

HIGH COURT OF MADHYA PRADESH : JABALPUR
SINGLE BENCH : JUSTICE MS.VANDANA KASREKAR

WRIT PETITION NO.900/2015

Smt.Sandhaya Mihilal Rai

Vs.

State of M.P. and others

Whether approved for recording : Yes

Shri A.M. Trivedi, learned senior counsel with Shri Parag S. Chaturvedi and Ashish Trivedi, learned counsel for the petitioner.

Shri Siddharth Seth, learned counsel for respondents No.3, 4 and 5.

Shri Anurag Shivhare, learned counsel for respondent No.6.

ORDER
(03/05/2017)

The petitioner has filed the present writ petition praying for the following reliefs :

“i). That, the petitioner prays that the Hon'ble Court may kindly issue a writ of certiorari to declare null and void the fresh poll of booth no.74 of Gram Panchayat, Chhatarplur in the interest of justice.

ii). That, the petitioner prays that the Hon'ble Court may kindly issue a writ of mandamus to direct respondents to declare elected to petitioner as Sarpanch, in the

interest of justice.

iii) That, the Hon'ble Court may kindly issue any other writ or direction in the interest of justice as the Court deems fit.”

2. The petitioner is a candidate for the post of Sarpanch of Gram Panchayat, Chhatarpur. There were total nine candidates who had contested the election. The polling was to be held on 13th January and the counting was started from 8.00 p.m. on the same day and the result was declared at about 9.00 p.m. Accordingly, the election was held and result was declared in which the petitioner was declared elected by four votes. After declaration of the result, supporter and agents of defeated candidate Lalita Yadav started disruption and with support of respondent No.5 ransacked the ballot box of Booth No.74. Respondent No.5 has also lodged FIR of the said incident in Police Station Panagar. Returning Officer thereafter made a report regarding said incident to the State Election Commission. The State Election Commission vide order dated 14/01/2015 has directed to conduct repoll on 15/01/2015. The said order was communicated to the petitioner on 14/01/2015 through Panchayat Secretary at 9.00

pm so that the petitioner could not prepare for re-polling. Subsequently, on 15/01/2015, re-polling was held and in the said re-polling, the petitioner got 165 votes and respondent No.6 got 307 votes. On the basis of the said polling, respondent No.6 declared elected. Being aggrieved by this, the petitioner has filed the present writ petition.

3. Learned senior counsel for the petitioner argued that the State Election Commission (respondent No.3) has erred in issuing direction for re-polling for the post of Sarpanch only when the ballots of the post of Panchas were also ransacked. He further submitted that as per Rule 72 of M.P. Panchayat Nirvanchan Niyam, 1995 re-polling can be ordered only where ballot papers accidentally or intentionally destroyed or lost or is damaged or tampered with to such an extent that the result of the poll at that polling station cannot be ascertained. But, in the present case, result was already ascertained and the true copy of the result sheet has already been provided to the candidates. In such circumstances, the present case does not fall within the provisions of Rule 72 of the Panchayat Nirvanchan Niyam. He further submitted that if the provisions of Rule 77 of the Panchayat Nirvanchan Niyam

has already been complied with, then the provisions of Rule 72 would not be applicable. He relied upon the judgment passed by the Apex Court in the case of **Ambika Prasad Dubey Vs. Distt. Magistrate, Allahabad & others**, reported in **AIR 1991 SC 1106**, in which the Apex Court has held that fresh poll held after declaration of result is liable to be set aside.

4. Respondent No.3 has filed reply and raised preliminary objection that in the present case, the election of Gram Panchayat, Chhatarpur, Janpad Panchayat, Panagar, Distt. Jabalpur has already been concluded and the result has already been declared. In such circumstances, it is submitted that any dispute with regard to the election of the Gram Panchayat will now be categorized as an election dispute as it tantamount to challenging the election of returned candidate or candidates, therefore, the present writ petition is not maintainable and the petitioner has a remedy of filing an election petition under Section 122 of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993. So far as merit of the case is concerned, respondent No.3 has submitted that the election for the post of Panch and Sarpanch of Gram

