P.H PUJAR

v.

KANTHI RAJASHEKHAR KIDIYAPPA AND ORS.

MARCH 05, 2002

[B.N. KIRPAL, Y.K. SABHARWAL AND K.G. BALAKRISHNAN, JJ.]

Representation of the People Act, 1951: Sections 81 and 100.

Election—Challenge by defeated candidate on the ground of non-filing of check memos by counting supervisors—High Court holding declaration of election void—Direction to recount ballot papers—Appeal before Supreme Court—Held, recount of votes cannot be ordered in a casual manner—Cannot be ordered merely because difference is meagre—Proper foundation should be laid in pleadings—Specific allegations should be made and proved—Held there was lack of pleadings as to material fact in the election petition—Held High Court erred in directing recount.

In the election petition filed by respondent No. 1, the defeated candidate, challenging the election of the appellant, the elected candidate, the issue involved, *inter alia*, was whether the counting of the votes was done in accordance with Rules High Court set aside the election of the appellant holding the declaration of the election to be void. It directed the Returning Officer to recount all ballot papers after proper scrutiny. Against the decision of High Court the returned candidate preferred appeal before this Court. On behalf of respondent No. 1. It was contended that the Counting Supervisors had not filled the check memos for counting of votes as required by them under the instructions contained in Hand Book for Returning Officers for election to the House of People and State Legislative Assemblies issued by the Election Commission of India. Consequently, it became impossible to know how many doubtful votes were taken by the Counting Supervisors to the Returning Officer and how many were directed by the Returning Officer to be validly polled by one or the other candidate, thereafter leaving the balance as rejected ballot papers. In this view, the High Court was perfectly justified in directing the recounting of all the ballot papers.

Allowing appeal of the returned candidate and setting aside the judgment of the High Court, the Court

A **HELD: 1. The High Court was clearly in error in directing the recount of the entire assembly votes and in setting aside of the election of the petitioner simultaneously even before the start of the recount. [212-D]**

2. The recount of the votes cannot be ordered in a casual manner. It cannot be ordered only because the margin of defeat is meagre. For seeking B **recount, proper foundation is to be laid in the pleadings by setting out material facts and later proving it by adducing requisite evidence. The recount cannot be ordered on the *ipse dixit* of the election petitioner. It can be ordered in rare cases where specific allegations are made and proved so as to do complete justice between the parties. [212-A-B]**

C

3. In the election petition it is obligatory for the election petitioner to set out the material facts. Except making a general and vague averment that respondent No. 4 (Returning Officer) refused to follow the mandatory provision of law in relation to the counting, the election petitioner has failed to plead any material fact whatsoever. There is not a whisper about the non- D **filing of the check memos by the Counting Supervisors or its effect. It has not been stated how and which mandatory provision of law of counting was not followed by the Returning Officer. There is total lack of pleading as to material fact in the election petition. [210-H; 211-A-B]**

E *Vadivelu* v. *Sundaran and Ors.*, **[2000] 8 SCC 355 and** *T.H. Musthaffa* **v.** *M.P. Verghese and Ors.*, **[1999] 8 SCC 692, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7113 of 2000.

F From the Judgment and Order dated 27.11.2000 of the Karnataka High Court in E.P. No. 2 of 1999.

K.K. Venugopal, D.N. Reddy, C.H. Jadhav, S. Sukumaran, V.K. Sidharthan and Ms. Divya Nair for the Appellant.

G Dr. A.M. Singhvi and L. Nageswara Rao, Girish Ananthamurthy and P.P. Singh for the Respondents.

The Judgment of the Court was delivered by

Y.K. SABHARWAL, J. The appellant was elected as a Member of the H Karnataka Legislative Assembly by a margin of 138 votes. The total votes

polled were 88,353. At the final counting it was found that the election petitioner (respondent no. 1 herein) secured 40,280 votes whereas the appellant secured 40,418 votes. The ballot papers rejected as invalid were 3872.

Respondent No.1 who was defeated by a margin of 138 votes challenged the election of the appellant in a petition filed in the High Court under Section 81 of the Representation of the People Act, 1951 (for short 'the Act'). A declaration was sought that the election of the appellant was void on the grounds of improper reception, refusal or rejection of votes as also for non-compliance of the provisions of the Act, the Rules and the orders made thereunder as set out in sub-clauses (iii) and (iv) of clause (d) of sub-section (1) of Section 100 of the Act. According to respondent no. 1, 59 ballot papers were also found to be missing. One of the allegations of respondent no. 1 in the election petition was that the number of ballot papers rejected could have been counted in his favour and his counting agents were not provided with any opportunity to inspect the ballot papers that had been rejected by the Returning Officer.

In all, six issues were framed. One of the issues was "whether the petitioner proves that the counting of the votes was not done in accordance with the rules?"

The election of the appellant was set aside by the impugned judgment holding the declaration of the election to be void. The High Court while so holding directed the Returning Officer to recount the ballot papers after properly scrutinizing the same and directed him to declare the result of the election by following the provisions of the law and the directions/instructions issued by the Election Commission.

