

Mahendra Pal vs Ram Dass Malanger And Ors on 27 October, 1999

Equivalent citations: AIR 2000 SUPREME COURT 16, 2000 (1) SCC 261, 1999 AIR SCW 4130, 1999 (6) SCALE 655, 1999 (9) ADSC 57, 2000 (2) LRI 1143, (1999) 8 JT 468 (SC), 1999 (8) JT 468, 1999 (10) SRJ 337, (1999) 3 SCJ 593, (1999) 9 SUPREME 265, (1999) 4 RECCIVR 660, (1999) 6 SCALE 655

Bench: Chief Justice, S. Rajendra Babu, R.C. Lahoti

CASE NO. :

Appeal (civil) 4085 of 1998

PETITIONER:

MAHENDRA PAL

RESPONDENT:

RAM DASS MALANGER AND ORS.

DATE OF JUDGMENT: 27/10/1999

BENCH:

DR. A.S. ANAND, CJ & S. RAJENDRA BABU & R.C. LAHOTI

JUDGMENT:

JUDGMENT 1999 Supp(4) SCR 170 The Judgment of the Court was delivered by DR. A.S. ANAND, C.J., Aggrieved by the dismissal of an election petition challenging the election of respondent No. 1 from 33-Kutlehar Assembly Constituency to the Himachal Pradesh Vidhan Sabha vide order dated 24th June, 1998, without trial, the Appellant has filed this appeal.

The Appellant had contested the election as a candidate sponsored by Indian National Congress while Respondent No. 1 had contested the election as a candidate sponsored by Bharatiya Janata Party, Whereas Respondent No.1 polled 11,660 votes, the Appellant was shown to have polled 11,657 votes. As many as 750 votes had been declared invalid. The remaining votes had been polled in favour of other candidates.

The principal challenge to the election of Respondent No. 1 who was declared elected by a margin of 3 votes only was based on improper reception of invalid votes in favour of Respondent No. 1 and improper rejection of valid votes polled in favour of the Appellant. It was alleged that many irregularities were committed during the course of counting which had materially effected the result of the election insofar as the returned candidate is concerned. It was also pointed out that the total number of ballot papers which were shown to have been distributed was 35310, but, after counting, the number of ballot papers polled as per Form 20-A, was shown to be 35318. It was alleged that 8 votes which had been counted in excess had been illegally counted in favour of the returned

candidate. An application filed by the Appellant, soon after the declaration of the result of election, for recount was rejected by the Returning Officer and the appellant has raised a grievance in that behalf also.

Respondent No. 1 resisted the election petition as well as the prayer for inspection and recount of ballot papers. Certain preliminary objections were raised in the written statement. Besides, Respondent No. 1 filed an application under Order 6 Rule 16 and Order 7 Rule 11 of the Code of Civil Procedure seeking rejection of the election petition on the ground that it lacked material facts and particulars and therefore did not furnish a cause of action, Respondent No.1 also filed a recrimination petition under Section 97 of the Representation of the People Act, 1951 (hereinafter (he Act). From the pleadings of the parties, the following preliminary issues were raised on 14.5.1998:

"1. Whether the election petition lacks in material facts and particulars and does not furnish a cause of action, as alleged, if so to what effect? OPR 2, Whether the election petition has not been properly verified, if so, to what effect? OPR 3, Whether true copy of the election petition has not been supplied to the respondents, if so to what effect? OPR 4, Relief,"

During the course of hearing, learned counsel for Respondent No. 1 did not press issues 2 & 3 and consequently both those issues were decided against Respondent No.1. Finding on those issues has also not been challenged before us. Issue "No, 1 was decided in favour of respondent No.1 and it was held that:-

"In view of the foregoing discussion, it is held that the pleadings contained in the petition lack material particulars as required under Section 83 of the Act and that such pleadings do not furnish a cause of action. The issue is accordingly decided in favour of respondent No.1 and against the petitioner."

