

Before Ajay Tewari, J.

BOHAR SINGH—Appellant

versus

**PRESIDING OFFICER, ELECTION TRIBUNAL (ADC) MOGA,
DISTT. MOGA AND OTHERS—Respondents**

FAO No. 6139 of 2015 (O&M)

June 25, 2018

Punjab Panchayat Election Rules, 1994, Rl. 33—Allegation of malpractice in election—Appellant elected as Sarpanch—Respondent challenged Election alleging alleging votes of persons living abroad were cast in favour of appellant by impersonation—in recounting no of rejected votes rose and respondent declared elected—No reason for recorded ordering recount except that candidates accepted same—Recount illegally ordered—Order of Tribunal set aside.

Held, that it has to be held that the recount was illegally ordered and consequently, the appeal is allowed and the order of the Election Tribunal is set aside.

(Para 15)

J.S. Brar, Advocate, *for the appellant.*

Ajay Pal Singh Gill, D.A.G., Punjab, for respondents No.1, 4 & 5.

Rajesh Bhateja, Advocate, for respondent No.2.

Aakash Singla, Advocate, for respondent No.6.

D.V. Sharma, Senior Advocate with Shivani Sharma, Advocate for respondent No.7.

AJAY TEWARI, J.

(1) This appeal has been filed against the judgment and order of the Election Tribunal allowing an election petition.

(2) The brief facts are that elections to the post of Sarpanch of Village Bhaloor, Tehsil Bagha Purana, District Moga were held on 03.07.2013. The appellant was declared elected having obtained 1695 votes while respondent No.2 obtained 1367 votes. The respondent

No.2 filed an election petition which having been allowed the present appeal has been filed. In the petition main allegations were as follow :-

(i) 9 persons were living abroad, 4 were absent but their votes were cast in favour of the appellant by impersonation with the active connivance of the polling staff.

(ii) There were 9 persons who had their votes and identity cards in villages other than Bhaloor but their votes were also cast.

(iii) The election staff did not verify the votes with the electoral list.

(iv) That in booth No.10, 19 votes, in booth No.12, 10 votes and in booth No.13, 11 votes which had been cast in favour of respondent No.2 were destroyed.

(v) The votes obtained by another candidate i.e. Resham Singh- respondent No.3 in the present case were actually 425 but in form No.IX it was shown that 276 votes were cast in his favour.

(vi) Many irregularities and illegalities were permitted to be done by the election staff.

(3) Respondent No.2 led his evidence but no evidence was led by the appellant. At that stage both the counsel and the parties agreed that recount be ordered. Strangely in the recount the number of rejected votes rose from 75 to 325 and after subtracting those votes and recount respondent No.2 was found to have obtained more votes than the appellant and he was consequently declared elected. Hence this appeal.

(4) During the pendency of the appeal, the following order was passed on 06.12.2016 :-

“Counsel for the parties have filed the affidavits of the appellant as also respondent No.2 (the contesting parties) to the effect that they do not have any objection if the recount is carried out of the votes which have been polled in the election to the post of Sarpanch of Gram Panchayat village Bhaloor, Tehsil Bagha Purana, District Moga. The affidavits are taken on record.

The case is adjourned to 20.12.2016, for consideration”

The recount was carried out and following order was passed on 18.05.2017:-

“C.M. No. 11226-CII of 2017 has been filed for examining/appreciating/recounting the votes and for discarding the recount done by the Registrar (Rules).

Notice in the application.

Mr. Rajesh Bhateja, Advocate accepts notice.

Adjourned to 02.06.2017.

Reply be filed on or before the next date of hearing.

A report dated 24.04.2017 given by the Registrar (Rules) of this Court has been received whereby, the appellant has got 1152 votes and the respondent/election-petitioner has got 1329 votes. Similarly as per the objections filed now at the time of recount, the Tribunal had also found that the appellant had only got 1254 votes whereas, the respondent had got 1409 votes. Consent was also given by the parties for recount of the votes by way of affidavit on 06.12.2016. Relevant portion of the affidavit of Bohar Singh, appellant reads as under:-

“1. That above captioned appeal filed by deponent is pending for hearing for today. Records of election have been summoned. Deponent has no objection in recounting and inspection/examination of polled ballot-papers i.e. valid as well as rejected ballot papers. Reasonable opportunity to inspect rejected ballot papers, the ballot-boxes, seals on these boxes, seal ink on ballot-papers and condition of envelopes of ballot-papers be provided to the deponent and his counsel as it is quite necessary for the just decision of the case and for the substantial cause of justice.”

