

WA 28/2017

BEFORE

HON'BLE THE CHIEF JUSTICE MR. AJIT SINGH

HON'BLE MR. JUSTICE MANOJIT BHUYAN

(Ajit Singh, CJ)

Mrs. M. Hazarika, learned senior counsel, assisted by Mr.K Baruah, learned counsel for the appellant.

Mr.BN Sarma, learned Senior Government Advocate, Assam for respondent No.1 and Mr. MK Choudhury, learned Senior Counsel for respondent Nos.2 and 3.

Heard on admission.

This appeal is directed against order dated 20.12.2016 passed by the learned Single Judge Bench of this Court, whereby he has disposed of WP(C) 234/2016, with a direction for re-counting of votes polled in Polling Station No.69 - Phatia Maji LP School (Phatia Nepalibari LP School) of 18 - Bengenagorah Gaon Panchayat under No.2 Machkhowa Zila Parishad Constituency.

2. On 17.12.2012, the State Election Commission issued a notification for holding elections in Panchayat Institutions. The election of Dhemaji Zila Parishad was held on 30.1.2013. Amongst other candidates, the appellant and respondent No.2 also contested the election for the office of Member from No.2 Machkhowa Constituency. And the Deputy Commissioner declared that appellant had won the election by a margin of 8 votes against Respondent No.2. Aggrieved, Respondent No.2 filed election petition (Misc. Election Case No.8/2013) before the Election Tribunal for setting aside the election of appellant and declaring him as elected candidate. The appellant vehemently contested the election petition. But the Tribunal, after examining the evidence brought on record, set aside his election and ordered for re-counting of votes polled in four Gaon Panchayats. The Tribunal also directed for issuance of fresh certificate to the winning candidate as per result of re-counting. However, the Tribunal did reject the prayer of Respondent No.2 for re-counting of votes in respect of Polling Station No.69 - Phatia Maji LP School (Phatia Nepalibari LP School) of 18 - Bengenagorah Gaon Panchayat under No.2 Machkhowa Zila Parishad Constituency.

3. Aggrieved with order dated 13.11.2015, the appellant filed WP(C) 7966/2015, whereas Respondent No.2 filed WP(C) 234/2016. The submission of appellant in his writ petition was that the Tribunal committed an illegality in directing for re-counting of votes polled in four Gaon Panchayats. The submission of Respondent No.2, on the other hand, in his writ petition was that the Tribunal ought to have allowed his prayer for re-counting of votes polled in Polling Station No.69 - Phatia Maji LP School (Phatia Nepalibari LP School) of 18 - Bengenagorah Gaon Panchayat under No.2 Machkhowa Zila Parishad Constituency.

4. The learned Single Judge agreed with both appellant and Respondent No.2 and by the impugned order has set aside the order of Tribunal directing for re-counting of votes polled in four Gaon Panchayats as well as rejecting the prayer of Respondent No.2 for re-counting of votes polled in Polling Station No.69 - Phatia Maji LP School (Phatia Nepalibari LP School) of 18 - Bengenagorah Gaon Panchayat under No.2 Machkhowa Zila Parishad Constituency. In the result, the learned Single Judge has directed the Returning Officer (Deputy Commissioner, Dhemaji) to re-count the votes polled in Polling Station No.69 - Phatia Maji LP School (Phatia Nepalibari LP School) of 18 - Bengenagorah Gaon Panchayat under No.2 Machkhowa Zila Parishad Constituency within 30 days and thereafter to issue a fresh certificate to the winning candidate depending on the out-come of re-counting. It is in this background, the appellant has filed the present appeal.

5. It is argued on behalf of the appellant that the learned Single Judge committed an illegality in directing for re-counting of votes in Polling Station No.69 - Phatia Maji LP School (Phatia Nepalibari LP School) of 18 - Bengenagorah Gaon Panchayat under No.2 Machkhowa Zila Parishad Constituency as it is well settled that re-counting of votes cannot be ordered merely for asking. The learned counsel for Respondent No.2, on the other hand, has defended the order of re-counting of votes, as passed by the learned Single Judge.