(Emphasis supplied) The findings on issue No, 1 have been seriously debated before us. Learned counsel for the appellant has vehemently argued that in the established facts and circumstances of the case, the election petition could not be dismissed at the initial stage without trial. Learned counsel for the returned candidate, on the other hand, tried to persuade us to uphold the finding recorded by the learned Election Judge. It was asserted that because of a small margin only, the appellant was seeking a recount and that actually the counting has not been shown to be faulty on any account whatsoever.

Section 83 (1) (a) of the Act mandates that in order to constitute a cause of action, all material facts, that is, the basic and preliminary facts which the petitioner is bound under the law to substantiate in order to succeed, have to be pleaded in an election petition. Whether in an election petition, a particular fact is material or not and as such required to be pleaded is a question which depends upon the nature of the charge levelled and the facts and circumstances of each case. The distinction between 'material facts' and 'particulars' has been explained by this Court in a large number of cases and we need not refer to all those decided cases. Facts which are essential to disclose a

complete cause of action are material facts and are essentially required to be pleaded. On the other hand "particulars" are details of the case set up by the party and are such pleas which are necessary to amplify, refine or explain material facts. The function of particulars is, thus, to present a full picture of the cause of action to make the opposite party understand the case that has been set up against him and which he is required to meet. The distinction between 'material facts' and 'material particulars' is indeed important because different consequences follow from a deficiency of such facts or particulars in the pleadings. Failure to plead even a single material fact leads to an incomplete cause of action and incomplete allegations of such a charge are liable to be struck off under Order 6, Rule 16, Code of Civil Procedure. In the case of a petition suffering from deficiency of material particulars the Court has the discretion to allow the petitioner to supply the required particulars even after the expiry of limitation. Thus, whereas it may be permissible for a party to furnish particulars even after the period of limitation for filing an election petition has expired, with permission of the Court, no material fact unless already pleaded, can be permitted to be introduced, after the expiry of the period of limitation.

Does the election petition in the instant case contain material facts so as to proceed to trials? To answer the question reference to some of the pleadings in the election petition would be useful. Para 10 of the election petition reads thus:

"10. That the counting staff after opening the ballot boxes on the tables, took out and separated the ballot papers for the Assembly Constituency as well as for the Parliamentary Constituency. After separating the votes, the votes taken out from each ballot box were counted without determining the same candidate wise. Then the number of the ballots taken out were entered in Form 20-A under Rules 56-B(7) of the Conduct of Election Rules, 1961, As per the Form 20-A, certified copy of which is added herewith as Annexure P/2, the total number of ballot papers polled from all the polling stations of the Assembly Constituency were shown as 35310, -while the votes actually counted from all these polling stations were shown as 35318, which is evident from the statement 'Round-wise detailed result of counting' a certified copy of which is added as Annexure P/3. Thus 8 votes more were counted than actually taken out from the ballot boxes for the Kutlehar Assembly Constituency. This cannot happen in any circumstances unless there is irregularity in the counting and this difference of votes clearly shows that the counting was not properly done and has materially affected the election of the respondent No. 1. These irregularities and illegalities were committed during the counting in favour of the respondent No. 1 by the members of the counting staff."

Para 11 provides:

"11. That Shri R.S. Sharma was the Returning Officer of 33 Kutlehar Assembly Constituency. The counting was completed in six rounds and a number of irregularities and illegalities were committed during the counting of votes on various tables of the Assembly Constituency. Further the votes of the petitioner were mixed in the bundles of Respondent No. 1. and many votes polled in favour of the petitioner

were illegally rejected. Further the votes polled which were required to be rejected were counted in favour of the respondent No. I, The counting for the first two rounds were held almost correctly but thereafter the Returning Officer and the other members of the counting staff started showing the partial attitude towards the petitioner as the result of all the Assembly Constituencies in the Himachal Pradesh had been declared and trend of the voting and results at the national level for the Parliamentary Constituencies had also started becoming available, further the result of this Assembly Constituency would have affected the formation of the State Government."

