

CASE NO.:
Appeal (civil) 887 of 2006

PETITIONER:
TANAJI RAMCHANDRA NIMHAN

RESPONDENT:
SWATI VINAYAK NIMHAN & ORS

DATE OF JUDGMENT: 31/01/2006

BENCH:
S.B. SINHA & P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T
(@ SPECIAL LEAVE PETITION (CIVIL) NO. 22355 OF 2004)
WITH
CIVIL APPEAL NO 886 OF 2006
(@ SPECIAL LEAVE PETITION (CIVIL) NO. 23763 OF 2004)

MUNICIPAL CORPORATION,
CITY OF PUNE & ANR.

\005Appellants

Versus

SWATI VINAYAK NIMHAN & ORS.

\005Respondents

P.K. BALASUBRAMANYAN, J.

Leave granted.

1. Elections to the Pune Municipal Corporation were held on 10.02.2002 and 03.03.2002. Election to the ward Prabhag 7A Pashan was held on 03.03.2002. The appellant and respondent No.1 before us were the main candidates. On 5.3.2002 the counting took place. The appellant was declared elected by a majority of 13 votes. At the counting it was announced that the total number of votes polled were 15,288; 828 votes were invalid, 5 were tendered votes and the total valid votes polled were 14,455. The appellant was declared to have secured 5,607 votes whereas respondent no.1 was declared to have secured 5,594 votes. Consequently, the appellant was declared elected.

2. On 15.3.2002, respondent no.1 filed EP 21/2002 under Section 16 read with Section 403 of the Bombay Provincial Municipal Corporations Act, 1949 in the Court of Small Causes, Pune challenging the election of the appellant. According to the election petition, the scrutiny and counting of votes were not according to the procedure laid down in the Municipal Corporations Act and the Rules framed thereunder. It was alleged that the ballot papers had first to be segregated with reference to colours used for the particular ward. The colour of ballot paper for Ward No.7-A was white. Thereafter the ballot papers had to be segregated with reference to each candidate and stacked into bundles containing 25 ballot papers each. It was pleaded that the bundling of the ballot papers each with 25 ballots was not done properly and the bundling was done without showing the individual ballot papers to the candidates or their election agents. The scrutiny of the ballot papers according to symbol marks and the preparing of bundles of 25 each according to the symbols, were going on simultaneously. Since only one counting agent was present at one table \026 there were in total, ten tables for this Ward \026 it was not possible for the agent to scrutinize all these procedures going on simultaneously. The election petitioner and her counting agents had taken strong objection to the procedure that was being followed by the four employees engaged in each table for the counting. The ballot papers were not shown to the candidate or to their counting agents

at the time of the actual counting. This failure of the counting staff had materially affected the result of the election. It was doubtful whether a bundle, supposed to contain 25 number of ballot papers, did in fact contain 25 ballot papers. The second ground was that the total number of invalid votes was declared as 828. While identifying the invalid votes, votes validly cast in favour of the election petitioner were wrongly rejected and votes which were really invalid were accepted as valid in the case of the winning candidate. Even though the intention was clear from the markings in the ballot papers, some of them were rejected wrongly and most of the votes rejected were cast in favour of the election petitioner. Thus, the failure to properly identify the invalid votes had also materially affected the election. The counting was interrupted every half an hour for 10 to 20 minutes and because of such interruptions, there was no proper or steady counting of the ballot papers. The Commissioner of Pune Municipality had announced a prize for the Returning Officer who finished the counting first and announced the result and since the Returning Officers were competing for the prize, the whole process of counting was hasty and it was undertaken without adequate care and this has vitiated the result of the election. The election petitioner further averred that several objections have been raised by the election petitioner and her agents and ultimately a written complaint was also given with a specific request for recounting of the invalid votes. No order was passed on that application. Since the whole process of counting was not proper, the election petitioner was entitled to have a declaration that the election of the winning candidate, the appellant before us, was void and his election set aside and for an order directing a fresh scrutiny and recounting of votes. The other prayers in the election petition are not relevant at this stage. The election petition was resisted by the appellant who disputed the allegations in the election petition and pleaded that there was no irregularity in the counting process and that no ground was made out for interfering with the election. It was also contended that every opportunity was given to the candidates and their counting agents, to watch the counting process and to scrutinize the ballot papers while the counting was going on according to the proper procedure and the election petitioner and her agents, had not raised any objection at the relevant time regarding any of the steps in the process of counting. There was no merit in the election petition and it was liable to be dismissed.

