

ORISSA HIGH COURT : CUTTACK

W. P.(C) NO. 5864 OF 2008

In the matter of an application under Articles 226 and 227 of the Constitution of India.

Sri Askhaya Sethi @ Akhaya Kumar Sethi Petitioner

-Versus-

Sri Shyam Sundar Das Opp. Party

For Petitioner : M/s. Ramakanta Mohanty,
B.R.Mohapatra, A.P. Bose,
S.N. Biswal, S.K. Mohanty,
D.P. Pattnayak, & M.R. Das.

For Opp. Party : M/s. Prafulla Kumar Rath,
P.K. Satpathy, R.N. Parija,
A.K. Rout, S.K. Nayak-2&
S.P.Mishra, N.Panda, T.Mehera & S.P.Barik.

Decided on 20.02. 2009.

P R E S E N T :

THE HONOURABLE SHRI JUSTICE M. M. DAS

M.M. Das, J.

Election to the Office of Sarpanch of Odanga Gram Panchayat, which consists of 15 wards, was held on 15.02.2007. The petitioner was returned as the Sarpanch of the said Gram Panchayat in the aforesaid election. The election of the petitioner has been challenged by the opposite party in Election Misc. No.56 of 2007 pending before the learned Civil Judge (Junior Division), Bhadrak. The grounds set forth in the election petition filed under section 31 of

the Orissa Gram Panchayat Act, 1964 are that 12 numbers of votes cast in favour of the election petitioner have been wrongly rejected, three ballot papers one each in Booth Nos.4,5 and 7 have been illegally accepted in favour of the writ petitioner, nine persons have voted in Booth Nos.8 as well as Booth No.14 and similarly 5 persons have cast their votes in Booth No.7 of Odanga Gram Panchayat as well as in Booth No.1 of Chhyalsingh Gram Panchayat and such persons were supporters of the writ petitioner, who was the opposite party in the election petition. The petitioner on appearing in the Election Misc. Case filed his written statement. After closure of evidence, the opposite party filed a petition on 18.02.2008, inter alia, making the following prayer:-

- “a) That the counter foils of the ballot papers issued to the votes of booth nos.7,8,11,13,14 of Odanga Gram Panchayat, who are specifically mentioned in the election petition be marked and the corresponding ballot papers be taken off from the valid ballot papers.
- b) That the ballot papers counted for the opposite party and rejected ballot papers be inspected, scrutinized and recounted”.

The petitioner filed his objection to the said application. Upon hearing on the application, the learned Civil Judge (Jr. Division), Bhadrak by his order impugned in the present writ petition dated 29.03.2008 allowed the said application observing and directing as follows:-

“In view of the above narration, I am of the view that for the just decision of the case, prayer made by the petitioner in respect of recounting and inspection, recheck of ballot papers and counter foil only is worth considering and as such it is allowed.

Put up on 17.04.2008 when both parties/counsel are to be present in the open court for recounting and inspection and recheck ballot papers and counter foils as prayed”.

The petitioner being aggrieved by the said order has preferred the present writ application seeking quashing of the same. Reliance has been placed on various decisions of the Apex Court as well as this Court by the petitioner in support of his contention that the circumstances did not warrant an order to be passed by the Election Tribunal directing inspection and recounting of ballot papers as has been done in the impugned order.

2. Mr. R.K. Mohanty, learned counsel for the petitioner relying upon the decision in the case of **Vadivelu v. Sundaram and others**, A.I.R. 2000 S.C. 3230 submitted that the facts of the present case do not satisfy the prerequisites conditions where an order for recounting/inspection of ballot papers could have been passed. He submitted that as has been held by the Supreme Court in the aforesaid decision as well as in the case of **Baldev Singh V. Shinderpal Singh and another**, (2007) I SCC 341, to pass an order for inspection/recounting of ballot papers, the Court must be satisfied that a prima facie case has been established, the material facts and full particulars have been pleaded stating the irregularities

for counting of votes. He further submitted that the Supreme Court held in the said case that a roving and fishing inquiry should not be directed by way of an order to recount the votes and in the process, the secrecy of the ballot papers should be guarded. A Division Bench of this Court in Writ Appeal No.67 of 2008 (***Narayan Chandra Nayak Vrs. Harish Chandra Jena and two others***) by judgment dated 04.11.2008 taking note of a number of decisions of the Apex Court as well as this Court, while dealing with a similar question held that the Court has to strike a balance so that the purity of election is preserved and remains unpolluted in order to achieve the goal of democracy but at the same time the secrecy of the ballots remains guarded. This Court further held that recounting can be directed in exceptional circumstances where the Court comes to the conclusion that the petitioner is not seeking a roving and fishing inquiry, he has pleaded the material facts and adduced evidence in support of his case and the returned candidate has failed to rebut the same.