Panchayat and Members of the Janpad Panchayat and Jila Panchayat were conducted on 13/01/2015 and counting for the post of Panch and Sarpanch was conducted on the same date i.e. 13/01/2015. When the counting was being conducted for the post of Panch and Sarpanch, a rowdy mob of 80 to 100 antisocial elements entered into the counting centre and ransacked ballot boxes. The officers and employees on election duty were also attacked and there was an atmosphere of fear and uncertainty in the polling booth. Presiding Officer immediately reported the incident to the returning officer and the police authorities. Thereafter reported the matter to respondent No.3. District Election Officer after seeking instructions from the State Election Officer, ordered for conducting re-polling for the post of Sarpanch in Polling booth No.74 in exercise of powers conferred under Rule 72(2)(a) of Panchayat Nirvachan Niyam. Thereafter re-polling was held and the result was declared on 17/01/2015. Thus, respondent No.3 has acted in accordance with law and no illegality has been caused by the respondent No.3 in ordering re-polling.

5. The petitioner has filed rejoinder and in the rejoinder

the petitioner has denied that the petitioner is having an alternate remedy of filing of election petition. He submitted that in the present case the petitioner has challenged the action of respondent No.2 for issuing the order of re-polling on the ground that once result has been declared, the election officer could not exercise the powers under Section 72 of the Nirvachan Niyam and cannot order for re-polling. In such circumstances, the petitioner has no remedy of filing election petition.

6. I have heard learned counsel for the parties and perused the record. The petitioner and respondent No.6 contested election for the post of Sarpanch. Gram Panchayat, Chhatarpur, Janpad Panchayat, Panagar, Distt. Jabalpur. Polling was held on 13th January, 2015 and on the same date result sheet was supplied to the petitioner. After counting the petitioner was declared elected, however, defeated candidate Lalita Yadav started disruption and with support of respondent No.5 ransacked ballot boxes of Booth No.74. Subsequently, FIR was lodged by respondent No.5. Returning Officer has submitted a report of the said incident to the State Election Commission. State Election

Commission vide order dated 14/01/2015 has issued direction for conducting re-polling for the said booth. Subsequently, on 15/01/2015 re-polling was held and in the said re-polling the petitioner got 165 votes and respondent No.6 got 307 votes. Being aggrieved by that order, the petitioner has filed the present writ petition. From perusal of the record, it reveals that respondent No.3 had issued direction for re-polling on the basis of the report submitted by the Presiding Officer and the present incident is covered under Rule 72(1) (a) which reads as under :

“72. Fresh poll in case of destruction, tempering etc of ballot boxes or due to procedural irregularity-(1)- If at any election-

- (a) any ballot box used at a polling station is unlawfully taken out of the custody of the Presiding Officer or the Returning Officer, or is accidentally or intentionally destroyed or lost or is damaged or tampered with to such an extent, that the result of the poll at that polling station cannot be ascertained, or
- (b)

7. It has further been found that after declaration of the result on 13/01/2015 the election officer has issued the result under format No.17 of Rule 77(2) of M.P. Panchayat Nirvachan Niyam, 1995. Rule 77 of M.P. Panchayat Nirvachan Niyam, 1995 reads as under :

“77. Counting of Votes:- (1) xxx

(2) After the counting of votes in respect of a polling station has been completed, the Returning Officer or such other officer authorized by him, shall make the entries in results sheet in form 16 for Panchas and in part one of the result sheets in form 17, 18 and 19 for Sarpanch, members of Janpad Panchayat and Zila Panchayat respectively and announce the total number of votes polled by each candidates.

(3) xxx

(4) The Returning Officer or the officer authorized by him shall furnish to every candidate or his counting agent, present at the close of the counting, a true copy of the relevant result sheet

prepared under sub-rule- (2) after obtaining a receipt there for and shall also attest it as a true copy.”

As per said rule, after counting of votes, the returning officer shall make entry of the result sheet in form 17, 18 and 19 for Sarpanch, members of Janpad Panchayat and Jila Panchayat respectively. After result as per Rule 77, the returning officer has power as per Rule 80 of the Nirvachan Niyam, to issue direction for recounting on the application submitted by any of the party. After recounting of the votes, returning officer has to declare the result as per Rule 81 of the Nirvachan Niyam. In the present case, the returning officer has not declared the result as per Rule 81 of the Nirvachan Niyam, therefore, it cannot be said that returning officer has declared the petitioner as elected candidate.

8. The Apex Court in the case of **Ambika Prasad Dubey (supra)** in para-7 has held as under :

“7. It will be seen from these Rules that the fresh poll could be ordered only when there is irregularities in the polling as provided under Rules 21-G and H. The present case is not concerned with the circumstances provided under Rr.

