

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CWP-26696-2018 (O & M)
Date of Decision: 11.01.2019

Shubh Lata and others

.Petitioners

Vs.

State of Punjab and others

. Respondents

**CORAM: HON'BLE MR.JUSTICE RAKESH KUMAR JAIN
HON'BLE MR.JUSTICE ANUPINDER SINGH GREWAL**

Present: - Mr. Sanjay Majithia, Senior Advocate with
Mr. Abhimanyu Singh, Advocate for the petitioners.

Mr. Rajesh Bhardwaj, Senior DAG, Punjab.

Mr. Mohit Garg, Advocate for respondent No.4.

RAKESH KUMAR JAIN, J. (ORAL)

This petition is preferred at the instance of three petitioners, who are aggrieved against the notification No.SEC-(PS)-SA-2018 (Annexure P-7) by which respondents No.6 to 8 were declared elected as Members of the Panchayat Samiti of Dharkalan and have also prayed that their election may be declared as illegal and they should be declared elected as such.

In brief, the general election for the Zila Parishad, Panchayat Samiti for the year 2018 was held on 19.09.2018 in the State of Punjab. The elections were to be governed by the provisions of the Punjab Panchayat

Election Rules, 1994 ('Rules' - for short).

The controversy involved is in regard to the election of the present petitioners, who had contested from Zone 3, 5 and 11. They contested the election for the post of Panchayat Samiti from the political party (BJP) and according to them they had defeated their nearest rival of the Congress party in the said election in which the result was declared on 21.09.2018.

According to the petitioners, the Returning Officer/Presiding Officer namely Mr. K. C. Bhagat had initially declared the result of petitioner No.1 having secured 1100 votes as against the candidate of Congress Party, who had secured 909 votes. Petitioner No.2 had secured 902 votes against the nearest rival, who had secured 818 votes and petitioner No.3 had secured 883 votes as against the losing candidate who had secured 791 votes. It is further submitted that it is an admitted fact that the Returning Officer had signed the declaration of result of at least petitioner No.1 whereas the result of the petitioners No.2 and 3 were allegedly compiled by the Election Staff. It is also not in dispute that the losing candidates from the Congress party had filed their respective applications before the Returning Officer requesting him for recounting of votes as they were alleging some kind of fraud/error at the time of counting. It is also not in dispute that the recounting had been done by the Returning Officer in the absence of the polling agent of the petitioners but it has come on record that efforts were made to seek their presence by way of sending them messages on telephone/mobile. Ultimately, after recounting of votes, the result was declared on Form IX by the Returning Officer and the

petitioners were shown to have secured less votes than the candidates of the Congress (respondents No.6 to 8) and hence they were declared to have been elected and the notification (Annexure P-7) which has been impugned was accordingly issued.

The petitioners had earlier filed a writ petition bearing CWP-25276-2018 before this Court on the same cause of action but the said writ petition was dismissed as withdrawn on 11.10.2018 with liberty to file it again with better particulars.

Be that as it may, learned counsel for the petitioners has argued that once the result has been declared by the Returning Officer, he becomes functus officio and could not have changed the result by recount. In this regard he has referred to the following decisions:-

- (1) Malkit Kaur versus Jatinder Kaur and others, 2001 (Sup2) JT 157 (Supreme Court).
- (2) Kashmir Kaur versus State of Punjab, 2004(1)RCR (Civil) 580.
- (3) Kulwant Singh and another versus State of Punjab and others, 2011 (2) RCR (Civil) 282.

It is also argued that the averments made in para 5 of the petition about the declaration of the result has been admitted in the corresponding reply filed by respondents No.1 to 3 and respondent No.5 separately. Learned counsel for the petitioners has submitted that though in the form and substance, the result has not been declared in Form IX but for all intents and purposes the result declared in respect of petitioner No.1 (Annexure P-3) conforms with the result having been declared in Form IX.

It is thus submitted that the respondent No.5 has committed an error of jurisdiction in changing the result as he had become functus officio

thereafter. It is also sought to be argued that there is no procedure for recounting of the votes at the instance of the Presiding Officer/Returning Officer at the asking of the loosing candidates and even if he had some inherent jurisdiction though not admitted, the recounting could not have been done in their absence.

In reply, learned counsel for the respondent-State has submitted that there is no error on the part of respondent No.5 much less respondents No.1 to 3 in declaring the result of the election, as the result declared by the Returning Officer, though under his signatures (Annexure P-3), was not the result declared on Form IX which is so provided specifically under the provisions of the Rules. It is submitted that it was only a compilation of the result as was done by the Election Staff insofar as Annexures P-4 and P-5 is concerned and, therefore, it is not inconformity with the declaration of result on Form IX. It is not denied that once the result is declared on Form IX by the Returning Officer then he would definitely become functus officio and would not be in a position to tinker with the result even on the asking of the loosing candidates for the purpose of recounting of votes. The sum and substance of the argument of the counsel for the respondent is thus that the recounting of votes has been done by the Returning Officer not voluntarily but on the asking of the loosing candidates who had alleged some kind of irregularity at the time of counting and after recounting he had found that the earlier compilation of the result was not correct and declared the correct result in Form IX which has not been tinkered with by the Returning Officer. It is also argued that if the petitioners are aggrieved against the procedure which has been adopted by the Returning Officer at the time of

recounting of the votes, the only remedy available to them is of filing of election petition. Therefore, the writ petition is not maintainable.