3. Law on this question has been well settled and it has been laid down that unless particulars with regard to illegality in counting of ballot papers, rejecting the ballots papers as invalid etc. have been pleaded in detail and evidence has been led in support of such pleading making out a prima facie case, an order, for recounting/inspection of ballot papers cannot be passed. In the case

of ***Harikrishna Lal Vs. Babu Lal Marandi***, (2003)8 SCC 613, the Apex Court held that the success of a winning candidate is not to be lightly interfered with and the burden of proof lies on the one, who challenges the election to raise necessary pleadings and adduce evidence to prove such averments as would enable the result of the election being set aside on any of the grounds available in the law. The secrecy of the ballot must be zealously guarded. In the case of ***R.Narayanan Vs. S. Semmalai***, AIR 1980 SC 206, the Supreme Court held that 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 *Vadivelu* (supra), the Supreme Court while dealing with a case under the Representation of People Act, 1951, referring to several earlier decisions held as follows:

“The result of the analysis of the above cases would show that this Court has consistently taken the view that recount 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 recount 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 above allegation, it can order recount 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 recount of votes under such circumstances to do justice between the parties”.

After holding as above, the Supreme Court, analyzing the pleadings in the election petition, came to a conclusion that the appellant therein has not set forth material facts or particulars required for recounting of votes, to justify his contention that there was irregularity or illegality in the counting, except making some general and bald allegations, no other details were found to be given in the pleadings. In the said case though an allegations was made that electoral roll contained the names of dead persons and the first respondent took advantage of the same and some persons had impersonated and cast votes in his favour, no details were given as to who committed such irregularities. The appellant therein also did not mention as to how many such votes were cast in favour of the first respondent and has also not alleged the nature of illegality or irregularity said to have been committed by the Counting Officer. It was also not specified as to in what manner, there was improper acceptance of invalid votes and improper rejection of valid votes. The Supreme Court, therefore, concluded that the election petition is bereft of all details and the appellant, when examined as P.W.1 cannot supplement anything by way of evidence. Taking note of the ratio of several Supreme Court judgments, this Court has also held in the case of Narayan Chandra Nayak (Supra) that it is the solemn duty of the election petitioner to

plead material facts. The case of illegal acceptance or rejection of ballots has to be pleaded giving the serial numbers and the source of information. Merely showing that petitioner's agent had told him was not enough. The name of the agent, who had furnished such information was to be disclosed in the election petition itself and note book on the basis of which such details had been furnished must be produced. The above findings were arrived at, following the decisions in the case of **Jitendra Bahadur Singh Vs. Krishna Behari**, AIR 1970 SC 276, **M. Chinnaswamy Vs. K.C. Palanisamy & Ors.** AIR 2004 SC 541 and **Chandrika Prasad Yadav Vs. State of Bihar & Ors.**, AIR 2004 SC 2036. In the present case, the election petitioner pleaded the following facts in the election petition in support of his plea that there was irregularity in counting of the votes.

“That during the process of counting the Presiding Officers of different booths illegally rejected 12 nos. of votes cast in favour of the petitioner on flimsy ground of major portions of the cross mark being in symbol ‘sun’ and also that there have been marking in favour of more than one candidates there has been marking on symbols like Sun, Plough and Umbrella in addition to the ‘fish’ symbol of the petitioner. It is humbly submitted that there has been only two candidates in the election for the post of Sarpanch of Odanga Gram Panchayat. For the whole State of Orissa there has been one set of ballot papers bearing six symbols as per the Orissa Gram Panchayat Election Rules. Names of the candidates are not printed on the ballot papers. The symbols of sun, umbrella, plough and ladder have not been allotted to the any candidates in the election for the office of Sarpanch of Odanga Gram Panchayat. These votes have been wrongly rejected though they should have been counted in favour of the petitioner.

