

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Civil Revision No.4069 of 2017 (O&M)

Date of Order: 8th August, 2017

Rakesh

..Petitioner

Versus

Ajay Kumar and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Sat Narain Yadav, Advocate,
for the petitioner.

Mr. Rao Devender Nirban, Advocate,
for the respondents.

ANIL KSHETARPAL, J.

Petitioner Rakesh Kumar was respondent in the election petition, filed under Section 176 of the Haryana Panchayati Raj Act, 1994 (hereinafter referred to as 'the Act').

Ajay Kumar, the petitioner, before the trial Court had filed an application seeking re-counting of the vote for the post of Sarpanch of the Gram Panchayat Karira. Learned Election Tribunal (hereinafter referred to as 'the Tribunal'), vide order dated 23.05.2017, has ordered re-count of the votes. Petitioner-Rakesh has challenged the aforesaid order passed by the Tribunal.

Election for the post of Sarpanch of Gram Panchayat, Karira, was held on 10.01.2016. On the same day, elections of Zila Parishad also took place. It is the allegations of the petitioner in the election petition that, although, in the first round, petitioner was declared elected. However, after 5-7 minutes, respondent in the election petition i.e. Rakesh was declared

elected by the Returning Officer. As per the final result declared, there was only difference of one vote as Rakesh was declared to have secured 663 votes, whereas Ajay Kumar was declared to have 662 votes. The Tribunal after considering all aspects of the matter, ordered re-count. Rakesh has filed the present revision petition against the aforesaid order.

Counsel for the petitioner has submitted that merely because the difference in votes is one, re-count cannot be ordered. Learned counsel has further submitted that since Section 176 of the Act does not provide for re-count if the election is held with electronic voting machine, therefore, the order is without jurisdiction. According to him the re-count can only be ordered if the voting was carried out with the help of ballot papers.

Counsel for the petitioner has further submitted that the electronic voting machine is not alleged to be defective, therefore, re-count could not be ordered. Counsel further submitted that Ajay Kumar was not able to prove that he submitted any representation for re-counting of votes, on 12.01.2016.

Under the Haryana Panchayati Raj Act, 1994, election petition is governed by the provisions made under Section 176 of the Act, which is extracted as under:-

“176. Determination of validity of election enquiry by judge and procedure(1) If the validity of any election of a member of a Gram Panchayat, Panchayat Samiti or Zila Parishad or Sarpanch of Gram Panchayat, Chairman or Vice-Chairman, President or Vice-President of Panchayat Samiti or Zila Parishad respectively is brought in question by any person

contesting the election or by any person qualified to vote at the election to which such question relates, such person may at any time within thirty days after the date of the declaration of results of the election , present an election petition to the civil court having ordinary jurisdiction in the area within which the election has been or should have been held, for the determination of such question.

(2) A petitioner shall not join as respondent to his election petition except the following persons :—

(a) where the petitioner in addition to challenging the validity of the election of all or any of the returned candidates claims a further relief that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner and where no such further relief is claimed, all the returned candidates ;

(b) any other candidate against whom allegations of any corrupt practices are made in the election petition.

(3) All election petitions received under sub-section (1) in which the validity of the election of members to represent the same electoral division is in question, shall be heard by the same civil court.

(4) (a) If on the holding such inquiry the civil court finds

that a candidate has, for the purpose of election committed a corrupt practice within the meaning of sub-section (5) he shall set aside the election and declare the candidate disqualified for the purpose of election and fresh election may be held.

2(aa) If on holding such enquiry the Civil Court finds that-

(i) on the date of his election a returned candidate was not qualified to be elected;

(ii) any nomination has been improperly rejected;

or

(iii) the result of the election, in so far as it concerns a returned candidate, has been materially affected by improper acceptance of any nomination or by any corrupt practice committed in the interest of the returned candidate by an agent other than his election agent or by the improper reception, refusal or rejection of any vote or the reception of any vote which is void or by any non-compliance with or violation of the provisions of the Constitution of India or of this Act, or any rules or orders made under this Act,

election of such returned candidate shall be set aside and fresh election may be held.