We have heard learned counsel for the parties and perused the record with their able assistance.

Rule 33 of the Rules has been pressed by the learned counsel for the petitioners in regard to counting of votes, which is reproduced as under:-

“33. Counting of votes (Section 66).--(1) In a Sabha area where there is only one polling Station, the Returning Officer shall follow the [procedure set out in sub-rule (2)] for the counting of votes and declaration of result for election to the Gram Panchayat.

(2) The Presiding Officer shall, as soon as practicable, after the close of the poll and in the presence of any candidate or polling [agent] who may be present:-

(a) [inspect] and also allow an opportunity to candidates or their polling agents to inspect the ballot-boxes and their seals to satisfy themselves that they are in order;

(b) open the ballot-box after checking the mark or marks made on the box and the label affixed, takes out the ballot papers from the box and arrange them in [convenient] bundles, separating the ballot-papers which he deems valid from those he rejects.

(c) allow the candidates and their agents who may be present, reasonable opportunity to inspect all ballot-papers, which is in the opinion of the Presiding Officer, are liable to be rejected but shall not allow them to handle those or any other ballot-papers. The Presiding Officer shall on every ballot-paper which is rejected, endorse the word "rejected" and record briefly on such ballot-papers the grounds for its rejection. A brief record shall be kept of the serial numbers of all ballot-papers [rejected;].

(d) count the valid votes given in each candidate with the aid of persons appointed to assist in the counting of votes and declare the election of the candidate who is found to have obtained the largest number of valid votes, or, if more than one member is to be elected for the Gram Panchayat, then the candidates who are found to have obtained the largest number of valid votes shall be declared to have been [elected; and]

(e) [after] the counting of ballot-papers contained in all the ballot-boxes has been completed, the Returning Officer shall record a statement in Form IX showing the total number of votes polled by each candidate.”

There is no dispute that as per Rule 33(2)(e) of the Rules, the result has to be declared by the Returning Officer only on Form IX. The exact language used in Form IX is also reproduced herein for the purpose of convenience:-

FORM IX

[See rule 33(2)(e)]

Statement of total number of votes

Statement of votes polled for the election of Panches/Sarpanches of

Gram Panchayat members of Panchayat Samiti/Zila

Parishad _____

Name of the Gram Sabha/Constituency Area _____

Polling Station _____

Serial No.	Name of candidate	Number of valid ballot papers polled by him	Number of rejected ballot papers

Total Number of			
(a) Valid votes _____			
(b) rejected votes _____			
(c) votes polled _____			
Dated _____		Signature of Returning/Presiding Officer	

The judgments relied upon by the learned counsel for the petitioners starting from the case of Malkit Kaur versus Jatinder Kaur (supra) and till the case of Kulwant Singh and another versus State of Punjab (Single Bench of this Court) is pertaining to the exercise of jurisdiction by the Returning Officer after the result is declared in Form IX. In the case of Malkit Kaur (supra), it has been held that once the result is declared in Form IX, in terms of the provisions of the Act, the Returning Officer is not empowered to alter the said declaration subsequently. The

said judgment of Malkit Kaur (supra) has been followed as it is by this Court in the case of Kashmir Kaur (supra) (DB) and then in the case of Kulwant Singh (supra) (SB).

In the present case, however, the result has not been declared by the Returning Officer on Form IX, therefore, we are not in agreement with the argument of the learned counsel for the petitioners that the result declared/compiled by the Returning Officer (Annexure P-3) has to be taken as a result having been declared on Form IX. To our mind, it was only the compilation of the result by him as he could declare the result only in terms of Form IX and not otherwise. Till that stage, the procedure of the declaration of result was still in the hand of the Returning Officer to whom separate applications were filed, which are available on record, by the loosing candidates/respondents No.6 to 8 for seeking correction in the result by recounting of the votes on the ground of irregularity having been committed at the time of counting. The question as to whether the recounting has been rightly or wrongly done is a matter of fact which can be verified only by way of filing of election petition in which the parties would lead their respective evidence.

We are also of the view that the question of procedure having been followed or not at the time of recounting is also a matter of election petition. Thus judgments relied upon by the learned counsel for the petitioners are not applicable to the facts and circumstances of the case in hand as it is not a case in which the result of the petitioners was declared by the Returning Officer on Form IX and has been changed thereafter.

With these observations, we do not find any merit in this

petition and the same stands dismissed. However, liberty is still granted to the petitioners to challenge the election, by filing an election petition, in accordance with law.

(RAKESH KUMAR JAIN)
JUDGE

(ANUPINDER SINGH GREWAL)
JUDGE

11.01.2019
A.Kaundal

Whether speaking /reasoned : Yes/No

Whether Reportable : Yes/No