Details of various irregularities and illegalities allegedly committed during counting as stated in para 11, on various grounds, were then provided in sub-paras (i) to (vii). We do not need to burden this judgment with reproduction of those sub-paragraphs. Para 13 of the election petition reads thus:

"13 That a perusal of form 20A (Annexure P/2) clearly indicates that the total number of votes found in the Ballot boxes of 82 Polling Stations pertaining to this Constituency were 35310 whereas a perusal of statement of 'Roundwise detailed result of counting in 33 Kulehar Assembly Constituency' (copy of which is added herewith as Annexure P/3) indicates that the total number of valid and rejected votes counted for the purpose of declaring the result were 35318, The above contemporaneous record/evidence clearly indicates that there is an increase of 8 votes at the time of counting. In other words 8 more votes were counted when in fact these votes were never cast/ polled at any of the Polling Stations. These 8 unaccounted for votes which have been counted in favour of respondent No. I have materially affected the election and the election result of respondent No. I as the difference of margin of victory is only of 3 votes. These excess votes were counted by the counting staff simply to help him in advancing his Election prospects when in fact these were fake votes, The submission made in this para go to the very root of the entire matter and render the election of respondent no. I void. In other words the election result of respondent No, I has therefore materially been effected."

Para 16 reads;

"16. That the petitioner was not allowed to note down the Sr. Nos., of the ballot papers despite demand Further the counting agents were outside the wire mesh/net and members of the counting staff were hurriedly counting the votes, they could not/were allowed to note down the Sr.Nos. of the ballot papers"

In para 21, the election petitioner stated:

"27. That a perusal of form 20-A (Annexure P-2) reveals that 2 votes in Polling Station No. 10 and 78 (leach) were shown as tendered votes. It may pertinently be added here that one more vote was also tendered in Polling Station No. 76 but the same has not been reflected in Form-20-A (Annexure- P/2). However, a perusal of

form I6-A. (Certified copy of which is added herewith as Annexure P/6) clearly reveals that one more vote has also been tendered at Polling Station No. 76. The above submissions clearly prove that in all there were 3 tendered votes and the margin of victory of respondent No.1 was by 3 votes. In view of this, three tendered votes ought to have been counted in the prevailing situation, Non counting of these 3 tendered votes has also materially affected the result of election of respondent No.1 (returned candidate). Besides inspection of these three tendered votes in the given circumstances also deserves to be granted, which may be allowed."

In the written statement, Respondent No. 1 in response to para 10 of the election petition stated:

"Para 10 of the petition is wrong and denied. The counting clearly shows that the replying respondent has secured more votes then the petitioner. As such, the replying respondent was rightly declared as elected.

The allegations made in this para are quite vague and does not disclose the material particulars. As such, this para deserves to be rejected and ignored."

The allegations in para 11 of the election petition were also denied and it was asserted that the allegations made in sub-paras (i) to (vii), para 11 were vague and lacked material particulars. It was asserted that the same were result of an after thought. The allegations contained in paragraph 13 of the election petition were also denied and it was maintained that:

"This para also lacks material particulars and is quite vague and hence is liable to be rejected. It does not give the name of the counting staff, who allegedly helped in advancing the election prospects of the replying respondent. This para cannot be considered in the absence of the Returning Officer being made party respondent. This para is liable to be deleted for want of material particulars."

Respondent No.1 then went on to say:

"On 3.3.1998 at 7.30 P.M., counting was complete and when the petitioner found that the replying respondent has won with a margin of 3 votes, he submitted his objection at 7.45 P.M. Even in that objection petition he never raised any objection relating to the difference of these 8 votes. Hence the objection now raised in this para is deemed to have been waived as the same was not raised at the initial stage. When the petitioner was satisfied by the roundwise counting, now he cannot get the benefit of discrepancies in Annexure P-2 and Annexure P-3 for the purpose of inspection of ballot papers and P-3 is no ground for recounting and inspection, the secrecy of votes cannot be disclosed, otherwise it would frustrate the very purpose of the secret ballot system. Moreover, the counting was conducted by the Returning Officer and the staff, but they have not been made party before this Hon'ble Court. As such, the petitioner cannot get the benefit of any discrepancy in Annexure P-2 and P-3 and the prayer for recounting is liable to be rejected,"

The averments in paragraphs 20 and 21 of the election petition were also denied.