6. True it is that re-counting of votes cannot be ordered merely for asking

. But, it is also well settled that order of re-counting can be passed when the election petitioner sets out his case with material facts supported by requisite evidence showing that because of a particular irregularity or illegality, the result of the election has been materially affected.

7. The learned Single Judge while directing for re-counting of votes polled in Polling Station No.69 - Phatia Maji LP School (Phatia Nepalibari LP School) of 18 - Bengenagorah Goan Panchayat under No.2 Machkhowa Zila Parishad Constituency, in paragraphs 21 and 22 of the impugned order, has held as under:-

21. In paragraph 9 of the election petition, the election petitioner had averred that in No. 18 Bengenagora Polling Station, which was in No. 69 Fatia Nepalibari L.P. School, the election petitioner polled 91 votes as against 83 votes polled by the returned candidate and, accordingly, such entries were made in Form No. XXVIII(D), but, in the consolidated result sheet, the election petitioner was shown to have polled 83 votes from No. 69 Fatia Nepalibari L.P. School and returned candidate was wrongly shown to have been polled 91 votes. The election petitioner had also led evidence to this effect. The election petitioner had proved the certified copy of the result of counting in Form No. XXVIII(D) in respect of No. 69 Fatia Nepalibari L.P. School and proved the signature of the counting observer as Ext.-11(1). In the said Ext.-11, election petitioner was shown to have polled 91 votes as against 83 votes polled in favour of Bipul Dutta, the returned candidate. He has also proved the result sheet (10 numbers) in Form XXIX(D) with signatures of election officials as Ext.-14(1) to 14(10), wherein in Ext. 14(7), Deben Dutta was shown to have polled 83 votes and Bipul Dutta 91 votes. The Additional Deputy Commissioner, Dharma Kumar Mily, examined on behalf of the Returning Officer, in his cross-examination had stated that in Ext. 11 relating to counting of votes at table No. 9 pertaining to 69 Fatia Nepalibari counting centre under No. 18 Bengenagora Gaon Panchayat showed that election petitioner received 91 votes as against 83 votes by the returned candidate and that Ext. 11 does not contain any mistake. In Ext. 14(7) {Form No. XXIX(D)} relating to table No. 9 pertaining to 69 Fatia Nepalibari counting centre under No. 18 Bengenagora Gaon Panchayat, the relevant data was not properly recorded. However, he had deposed that it was a mistake as the serial numbers of the candidates were wrongly recorded therein.

22. An issue was framed, being issue No. 1, to decide as to whether any error had occurred in calculation and compilation in the result sheet of votes as averred by the election petitioner. The Tribunal did not record any finding with regard to the discrepancy as noted in Ext.-11 and Ext.-14(7) relating to No. 69 Fatia Nepalibari L.P. School. The election petitioner had made adequate statement of material facts and had also led evidence to demonstrate the apparent contradiction in respect of votes polled by the election petitioner and the returned candidate in Ext.-11 and Ext.-14(7) in relation to No. 69 Fatia Nepalibari L.P. School. The Returning Officer had admitted that there was a mistake but had sought to justify in his evidence that, in reality, it was Bipul Dutta who had secured 91 votes and the election petitioner 83 votes. Such statements cannot be accepted on face value in view of the fact that in his cross-examination he had stated that his evidence on affidavit was not made based on his personal knowledge and that he was not present at the time of counting. Having regard to the materials on record, the Court is of the considered opinion that, prima facie, the election petitioner has been able to establish an irregularity in respect of table No. 9 pertaining to 69 Fatia Nepalibari counting centre under No. 18 Bengenagora Gaon Panchayat to the extent that it materially affected the result of the election as, if the contention of the election petitioner is found to be correct in the recounting, it will be the election petitioner who would have been declared elected on the basis thereof by a margin of 8 votes. In that view of the matter, I am in agreement with the learned counsel for the petitioner in WP(C) 234/2016 that in the attending facts and circumstances, the learned District Judge, Dhemaaji, ought to have directed recount in respect of the votes counted in Polling Station No. 69 Fatia Nepalibari L.P. School under Bengenagora Gaon Panchayat.