In view of the above, the interim order dated 17.09.2015 staying the operation of the order of the Election Tribunal electing respondent no. 2-Gurdas Singh as a Sarpanch is vacated keeping in view that only one year of the elected tenure is left. State to take necessary action on the order of the Election Tribunal dated 15.07.2015.

Thereafter, the following order was passed on 02.08.2017 :-

“From the perusal of the previous order dated 18.05.2017,

it is evident that appellant Bohar Singh the original declared elected Sarpanch of village Bhaloor on a recount by the Election Tribunal, as also the consensual recount before this Court has been found to have secured lesser votes than respondent no.2-Gurdas Singh (Election Petitioner). Accordingly respondent no.2 has been declared as elected Sarpanch by the Election Tribunal and appellant ousted from the office. Even the initial stay granted in favour of appellant Bohar Singh stands vacated.

From the hearing, it has become apparent that the Returning Officer Jarnail Singh-respondent no.4 would be required to explain the glaring discrepancies in maintaining the records in violation of provisions of The Punjab Panchayat Election Rules 1994.

List for further consideration on 23.08.2017.

Let Mr. Jarnail Singh, Returning Officer-respondent no.4 be personally present in Court.

To be taken up after urgent.”

Thereafter on 23.08.2017 the following order was passed :-

“In compliance of the directions passed on 02.08.2017, Mr. Jarnail Singh, Returning Officer, is present in Court and states that there was one polling station for the four (04) booths i.e. Booth Nos. 10 to 13 of Village Bhaloor, Tehsil Bagha Purana, District Moga, involved in the present election, and Mr. Harjinder Singh was the Presiding Officer of the said booths; further in view of Rule 33 of the Punjab Panchayat Election Rules, 1994, the said Presiding Officer was the Returning Officer responsible for maintaining of records and declaration of the result of the office of Sarpanch of the said village. He further submits that the entire responsibility of the said booths is, thus, of the said Mr. Harjinder Singh.

List on 19.09.2017 for further consideration.

Let Mr. Harjinder Singh, the then Presiding-cum-Returning Officer of the aforesaid booths be personally present in Court alongwith Mr. Jarnail Singh, who is present in Court, to explain the discrepancies.

To be taken up after urgent list.”

Thereafter the following order was passed on 19.09.2017 :-

“Appellant-Bohar Singh was declared as elected Sarpanch of Village Bhaloor, Tehsil Bagha Purana, District Moga, in the General Election held in the month of July 2013, by a margin of 328 votes, however, on a recount before the Election Tribunal, he (appellant) was found to have been defeated by 155 votes by election petitioner/respondent No. 2 (Gurdas Singh). His margin of defeat has been found to be further increased on a recount ordered by this Court to 177 votes. There appears to be a tampering of record as the seal of the envelopes containing the ballot papers have been found to be tampered, as also one of the envelope of a different colour has been substituted in place of the original envelope.

This Court vide order dated 02.08.2017 had directed Mr. Jarnail Singh, Returning Officer-respondent No. 4, to explain the discrepancies in maintaining the records in violation of the provisions of the Punjab Panchayat Election Rules, 1994.

On 23.08.2017, Mr. Jarnail Singh, appeared in person and the following order was passed:-

“In compliance of the directions passed on 02.08.2017, Mr. Jarnail Singh, Returning Officer, is present in Court and states that there was one polling station for the four (04) booths i.e. Booth Nos. 10 to 13 of Village Bhaloor, Tehsil Bagha Purana, District Moga, involved in the present election, and Mr. Harjinder Singh was the Presiding Officer of the said booths; further in view of Rule 33 of the Punjab Panchayat Election Rules, 1994, the said Presiding Officer was the Returning Officer responsible for maintaining of records and declaration of the result of the office of Sarpanch of the said village. He further submits that the entire responsibility of the said booths is, thus, of the said Mr. Harjinder Singh.