(b) If, in any case to which 2 clause (a) or clause (aa) does not apply, the validity of an election is in dispute between two or more candidates, the court shall after a scrutiny and computation of the votes recorded in favour of each candidate, declare the candidate who is found to have the largest number of valid votes in his favour, to have been duly elected :

Provided that after such computation, if any, equality of votes is found to exist between any candidate and the addition of one vote will entitle any of the candidate to be declared elected, one additional vote shall be added to the total number of valid votes found to have been received in the favour of such candidate or candidates, as the case may be, elected by lot drawn in the presence of the judge in such manner as he may determine.

(5) A person shall be deemed to have committed a corrupt practice-

(a) who with a view to induce a voter to give or to refrain from giving a vote in favour of any candidate, offers or gives any money or valuable consideration, or holds out any promise of individual profit, or holds out any threat of injury to any person ; or

(b) who, with a view to induce any person to stand or not to stand or to withdraw or not to

withdraw from being a candidate at an election, offers or gives any money or valuable consideration or holds out any promise or individual profit or holds out any threat of injury to any person ; or

(c) who hires or procures whether on payment or otherwise, any vehicle or vessel for the conveyance of any voter (other than the person himself, the members of his family or his agent) to and from any polling station.

Explanation 1.— A corrupt practice shall be deemed to have been committed by a candidate, if it has been committed with his knowledge and consent by a person who is acting under the general or special authority of such candidate with reference to the election.

Explanation 2.— The expression "vehicle" means any vehicle used or capable of being used for the purpose of road transport whether propelled by mechanical power or otherwise, and whether used for drawing other vehicles or otherwise."

A reading of Section 176(4)(b) of the Act, it is clear that the Election Tribunal has power to order computation of the votes recorded in favour of each candidates.

Learned counsel for the petitioner has relied upon the judgment passed by the Hon'ble Supreme Court of India, reported as **Udey Chand v.**

Surat Singh and another, 2009(10) SCC 170. Learned counsel for the petitioner has referred to para 17 of the judgment to assert that re-counting cannot be ordered.

I have considered the submissions of learned counsel for Rakesh, the petitioner, herein.

The aforesaid judgment lays down that re-count cannot be ordered merely on the bald allegation of irregularity in the counting process. It has been held that without holding some enquiry, re-count cannot be ordered. It has further been held that the provision seeking re-count must contain adequate statement of material facts on which the election petitioner relies in support of his allegation(s) and it must also be supported by some contemporaneous evidence to show irregularity or illegality in the counting. Para 17 of the aforesaid judgment is extracted as under:-

“17. It is no doubt true that the legislature in its wisdom has not incorporated in clause (b) the expression "on the holding of such inquiry", as it appears in clause (a), but bearing in mind the importance and the sanctity of the secrecy of a ballot, in our considered opinion, it cannot be the intention of the legislature that a bald allegation of irregularity in the counting process would ipso facto warrant a re-count. Such an interpretation of the provision, in our view, would not only tantamount to automatic conversion of a petition under [Section 176\(1\)](#) of the Act into an order for recounting, it would be destructive of the settled principle of secrecy of poll, as also violative of letter and spirit of [Section 183](#) of the

Act, which mandates every officer, agent etc.; who performs duty in connection with the recording or counting of votes, to maintain the secrecy of votes. In our judgment, the sole object of the Legislature in giving wide powers to the Election Tribunal is to decide the objections under clause (b) of sub-section (4) of [Section 176](#) of the Act expeditiously without holding a full-fledged regular enquiry, as postulated in clause (a) of the said provision, so that the actual mandate of the electorate is given effect to without any delay; the successful candidate is able to utilise his complete tenure for the purpose he has been elected and above all the purity of election process is safeguarded. Nonetheless, the secrecy of the ballot being sacrosanct, it cannot be permitted to be tinkered with lightly and an order of re-count cannot be granted just for the asking. We have no hesitation in holding that a petition for re-count as contemplated under clause (b) of [Section 176\(4\)](#) of the Act must contain adequate statement of material facts on which the election petitioner relies in support of his allegation(s) and it must also be supported by some contemporaneous evidence to show irregularity or illegality in the counting. On this basic material, which affords the basis for the allegations in the petition and the response of the opposite party thereon, the Tribunal is required to record its prima facie satisfaction that in