21-G and H. But it is concerned with the irregularities at the time of counting of ballot papers. The case, in other words, is covered by R. 21-F. It has been found at the counting that 41 ballot papers were mixed up in the bundle of respondent-4 when the electricity went off and those 41 ballot papers upon scrutiny were found to have been not issued by the Polling officers. In other words, they have not been used at the polling. They ought to have been, therefore, discarded. They ought not to have been included in favour of respondent-4. If those 41 ballot papers are excluded from the total number of votes held by respondent-4, he would get only 443 votes as against 456 votes polled by the petitioner. The petitioner is entitled to be declared as duly elected Pradhan. The Returning Officer instead of declaring the petitioner as duly elected Pradhan has reported for fresh poll. This is a clear case of failure to exercise jurisdiction by the Returning Officer and repoll ordered by the District Magistrate on this basis is no better. It is equally contrary to law and

beyond jurisdiction. The High Court seems to have overlooked this material aspect of the case and dismissed the writ petition on erroneous view of the law.”

9. Other ground regarding availability of the alternate remedy is concerned, Section 122 (i) of the M.P. Panchayat Evam Gram Swaraj Adhiniyam, 1993 reads as under :

“122 – Election Petition- (1) An election under this Act shall be called in question only by a petition presented in prescribed manner :-

- (i) in case of (Gram Panchayat or Gram Sabha) to Sub Divisional Officer (Revenue);
- (ii) in case of Janpad Panchayat to the Collector; and
- (iii) in case of Jila Panchayat to the Divisional Commissioner and not otherwise.”

As per Section 122 of the Adhiniyam, 1993, the petitioner can question the election. The contention of

learned counsel for the petitioner that is in the present case, remedy of election petition is not available to the petitioner on the ground that once the result has been declared, then election officer could not exercise the power under Rule 72 of the Nirvachan Niyam, 1995 and cannot order for re-polling. Thus, it is submitted by him that in the present case, the petitioner has challenged the order of re-polling and not the election of respondent No.6, therefore, the writ petition is maintainable. This contention of learned counsel for the petitioner is not acceptable in view of the decision passed by the Apex Court in the case of **Mohinder Singh Gill and another Vs. The Chief Election Commissioner, New Delhi and others**, reported in **AIR 1978 SC 851**. Para-31 and 32 of the said judgment reads as under :

“31. If 'election' bears the larger connotation, if 'calling in question' possesses a semantic sweep in plain English, if policy and principle are tools for interpretation of statutes, language permitting the conclusion is irresistible' even though the argument contra may have emotional

impact and ingenious appeal, that the catch-all jurisdiction under Art. 226 cannot consider the correctness, legality or otherwise of the direction for cancellation integrated with re-poll. For, the prima facie purpose of such a re-poll was to restore a detailed Poll process and to, complete it through the salvatory effort of a repoll. Whether in fact or law, the order is validly made within his powers or violative of natural justice can be examined later by the appointed instrumentality, viz., the Election Tribunal. That aspect will be explained presently. We proceed on the footing that re-poll in one polling station or in many polling stations for good reasons, is lawful. This shows that re-poll in many or all segments, all- pervasive or isolated, can be lawful. We are not considering whether the act was bad for other reasons. We are concerned only to say that if the regular poll, for some reasons, has failed to reach the goal of choosing by plurality the returned candidate and to achieve

this object a fresh poll (not a new election) is needed, it may still be a step in the election. The deliverance of Dunkirk is part of the strategy of counter-attack. Wise or valid, is another matter.

32. On the assumption, but leaving the question of the validity of the direction for re-poll soon for determination by the Election Tribunal, we hold that a writ petition challenging the cancellation coupled with re-poll amounts to calling in question a step in 'election' and is there, fore barred by Art. 329(b). If no re-poll had been directed the legal perspective would have been very different. The mere cancellation would have then thwarted the course of the election and different considerations would have come into play. We need not chase a hypothetical case.”

10. Thus, in the present case, after re-polling the election was already held and respondent No.6 is declared elected and

as there is no interim order passed by this Court in favour of the petitioner now, therefore, remedy lies to the petitioner only to file election petition.

11. Thus, in view of the aforesaid discussion, this writ petition is dismissed on the ground of availability of alternate remedy.

(Ms. Vandana Kasrekar)
JUDGE

ts