That in three ballot papers, one each in booth nos.4, 5 and 7 have been illegally accepted in

favour of the O.P. though the major portion of the arrow cross mark is on the symbol 'fish'. These three ballot papers should have been counted in favour of the petitioner but has wrongly been counted in favour of the O.P.

That by such illegalities the O.P. has been declared to have secured 1523 votes and the petitioner have been shown to have secured 1509 votes. In the event of correct and proper inspection of the ballot papers it would be seen that the petitioner has secured 1524 valid votes and the O.P. has secured 1520 votes.

That 10 persons of Odanga Gram Panchayat have been enrolled as voters in both Ward Nos.11 and 13. Similarly 7 persons have been enrolled in Ward no.7 of Odanga Gram Panchayat though they are voters and inhabitants of adjacent Ganijanga Gram Panchayat. Coming to know about this, the agents of this petitioner as well as of other candidates contesting for different offices filed a written objection to the Presiding Officer of Booth no.11 of Odanga Gram Panchayat, praying him not to allow these voters to cast their votes in Booth no.11 as they have already exercised their franchise in booth no.13 of Odanga G.P. and in Ganijanga Gram Panchayat. A copy of the said application is being filed along with this petition. It is humbly submitted that the Presiding Officer of booth no.11 did not take any step against those voters as a result of which 10 persons have cast their votes in booth no.11 though they have already cast their votes in booth no.13 of Odanga Gram Panchayat. All of them have cast their votes in favour of the Opposite Party in both the booths.

That after the closure of polling the petitioner further came to know that 9 persons of Odanga Gram Panchayat have cast their votes in favour of the O.P. both in booth nos.8 and 14. Similarly, 5 persons have cast their votes in booth no.7 of Odanga Gram Panchayat though they have also cast their votes in booth no.1 of Chhayalsingh Gram Panchayat. It is humbly submitted that all these persons are supporters of the O.P. and have been canvassing votes for the O.P. All of them have cast their votes in favour of the opposite party".

4. The pleadings, as quoted above, do not specify as to who are the nine persons of Odanga Gram Panchayat, who have cast their votes in favour of the opposite party in the court below (writ

petitioner) both in booth nos.8 and 14 and similarly who were the five persons, who have cast their votes in booth no.7 of Odanga Gram Panchayat have also cast their votes in booth no.1 of Chhyalsingh Gram Panchayat. The source of such knowledge of the election petitioner has also not been disclosed in the pleadings. It has not been specifically stated as to which are the 12 votes which were illegally rejected though they were cast in favour of the election-petitioner. No particulars have been mentioned with regard to the alleged three ballot papers, one each in booth nos.4, 5 and 7 which have been illegally accepted in favour of the opposite party in the court below (writ petitioner). In the petition filed for calling for the counter foils of the ballots papers issued to the voters of the booth nos.7, 8, 11, 13 and 14 of Odanga Gram Panchayat and the ballot papers counted in favour of the writ petitioner and the rejected ballot papers for inspection, scrutiny and recounting, additional allegations have been made which are not there in the election petition.

5. Considering the pleadings of the election petitioner in the touch stone of the ratio of the decisions of the Apex Court referred above as well as the Division Bench decision of this Court in W.A. No.67 of 2008 and also applying the ratio of the decision in the case of **Gajanan Krishnaji Bapat Vs. Dattaji Gaghabaji Meeha**, AIR 1995 SC 284, it would be seen that the Election Tribunal has considered facts which are beyond the pleadings of the election

petitioner and the and the direction issued in the impugned order that for the just decision of the case there should be recounting/ inspection/rechecking of ballot papers and counter foils as prayed, is contrary to law as laid down. The learned Election Tribunal also without any basis has concluded that the allegation with regard to irregularity in counting of ballots papers has been vividly mentioned in the election petition. In view of such position, the impugned order dated 29.03.2008 passed in Election Misc. Case No.56 of 2007 under Annexure-1 cannot be sustained and the same is accordingly quashed. The Election Tribunal is directed to hear arguments of the parties and dispose of the election petition on the materials available on record within a period of one month from the date of receipt of this order.

6. The writ petition is accordingly allowed, but in the circumstances without cost.

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M. M. Das, J.

Orissa High Court, Cuttack.
February 20th, 2009/Himansu.