order to decide the issue raised in the petition and in order to do complete justice between the parties the "scrutiny and computation of the votes" recorded in favour of each candidate is necessary. The need to record reasons in support of the satisfaction can hardly be over-emphasised because reasons are the soul of the orders/judgment. Therefore, we hold that though in an election petition seeking an order under [Section 176\(4\)\(b\)](#) of the Act, it may not be necessary for the Court to hold a regular enquiry as postulated under clause (a) of [Section 176\(4\)](#) of the Act but the Court is obliged to apply its mind to the material facts, disclosed in the petition, on which the allegations of irregularity or illegality are founded, along with some contemporaneous evidence, which would depend on the facts and circumstances of each case. An order for re-count on the basis of bare allegations in the election petition would not be a proper exercise of jurisdiction under the provision."

I have considered the submissions of learned counsel for the parties and in my opinion, there is no force in the submissions of learned counsel for the petitioner for the following reasons:- (i) in the election petition, the petitioner had given sufficient details as to how there was irregularity in the re-counting. It was the allegation of the petitioner in the election petition that initially Rakesh was declared elected. However, later on Returning Officer changed the result. It is further the allegation of the

petitioner that on that day two elections were being held simultaneously. The result of the election of Saranch was declared on 10.01.2015, whereas the counting for election of member of Zila Parishad was held on 28.01.2016 and it appeared in the newspaper that one electronic voting machine used for booth no.104 for the election of Sarpanch was found wrongly deposited in the treasury of Zila Parishad.

The Tribunal after framing the issues examined the witnesses. The Returning Officer, namely, Hukam Singh was examined as RW3. His statement is very important. Sh. Hukam Singh admits that he carried out the counting twice over. He further feigned ignorance that one electronic voting machine used in booth no.104 was found wrongly deposited with the treasury of Zila Parishad.

Once, there is some evidence available on the file that votes polled on one booth through one electronic voting machine even has not been counted and was found to be wrongly deposited, in the treasury of the Zila Parishad, the Tribunal was justified in ordering re-count.

Counsel for the petitioner has submitted that because margin is of one vote, therefore, re-count cannot be ordered. There is some substance in the argument. However, in the peculiar facts in the case, the learned Tribunal has not only ordered re-count on the ground that difference is of one vote but after taking into consideration the pleadings and evidence available on the file. Learned Tribunal after appreciating the evidence found that there is some irregularity in the re-counting. Therefore, re-counting has been ordered.

Counsel for the petitioner has further submitted that the re-counting can be ordered if ballot papers have been used. However, re-count

cannot be ordered when the electronic voting machine has been used. He submits that Section 176(4)(b) of the Act only applies when election are held with ballot papers.

I have carefully read the provisions of Section 176 of the Act. I do not find that the re-counting can only be ordered when the election is held with ballot papers and not, when electronic voting machine used. Section 176 of the Act does not make a distinction in this regard.

Learned counsel for the petitioner has further submitted that there is no complaint that electronic voting machine was defective, therefore, re-count cannot be ordered.

I have considered the submissions made by counsel for the petitioner. However, I am unable to agree.

In this case, there are specific allegations that one electronic voting machine in which votes recorded at one particular time has not been taken into consideration and the aforesaid mistake happened because on the same day two different elections were held from the same booth, one for Sarpanch of the Gram Panchayat and other for member of Zila Parishad, the Tribunal was justified in ordering re-count of votes. Still further even Returning Officer has admitted that he counted the vote twice over proving to some extent assertion of the election petitioner.

Counsel for the petitioner has further submitted that the petitioner in the election petition has not been able to prove the complaint sent to District Election Officer, dated 12.01.2016.

I have seen the application. The application has been sent through registered post and the receipt of the registered post has been pasted on the application itself. Therefore, the argument of learned counsel cannot

be accepted.

For the reasons recorded above, the revision petition is dismissed. The order passed by the Election Tribunal dated 23.05.2017 is upheld.

8th August, 2017
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned	: Yes/No
Whether reportable	: Yes/No