8. It is, thus, apparent that 91 votes polled and accounted in favour of Respondent No.2 in Form No.XXVIII(D) vide Exhibit 11(1) as against 83 votes polled

was mistakenly shown in favour of appellant in the consolidated result sheet exhibit 14 and 83 votes polled and accounted in favour of appellant was wrongly shown in favour of Respondent No.2. This fact was also admitted by the Returning Officer.

9. Also we by our earlier order dated 30.1.2017 while issuing notice to the respondents in the present appeal had directed that although re-counting be held in compliance of the order of learned Single Judge the result of re-counting be not declared and instead it be placed before this Court in a sealed cover. The re-counting was therefore held on 3.2.2017 and the relevant extract of the summary proceedings of re-counting with its result placed before us reads as under:

The re-counting of Ballot Paper of votes polled at the Polling Station No.69 - Phatia Maji LP School (Phatia Nepalibari LP School) of 18 - Bengenagorah Gaon Panchayat under No.2 Machkhowa Zila Parishad Constituency was taken up at the Conference Hall of the Deputy Commissioner, Dhemaji on 03-02-2017 from 11:00 A.M. onwards in pursuance of Order received from Hon'ble Chief Justice, Mr. Ajit Singh and Hon'ble Mr. Justice Achintya Malla Bujor Barua dtd. 30/01/2017 and Hon'ble Gauhati High Court order in WP(C) 7966/2015 dtd. 03/01/2017.

Sri Utpal Borah, ACS, Addl. Deputy Commissioner (Election), Dhemaji briefed out the order received from the Hon'ble Chief Justice Mr. Ajit Singh and Hon'ble Mr. Justice Achintya Malla Bujor Barua to the candidates/representatives present and elaborated about the whole process of re-counting.

The counting process started immediately after the Box in which the Ballot papers were kept was taken out from the O/O the Treasury Officer and after opening of the sealed Trunk in presence of Sri Utpal Borah, ACS, Addl. Deputy Commissioner (E) and in presence of candidates/representatives.

The counting process started at 11:30 A.M. in a transparent manner by Sri Chittaranjan Dutta, Administrative Officer, O/O the Deputy Commissioner, Dhemaji and Counting Supervisor and Sri Labaram Narzari, Sr. Asstt. DC's Office, RKGo Branch and Counting Assistant in presence of the Candidates/representatives. The attendance of the members present were also taken.

One vote of Ballot was rejected during the re-counting as there was no Arrow Cross Mark signed but had a clear thumb impression mark. The said vote was earlier accounted in favour of Sri Deben Dutta, the AGP Candidate.

After re-counting of Polling Station No.69 - Phatia Maji LP School (Phatia Nepalibari LP School) of 18 - Bengenagorah GP under No.2 Machkhowa Zila Parishad Constituency in connection with last Panchayat Election, 2012-13, the final figure of votes secured by the candidates are as follows:

Sl No.	Name of the candidates	Name of the party	Votes received
1.	Deben Dutta	AGP	90
2.	Bipul Dutta	INC	83
3.	Jugal Buragohain	BJP	10
4.		Doubtful	6
5.		Total votes polled	189

The result of re-counting however was not declared as per direction of Hon'ble Gauhati High Court as an interim measure and the result of re-counting will be placed before the court in a sealed cover. No untoward incident took place during the re-counting process and it was conducted in a smooth and peaceful manner. The whole process was video graphed.

(U. Borah, ACS)
Addl. Deputy Commissioner (E),
Dhemaji

10. The above quoted result of re-counting clearly establishes that actually only 83 votes were polled in favour of appellant whereas 90 votes were polled in favour of Respondent No.2 but by mistake 83 votes were accounted against the name of respondent No.2 and 90 votes were wrongly accounted in favour of appellant. And this mistake on the face of it materially affected the result of election in question. The result of re-counting has also proved beyond doubt the case of

Respondent No.2 that despite 91(90) votes polled and accounted in his favour vide exhibit 11(1) as against 83 votes polled was wrongly shown in favour of appellant in the consolidated result sheet exhibit 14 and 83 votes polled and accounted in favour of appellant was wrongly shown in his favour. We, therefore, find no merit in the appeal. The result of election be now declared as directed by the learned Single Judge.

11. The appeal is dismissed.