In the rejoinder filed by the Appellant to the written statement of Respondent No.1, it was again asserted that:

"...The petitioner has given the concise statement of material facts. It is denied that the petition lacks material facts and particulars or is liable to be dismissed. The petitioner as well his counting agents had raised objections regarding the irregularity at the time of the counting. Under the Representation of People Act, the officials staff and Returning Officer are not to be made party, even though the averments regarding their partial attitude has been levelled in the petition"

In reply to para 1 l(i) of the written statement it was, inter alia, stated:

"...The petitioner has given a concise statement of material facts, as required under section 83(1) (A) of the Representation of People Act. The petitioner will produce the evidence in that regard. The petitioner and his counting agents had raised the objections. The petitioner had himself made the oral/written objections which were not entertained by the Returning Officer"

In answer to para 12, it was stated:

"That the contents of para 12 are wrong and denied. The petitioner has given the number of ballot papers which are not duly signed and attested, but as already submitted the petitioner was not allowed to note down the serial numbers therefore, the same cannot be given. It is denied that the averments are vague. The petitioner has given the concise statement of material facts. It is denied that the averments are based on doubt. It is denied that the necessary material facts and particulars are missing. The concise statement of material facts has been made as required under section 83 (i)(a)"

The contents of para 13 of the written statement were denied and those of the election petition were reiterated. The election petitioner then went on to add:

"...It is denied that the election petition is based on doubt or is liable to be dismissed in limine. It is denied that the secrecy of ballot papers can be infringed in the present case. In the present case prima facie case is proved on the record that illegality has been committed during the counting. It is pertinent to mention here that the respondent No. 1 has not denied the contents of Annexures P-2 and Annexure P-3 which is apart of the election petition. Thus he has admitted the facts that in fact the actual votes counted were more than the votes actually taken out from the ballot boxes and such votes are (8) eight in number, which have materially affected the result of Returned candidate. Further, respondent No. 1 is silent relating to the tendered vote. Thus a complete case is made out for the recount of votes." (Emphasis

throughout supplied) A perusal of the impugned judgment shows that the learned designated Judge took detailed note of the averments made in the election petition and reproduced the same. However, the learned designated judge while holding that the petition lacked material facts and particulars opined:

"Be it stated that it is not the case of the petitioner that such excess eight votes were counted in favour of the respondent No. 1 or that such votes were not mixed in the votes during counting by respondent No. 1 or his counting agent at this behest.

In order to make out a case for recount, the petitioner should have specifically averred the total number of votes issued to the Voters, total number of votes polled and counted. No such particulars have been set out in para 10 of the petition. The averments made, therefore, lack in material facts"

(Emphasis ours) Apparently, there has been a misreading of the averments in the election petition. As already noticed, the election petitioner had in paragraph 13 of the election petition categorically asserted that:

"...The above contemporaneous record/evidence clearly indicates that there is an increase of 8 votes at the time of counting. In other words 8 more votes were counted when in fact these votes were never cast/ polled at any of the Polling Station. These 8 unaccounted for votes which have been counted in favour of respondent No. I have materially affected the election and the election result of respondent No. I as the difference of margin of victory is only of 3 votes.."

(Emphasis provided) Thus, the observations of the learned designated Judge to the effect that it was 'not the case of the election petitioner that excess 8 votes had been counted in favour of Respondent No. 1' or that those votes had not been mixed with votes during counting, is not based on a correct reading of the averments in the election petition.

Similarly, the observations of the learned designated Judge to the effect that "the election petitioner had not disclosed the total number of votes polled and counted for" is based on misreading of the petition. A careful reading of paragraph 10 of the election petition shows that categorical averments had been made therein to the effect that while the total number of ballot papers polled from all the polling stations of the assembly constituency were shown as 35310, the votes actually counted from all those polling stations were shown as 35318. These averments were supported by reference to annexure P-2 and annexure P-3.