In this appeal preferred by the returned candidate, after hearing learned counsel for the parties this Court in terms of the order dated August 7, 2001, directed that for the present only 3872 ballot papers deserve to be recounted after proper scrutiny. The directions for recount of the said ballot papers were issued. The recounting was directed to be conducted by the Registrar of the Karnataka High Court and the report sent to this Court thereafter. The Court, at that stage, did not express any opinion either on the aspect of 59 missing ballot papers or on the legality of the direction in the impugned judgment of the High Court for recount of all ballot papers after proper scrutiny and also about the legality of the direction declaring as void the declaration of election in question. In the said order, it was noticed that these aspects, if necessary,

A would be examined on receipt of the report of the Registrar.

The recount has been conducted by the Registrar (Judicial) of High Court of Karnataka and report submitted. From the report it appears that on opening the trunks and the sealed packets containing the rejected ballot papers it was found that there were in all 3858 ballot papers considered as rejected B and not 3872. On recount of the said ballot papers it was found that 42 were clearly polled in favour of the appellant whereas 22 were clearly found polled in favour of respondent no. 1 In respect of 36 ballot papers considering the placement of the seal by the voter it was reported that the said number of 36 rejected ballot papers also deserve to be counted in favour of the appellant C and for the same reason 61 ballot papers deserve to be counted in favour of respondent no. 1. Thus, out of the rejected ballot papers, 78 votes were found in favour of the appellant and 83 in favour of respondent no. 1. In this way the margin of the defeat of respondent no. 1 stands reduced by 5 votes. If respondent no. 1 is given the benefit of 14 ballot papers found less in the rejected bundles wherein instead of 3872, the ballot papers found were 3858 D and is further given the benefit of missing 59 votes, the margin of defeat would stand reduced to 78 votes. The total excess votes polled by the appellant being 138, his margin of victory would stand reduced to 60 which would have no material bearing on the result of the election.

E After receipt of the report and on consideration of the aforesaid fact situation in respect whereof there is dispute, we have further heard Mr. K.K. Venugopal, learned counsel for the appellant and Mr. Nageshwar Rao, learned counsel for respondent no. 1. On conclusion of the hearing, we directed that the appeal stands allowed for the reasons to be given later.

F Mr. Nageshwar Rao, learned counsel for respondent no. 1 strenuously contends that the direction in the impugned judgment for general recount of all ballot papers is legal and fully justified on the facts and circumstances of the case. Learned counsel points out that the Counting Supervisors had not filled the check memo for counting of votes as required by them under the G instructions contained in Hand Book for Returning Officers for election to the House of People and State Legislative Assemblies issued by the Election Commission of India by not filling in particular Part-II of Annexure XLII-B (para 21) Chapter 14-B-check memo for counting of votes. The result of it, according to learned counsel, is that now it has become impossible to find out and know how many doubtful votes were taken by the Counting H Supervisors to the Returning Officer and how many were directed by the

Returning Officer to be validly polled by one or the other candidate, thereafter leaving the balance as rejected ballot papers. In this view, the learned counsel contends the High Court was perfectly justified in directing the recounting of all the ballot papers. According to the directions issued by the Election Commission, the Counting Supervisor, after each round of second stage of counting was required to enter the total number of such ballot papers in the second part of the check memo in their own hand and such check memo was to be carried with the ballot papers to the Returning Officer for taking decision. But admittedly no entry regarding total number of ballot papers had been made by the Counting Supervisors at any point of time as is evident from the original Check Memos. It was pointed out that the High Court has found that the number of such doubtful ballot papers was noted by the Counting Supervisors on chit of papers which used to be destroyed on taking decisions on such ballot papers and completion of scrutiny of ballot papers and on the dictate of the Returning Officers only total number of rejected ballot papers had been entered in the second part of the check memo pertaining to the each part of the counting which was contrary to the direction issued by the Election Commission for counting of votes. Considering such illegality committed by the Counting Supervisors and the Returning Officers with regard to the scrutiny and taking of doubtful ballot papers, the High Court rightly held, it is contended by Mr. Rao, that the result of the impugned election has been materially affected thereby requiring an order for general recount.

To appreciate the aforesaid contention, it is necessary to notice the grievance which in fact was projected by the election petitioner at the time of counting and what allegations have been made in the election petition assuming, for the present purpose, that the instructions in the Hand Book are in nature of instructions issued by the Election Commission of India under Article 324 of the Constitution of India.

In the letters given to the Returning Officer after the recount the grievance of respondent no. 1 as a defeated candidate was not as sought to be projected as earlier noticed or projected & noticed by the High Court in the impugned judgment but was that the margin of defeat being small the 'disputed votes' be re-examined. It was that the counting was completed in a hurried manner of 'the doubtful votes' and that the same had not been considered properly in his favour and were rejected on all the tables. His grievance was that as there was a meagre difference of margin and for this reason a request was made for recount of the entire Bagalkot Assembly Constituency before announcing the results. On consideration of this request

A the Returning Officer noted that at no point of time objection was raised to the counting of votes on any of the tables and that while deciding the doubtful ballot papers no objection had been raised and he had done the counting of votes after taking decisions of doubtful ballot papers in a scientific manner and thus the objection after completion of the counting cannot be considered and was rejected. Thus, it can be seen that the thrust of respondent no. 1 was B about illegality committed in respect of rejected ballot papers. The said ballot papers have been recounted but it has only reduced the margin from 138 votes to 60 votes as noticed hereinbefore.