3. On behalf of the election petitioner, she got herself examined as PW 1 and examined two witnesses as PWs 2 and 3. On behalf of the appellant before us, the winning candidate, he got himself examined as RW 1. The Small Causes Court, the Election Tribunal, framed the issues essentially relating to the alleged irregularities in counting. It proceeded to enter prima facie findings and ordered recounting of votes by a suitable officer to be appointed as Court Commissioner and directed the parties to suggest the name of a suitable person to be named as Court Commissioner and deferring its final judgment until the receiving of the report of the Commissioner. The returned candidate, the appellant before us, challenged the order of the Election Tribunal in the High Court of Bombay in WP No.6067 of 2004. A learned Single Judge of the High Court, stating that on an over all view of the matter and the faulty nature of the procedure adopted by the Returning Officer for the counting, no fault could be found with the view taken by the Election Tribunal when it directed the recounting of votes, dismissed the writ petition. The returned candidate has challenged the order of the Bombay High Court in SLP (C) No.22355 of 2004. The Municipal Corporation and the Returning Officer who were also parties to the election petition have challenged the decision in SLP(C) No.23763 of 2003.

4. We shall first deal with the appeal filed by the Municipal Corporation and the Returning Officer. The learned Solicitor General who appeared on behalf of the Municipal Corporation and the Returning Officer submitted that the appellants were aggrieved by the remarks made by the Election Tribunal on the announcement of a prize by the Commissioner of the Corporation for the Returning Officer who finished the counting first and announced the result as having a bearing on the irregularity in the counting

process. Learned Solicitor General submitted that the said finding was untenable on the materials available and if that finding were correct, it would mean that the election in all the Wards in the Municipal Corporation would be amenable to challenge since the prize was announced not merely for the counting in the Ward in question but it was a general inducement in respect of the counting relating to all the Wards in the Corporation. Counsel for the first respondent, the election petitioner, submitted that the announcing of a prize in the manner in which it was done by the Commissioner of the Corporation was unwarranted and it certainly contributed to some haste in the counting process and such haste has also resulted in improper counting of votes including in the identification of invalid votes and to that extent the Election Tribunal was fully justified in criticizing the said action of the Commissioner of the Municipal Corporation. Counsel for the returned candidate submitted that the announcement of a prize for the rerunning officer who completed the counting process first, had in no manner affected the proper counting of the votes polled and there was no material on the basis of which the Election Tribunal could have criticized the action of the Municipal Commissioner. In reply, learned Solicitor General submitted that there was no absence of bona fides on the part of the Commissioner in announcing an award for the returning officer who completed the counting process first and the award was announced only with the good intention of ensuring that the counting process was completed as expeditiously as possible and was not allowed to linger on.

5. There is no material available in the case which would suggest that the announcement of the prize by the Commissioner had by itself resulted in any irregularity in the process of counting. The process of segregating the ballot papers by colours, segregating the votes polled for each candidate and identifying the invalid votes after showing it to the counting agents and bundling of the ballot papers into 25 each has been done as contemplated by the relevant rules relating to the counting. The announcing of a prize for completing the process quickly is not shown to have resulted in any of the steps in the process being given up. In that view, it is not possible to say that the process of counting became defective for the reason that the Commissioner of the Municipal Corporation had announced an award. But at the same time, it could not be said that the act of the Commissioner was a prudent one in the sense that such an inducement could have resulted in some returning officer or the other, taking short cuts to finish the process of counting at the earliest. There is no allegation of any mala fides on the part of the Commissioner. Though we have no doubt that the action of the Commissioner of the Municipal Corporation was bona fide, we think that prudence ought to have dictated that he desisted from making any such announcement before the counting was started. But on the materials it is clear that this fact by itself has not vitiated the counting process in the elections in the ward in question, namely, Ward No.7-A. The appeal filed by the Municipal Corporation and the Returning Officer will stand disposed of with the above finding or observation.