List on 19.09.2017 for further consideration.

Let Mr. Harjinder Singh, the then Presiding-cum- Returning Officer of the aforesaid booths be personally present in

Court alongwith Mr. Jarnail Singh, who is present in Court, to explain the discrepancies.

To be taken up after urgent list.”

At the time of hearing, Mr. Jarnail Singh and Harjinder Singh both are present in Court.

Mr. Harjinder Singh states that on a proper count of votes, he had declared Bohar Singh (appellant) as the winner.

There appears to be a conflicting stand of the two said officers, however, they are agreed that the records had ultimately been submitted in the custody of the then SDM, Bagha Purana, Dr. Mandeep Kaur.

Before proceeding further, it is deemed appropriate to issue notice to Dr. Mandeep Kaur, PCS, as well and on the oral request, Dr. Mandeep Kaur, Jarnail Singh and Harjinder Singh are impleaded as party respondent Nos. 5, 6 & 7, respectively. The amended memo of parties be filed by the counsel for appellant.

Learned State Counsel accepts notice on behalf of impleaded respondent No. 5 (Dr. Mandeep Kaur) as well.

List on 31.10.2017 for further consideration.

Let impleaded respondent Nos. 5 to 7 file their respective affidavits in the aforesaid context by the adjourned date. They shall also be personally present in Court on the next date of hearing.”

After the replies were filed the following order was passed on 16.05.2018 :-

“I have heard the matter at length. Prior to today the matter was taken up in two segments. The initial stages of the hearing ended with the recount in this Court. Thereafter the appellant raised certain other issues and on those issues this Court had impleaded and summoned the election officials and had required them to give their response which is also on the record. The main issue raised by the counsel for the appellant was that there was an inexplicable change in the number of rejected votes. As per the appellant, the electoral officials had connived with the respondent No.2 at different stages and had illegally stamped valid votes as rejected and

a huge majority of those original votes had been cast in favour of the appellant.

On the other hand, the counsel for the respondent No.2 has argued that actually the connivance was between the appellant and the electoral officials, since the votes of the third candidate i.e. Resham Singh had been wrongly counted in favour of the appellant, which assertion counsel for the appellant has denied.

In my considered opinion, these are serious issues which not only affect the fortunes of the candidates concerned but also put a question mark on the very sanctity of the electoral process. It may also be mentioned that when this Court had ordered the recount by one of the Registrars, only physical recount was done but this aspect was not considered by the Registrar. It is common case of the parties that the term of these Panchayats is coming to an end and there is a likelihood that the notification for the fresh elections may be issued anytime by the end of this month.

Resultantly, I deem it appropriate to appoint and direct Sh. Phalit Sharma, OSD (Gazette-II Branch) to inquire the matter and submit his report on or before 25.05.2018 along with copy to the counsel. The OSD would try and ascertain the cause of the change in number of rejected votes and would also see the issue of discrepancy in the number of votes of Resham Singh. It has been categorically informed to the counsel that in view of the extreme urgency of the matter, if any counsel is not able to appear before the said OSD on a date and time fixed it would be incumbent upon them to make alternate arrangements and there would be no request for adjournment. Counsel have agreed to this course of action.

Let the record of this case be sent to the said OSD immediately. Counsel are directed to appear before the OSD (Gazette-II) at 12 O' Clock tomorrow i.e. 17.05.2018 so that he can have the preliminary examination of the matter and fix the schedule. Learned Deputy Advocate General is directed to hand over the necessary material including the Act, the Rules and the Guidelines to the OSD tomorrow at 12 O' Clock.

The matter is adjourned to 28.05.2018 To be shown in the urgent list.”

