led any evidence or laid foundation stating that there was improper reception of vote in favour of the respondent or improper rejection of any vote which were in his favour, and that he has not raised any objection at the time of counting of votes on the basis of so-called excess of 8 ballot papers, the High Court rightly refused to re-counting of votes. The discrepancy of 8 ballot papers could be attributed to accidental slip or clerical or arithmetical mistakes which might have been committed at the time of preparation of the statements in Forms 16 and 20.

In the result, the impugned order passed by the High Court does not call for interference in this appeal. The appeal is, therefore, dismissed with costs throughout.

J.
(M.B. SHAH)

J.
(B.N. AGRAWAL)

March 1, 2002.