Besides the incorrect reading of the averments in election petition as noticed above, the following observations made by the learned designated Judge are wholly conjectural and suffer from the vice of surmise:

"Even otherwise the discrepancy is too insignificant which could be safely attributed to accidental slip or clerical or arithmetical mistakes that might have been committed

at the time of counting and preparation of the statements in Form 16 and 20A,"

It was no body's case in the pleadings that there was some "accidental slip or clerical or arithmetical mistake" committed either at the "time of counting" or while "preparing the statements in Form 16 and 20A". The alleged discrepancy between Ex.P2 and Ex. P3 was of 8 votes while the margin of defeat was only 3 votes. How then could this discrepancy, in the facts and circumstances of this case be said to be "too insignificant" is not understandable.

We also find that the Learned designated Judge appears to have lost sight of the distinction between material facts and material particulars. The ultimate paragraph, while dismissing the election petition which has been quoted in an earlier part of this judgment, records that "the pleadings contained in the petition lacked in material particulars, as required under Section 83 of the Act". If that was so, material particulars could always be required to be furnished by the election petitioner.

In the present case, it is not disputed, as indeed it cannot be, that in Form 20-A, Ex.P-2, it is recorded that the total number of votes found in the ballot boxes of 82 polling stations pertaining to this constituency were 35310 whereas a perusal of statement of "roundwise detailed result of counting, certified copy whereof is Ex. P-3, records that the total number of valid and rejected votes counted for the purpose of declaring the result were 35318. A difference of 8 votes had been projected in Annexure P-2 and Annexure P-3. The margin of difference between the votes polled by the election petitioner and the returned candidate, in the present case, was only 3 votes. Unless a satisfactory explanation was furnished during the trial about the discrepancy, there would be need to inspect the ballot papers to clarify doubts regarding the excess counting of 8 votes, allegedly in favour of the returned candidate. This was also necessary to dispel doubts about the allegations of irregularity in counting. Had the Returning Officer, instead of rejecting the application for recount made a test check, soon after the declaration of result, he could have silenced the scepticism and removed all doubts but since that was not done, the learned designated Judge ought to have considered the matter in its correct perspective.

Indeed, recount of ballot papers cannot be ordered just for the asking but it is equally well settled that while maintenance of secrecy of ballot is sacrosanct, maintenance of purity of election is equally important.

Our perusal of various paragraphs of the election petition and particularly of the averments contained in paragraphs 10 to 13, 16 and 20, go to show that sufficient material facts, to provide a cause of action, for trial of the election petition have been provided in the election petition. In various sub-paras of paragraph 11 of the election petition, particulars of irregularities have also been spelt out. The non-mention of serial numbers of the improperly counted ballot papers, keeping in view the averments made in paragraph 16 of the petition, could not be a ground to non-suit the election petitioner at the threshold, without trial more particularly because of the discrepancy between Ex.P.2 and Ex.P.3, Pleadings have to be read as a whole to ascertain their true import. It is the substance and not merely the form, which is required to be looked into for construing the pleadings. The intention of the party needs to be gathered from the tenor and terms of his pleadings taken as a whole. These well settled principles appear to have been lost sight of by the learned

designated Judge. Construed reasonably, the averments in the election petition, in our opinion, do make out a case for the petition proceeding to trial. Whether or not a case is eventually made out to justify recount/inspection would depend upon the evidence led by the parties in support of their pleadings at the trial.

We are of the opinion that the election petition did contain an adequate statement of material facts on which the allegations of irregularities or illegalities in counting were founded. The election petition therefore deserved to be tried on merits. We are unable to persuade ourselves to sustain the findings recorded by the learned designated Judge on issue No. 1, We, however, refrain from expressing any opinion on the merits of the controversy between the parties as that would be a matter to be decided by the designated Judge after affording an opportunity to the parties to lead evidence in support of their respective pleadings. Since, the election petition was dismissed without trial on deciding issue No, 1 against the Appellant, with which finding we have not agreed, we set aside the finding of the High Court on issue No, 1 and direct that the election petition be now tried on merits in accordance with law. The learned designated Judge is requested to expeditiously dispose of the petition. There shall be no order as to costs in so far as this appeal is concerned.