Reverting now to the allegations made in the election petition wherein C it is obligatory for the election petitioner to set out the material facts reference has been made only to the allegations made in para 5 of the election petition. It may be useful to reproduce the said paragraph in full. It reads as under :

> "The petitioner submits that during the counting process, it was found that the 4th respondent, Returning Officer, has determined to favour D the 1st Respondent herein in the counting by way of helping him to the extent possible to boost his votes by adopting any method available. The petitioner had appointed 12 counting agents in all. Five counting tables were arranged in each hall to count the casted votes and 1 counting table each to examine the doubtful ballot papers. The Petitioner had appointed counting agents to all the counting tables. E The Respondent No. 4 refused to follow the mandatory provisions of law in relation to the counting. He did not satisfy himself whether or not the ballot boxes had, in fact, tampered with. He rejected the number of Ballot papers, which could have been counted in favour of the Petitioner and the Counting Agents of the Petitioner were not F provided with an opportunity to inspect the Ballot papers, the Respondent No. 4 had rejected. After the counting, the 4th Respondent was obliged to make entries in the result sheets in Form No. 20 and announce the particulars as required under Rule 55-B (7) of the Conduct of Election Rules, 1961. This mandatory provision of law has been deliberately violated by the 4th Respondent, which clearly G suggests that the 4th Respondent had acted in a manner detrimental to the right and interest of the petitioner herein, with a view to help the 1st Respondent, the declared candidate, for the reasons best known to him."

As can be seen from the aforesaid except making a general and vague H averment that respondent no. 4 (Returning Officer) refused to follow the

mandatory provision of law in relation to the counting, the election petitioner has failed to plead any material fact whatsoever. There is not a whisper about the non filing of the check memos by the Counting Supervisors or its effect. It has not been stated how and which mandatory provision of law of counting was not followed by the Returning Officer. There is total lack of pleading as to material fact in the election petition.

In *Vadivelu* v. *Sundaram and Ors.*, [2000] 8 SCC 355 this Court speaking through one of us, Balakrishnan, J., considered the question whether recount was justified or not, the circumstances under which it could be ordered, on a survey on some of the earlier decisions held that the recount of votes could be ordered very rarely and on specific allegations in the pleading in the election petition that illegality or irregularity was committed while counting. The petitioner seeking recount should allege and prove that there was improper acceptance of votes or improper rejection of valid votes. If only the court is satisfied about the truthfulness of the said allegations 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 and 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. In *T.H. Musthaffa* v. *M.P. Verghese and Ors.*, [1999] 8 SCC 692 upholding the view taken by the High Court that the pleadings are insufficient to order recount, it was noticed that the pleadings raised in the case did not refer to either Rule 39 or Rule 56 of the Rules much less to the "Pamphlet Showing Illustrative Cases of Valid and Invalid Postal and Ordinary Ballot Papers" issued by the Election Commission of India nor are there any specific allegations found in the case and the allegation made in the course of the petition that there is wrong acceptance of invalid votes without clarifying as to how many votes were liable to be rejected for using wrong instrument by the voters by expressing their preference, it was said in absence of such plea, the learned judge could not have granted the relief for recount. It was further said that in this view, the evidence could not be looked at in this regard in absence of appropriate pleadings. The Court said "unless the appellant had put forth his case in the pleadings and the respondents are put on notice, the respondents cannot make an admission at all and there is no such admission in the course of the pleadings. If the pleadings did not contain the necessary foundation for raising an appropriate issue, the same cannot go to trial. Any amount of evidence in that regard will be futile."

A The recount of the votes cannot be ordered in a casual manner. It cannot be ordered only because the margin of defeat is meagre. For seeking recount, proper foundation is to be laid in the pleadings by setting out material facts and later proving it by adducing requisite evidence. The recount cannot be ordered on the ipse dixit of the election petitioner. It can be ordered in rare cases where specific allegations are made and proved so as to do complete B justice between the parties.

As already stated in the present case, the main and rather the only ground on which the recount was sought and was allowed by the High Court was the non-filing of the check memos by the Counting Supervisors and C directions given in that behalf to the said supervisors by the Returning Officers - an aspect in respect whereof there are no pleadings and no material facts. Therefore, the High Court was clearly in error in directing the recount of the entire assembly votes and in setting aside of the election of the petitioner simultaneously even before the start of the recount. The view of the High Court is clearly unsustainable.

D

The aforesaid are the reasons for our setting aside the impugned judgment of the High Court and the dismissal of the election petition.

T.N.A. Appeal allowed.