(5) OSD (Gazette-II) has submitted his report in terms of the order dated 16.05.2018 and the same is taken on record, wherein it had been found that the conduct of election by of Sh.Harjinder Singh, Polling-cum- Returning Officer of the Booths No.10 to 13 and Shri Jarnail Singh, the Returning Officer has not been as per law. He has pointed out various discrepancies which have been found in the counting, in dealing with rejected votes and in retaining the ballots in contravention of the provisions of Rule 33 of the Punjab Election Rules, 1994 and of otherwise not adhering to the different requirements for keeping the votes, ballot boxes etc. safely. He has ultimately concluded as follows:-

“Hence, it is concluded that prima facie the variation in number of votes rejected at three different stages, is because of negligence on the part of the polling staff and at the same time tampering with the record after declaration of result in the given circumstances can also not be ruled out.”

(6) Against this backdrop of fact two issues arise. The first is with regard to the two contending candidates i.e. appellant and respondent No.2 and the second is the issue with regard to the conduct of Panchayat Elections generally.

(7) As regards the first issue the counsel for the appellant has argued that all the recounts which were carried out were illegally conducted. He has relied upon *P.K.K. Shamsudeen versus K.A.M. Mappillai Mohindeen and others*¹ wherein the Supreme Court in para Nos.7, 8 and 13 in the judgment held as follows :-

“7. All the three contestants accepted the correctness of the recounting of votes and signed a memo to that effect before the Tribunal Based on the figures of the recount the petitioner pressed for a declaration that he had been duly elected to the post of the President of the Panchayat. On the other hand, the first respondent prayed that the Tribunal should direct a fresh election to be held for the post of clined to order re-election and instead declared the petitioner to have been duly elected because the recount

¹ 1989 AIR (SC) 640

clearly proved "that the petitioner has secured 28 votes more than the first respondent".

8. Against the order of the Tribunal the first respondent filed Civil Revision Petition No. 704/88 to the High Court. A learned single judge of the High Court allowed the revision holding that the Tribunal had erred in ordering a recount of the votes when the petitioner had not made out a prima facie case for an order of recount of votes being made. The High Court has pointed out that the secrecy of the ballot is sacrosanct and as such the secrecy of the ballot should not be violated by any Tribunal unless a prima facie case of a compulsive nature had been made out by the defeated candidate for the rule of secrecy being broken and the ballot papers being inspected and counted afresh. Consequently the High Court set aside the order of the Tribunal and restored the election result in favour of the first respondent. It is against the said order of the High Court the petitioner has filed this special leave petition.

13. Thus the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from hindsight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election petitioner on the threshold before an order for recount of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or court should not order the recount of votes".

(8) He has contended that in the present case no such finding was recorded at any stage before the recount was ordered.

(9) Counsel for respondent No.2 has relied upon ***Gurtej Singh versus Darbara Singh***² to argue that in that case this Court after considering the judgment in ***P.K.K. Shamsudeen's case supra*** had allowed recount. Counsel for the appellant however points out that in that case this Court had noticed that the Presiding Officer had passed a detailed speaking order ordering recount.

(10) Looked at from this angle and in view of the judgment passed in ***P.K.K. Shamsudeen's case supra*** this appeal has to be allowed because in the present case no reasons were recorded for ordering recount except that the candidates had accepted the same.

(11) Resultantly, it has to be held that the recount was illegally ordered and consequently, the appeal is allowed and the order of the Election Tribunal is set aside.

(12) Coming now to the second question, one view that cannot be taken to be illegitimate can be that since the appeal has been allowed on the legal question of the recount the matter should be closed. However another equally compelling view can be that the discrepancies pointed out in this case cannot be said to be an isolated instance and could be well systemic and thus this Court cannot shut its eyes to a procedure which may actually result in a subversion of the democratic process. It has been brought to my notice that one ***CWP No.12120 of 2018 titled as Gurinder Singh and others versus State of Punjab and another*** is pending in this Court wherein the larger issue of fair and free conduct of Panchayat Elections has been raised and that petition is pending for 06.07.2018.

(13) Let record of this case be also sent so that the larger issues raised in the present case can be decided in that writ petition.

(14) Appeal stands disposed of in the above terms.

(15) Since the main case has been decided, the pending civil miscellaneous application, if any, also stands disposed of.

Dr. Payel Mehta

² 2000 (2) RCR (Civil) 525