6. Now coming to the appeal filed by the elected candidate, it is submitted on his behalf that the Small Causes Court has ordered a recount without a ground being made out in support of such a prayer and that the High Court has not properly applied its mind while declining to interfere with the order of the Small Causes Court. It is submitted that the allegations in support of the prayer for recounting or the allegations in challenge to the process of counting were general in nature and in the absence of specific facts in that behalf being pleaded and proved, it could not be held that a ground for recounting has been made out. After all, a challenge to an election by way of an election petition was a statutory right and the court could grant relief in such an election petition only when proper and sufficient grounds are pleaded and established and not based on general allegations. The fact that a prize had been announced for the returning officer who announced the result first and the vague statement of the election petitioner and her witnesses that the process was hurried, cannot by themselves justify the order for recounting. It was submitted that the order required to be interfered with in the circumstances of the case. On behalf of

the election petitioner it was submitted that adequate grounds have been pleaded and established by evidence and the Small Causes Court was fully justified in ordering recount. The High Court was equally justified in not interfering with that order. After all, it was the duty of the election tribunal to ensure the purity of elections and in that context, there was no reason for this Court to interfere with the order now passed.

7. We have given our anxious consideration to the relevant aspects in the light of the rival submissions. We have already indicated that the announcement of a prize for the returning officer who first completed the process of counting has not vitiated the election, though we have indicated that it would have been more prudent for the Commissioner not to have undertaken such an exercise. It is seen from the election petition that the allegations are to the effect that there was hurry in the process of segregation of votes by colour, in the process of identifying the votes secured by each candidate and in the matter of identifying the invalid votes. The election petitioner had a case that after the counting and before the result was declared, she had made an application before the Returning Officer praying for a recount of the invalid votes. It must be noted that the prayer in that application was only for recounting of the invalid votes and not for a general recount. Though no doubt in the pleading of the returning officer it was admitted that an application in that behalf had been filed and it was asserted that the said application was rejected leading to the inference that the election petitioner had in fact made an application before the results were declared, it has to be noted that the election petitioner did not cite or seek production of the said petition filed by her before the results were declared. In our view, the election petitioner ought to have cited the said document so as to establish her case regarding the specific allegations she had made contemporaneously with the conclusion of the process of counting. Except generally stating that the counting process was hurried, that while one person was engaged in stacking 25 ballot papers as secured by each candidate, the others were segregating the votes secured by each candidate and it was difficult for the one agent present at the table to keep an eye on everything simultaneously, nothing specific has been established regarding irregularity in the process that was undertaken. It is one thing to say that it is doubtful whether the bundle of votes polled by a candidate which is supposed to contain 25 ballots might not have contained 25 ballot papers and another thing to establish that, that is the case. Same is the position regarding the segregation of the votes secured by each of the candidates. The election petitioner admitted that 40 bundles were given to each table for counting, that ballot papers were separated as per symbols and counted as early as possible. The bundles of 25 ballot papers were again counted before the main counting officer. She has further admitted that it was true that all invalid ballot papers were shown to all before putting them in the box kept for invalid ballot papers. She has also admitted that during the counting procedure (not after the counting was over) she did not make any written complaint and that she had given only one written complaint on the point that each bundle was made wrongly. PW2, one of the agents of the petitioner has stated that he cannot say whether each bundle contained 25 ballot papers. He was attentive at the time of making bundles. It was true that each bundle containing 25 ballot papers was opened one by one and the same were put in separate boxes. Invalid ballot papers were kept aside after showing the same to the representatives. After separation of ballot papers of each of the candidates the same were prepared in bundles each containing 25 ballot papers. He could not say whether each bundle contained 25 ballot papers. He had not lodged any complaint orally or in writing from the time of starting of the counting till the declaration of the results. In cross examination on behalf of the officers he has also stated that it was not true that the counting officers were making haste during the process of counting of votes as stated by him falsely. It was not true that the counting officers wanted to complete the counting of votes as early as possible and they were whispering in that behalf. PW3 in his cross examination has stated that after opening of the ballot boxes separation of white coloured ballot papers was carried out. It was true that the votes polled in favour of the contesting candidates were separated. It was not true that there was no reason to

complain about the counting as it was done according to the rules and in a smooth manner. The separating was done after showing the ballot papers to the representatives of the candidates and only thereafter such ballot papers were put in different boxes. However, the same were being shown in haste, that is to say, they were shown, but in haste. He had not given written complaint about there being less or more than 25 ballot papers in each bundle.

8. This Court after referring to a number of prior decisions, has held in *Mahendra Pal vs. Ram Dass Malanger and others* [(2002) 3 SCC 457] that an order for recounting cannot be made as a matter of course. Unless the election petition had laid the foundation and there was clinching evidence to support the case set up by the election petitioner, a recount normally could not be ordered. In *Chandrika Prasad Yadav Vs. State of Bihar & Ors.* [(2004) 6 SCC 331], relying on an earlier decision in *M. Chinnaamy Vs. K.C. Palanisamy & Ors.* [(2004) 6 SCC 341], a bench of three Judges (to which one of us S.B. Sinha, J. was a party) held that an election petition seeking a recount must contain a concise statement of material facts and clear evidence in support of the facts pleaded. It was held that a small margin of victory by itself was not a ground for ordering recount. A roving and fishing inquiry was not permissible while directing recount of votes. The requirement of maintaining secrecy of ballot papers had also to be kept in mind before directing a recount. The requisites for ordering recount are a prima facie case and pleading of material facts detailing the irregularities in counting of votes. Going by the tests laid down by these decisions, it is clear that the election petitioner in the case on hand has not made out a specific case for recount. In other words, except generally asserting that the process of counting was undertaken hurriedly and suggesting that mistakes might have occurred because of the haste shown, she has not been able to establish specifically any flaw either in the matter of segregation of votes polled in the ward by colour, segregation of the votes polled by each candidate, or in the matter of bundling of the votes into 25 or in the matter of identification of the invalid votes which were clearly shown to all the counting agents before being deposited in the box kept separately for invalid votes. It is true that there could be a suspicion that in view of the announcement of an award for the returning officer who finished the counting process first, there might have been some hurry in the process of counting. But such a general feeling or possibility cannot be a substitute for clear pleading and evidence in support of a prayer for recounting of the votes. After all, only 15,000 odd votes were involved and there were 10 tables and each table dealt with only about 40 ballot boxes. Admittedly each ballot paper was shown to the agents before it was deposited into the receptacle kept for it and at best the evidence is that it was done with some haste.

9. The election tribunal was carried away by the fact that the Commissioner had announced an award and it felt that that might have resulted in undue haste being shown, resulting in improper counting. But the tribunal had not considered whether specific and concrete material has been made available, for it to exercise its jurisdiction to order a recount. It has not referred to any specific irregularity as having been proved in support of its order. The findings if any, in support of the order for recount are akin to general observations. The High Court had not applied its mind adequately to the question arising for its decision and seems to have been influenced by the announcement of the prize by the Commissioner. We have already indicated that the said act was not mala fide but at best lacked prudence and it is not shown that that by itself, has lead to any irregularity in counting that would justify an order for recount.

10. Thus, on the whole we are of the view that the election petitioner has not supplied adequate material in support of her prayer for an order of recount and there is no sufficient reason for ordering a recount. In that view, the orders of the Small Causes Court and that of the High Court have to be set aside. Since the election petition has not been finally disposed of by the Small Causes Court, the election petition has necessarily to be remanded to that Court for rendering a final decision thereon.

11. In the result, the appeals are allowed but without any order as to costs. The order of the High Court in WP No.6067 of 2004 and that of the Small Causes Court in EP No.21 of 2002 dated 13.7.2004 are set aside. Election Petition No.21 of 2002 is remitted to the Small Causes Court, Pune to be disposed of in accordance with law and in the light of the findings in this Judgment.

JUDIS