Supreme Court of India
N. Gopal Reddy vs Bonala Krishnamurthy And Ors. on 10 February, 1987
Equivalent citations: AIR 1987 SC 831, JT 1987 (1) SC 406, 1987 (1) SCALE 290, (1987) 2 SCC 58, 1987 (1) UJ 386 SC
Author: K Singh
Bench: E Venkataramiah, K Singh
JUDGMENT K.N. Singh, J.

1. N. Gopal Reddy, the appellant was declared elected member of the Andhra Pradesh Legislative Assembly from Gadwal Assembly Constituency, having obtained 38291 votes. Bonala Krishnamurty, respondent No. 1 filed an Election Petition under Section 100 of the Representation of People Act, 1951 challenging the validity of the appellants election claiming relief for setting aside of the election of the returned candidate and also for declaring D.K. Samarasimha Reddy respondent No. 6 as duly elected. One of the grievances raised by the election petitioner was that even though the Returning Officer had issued orders on an application made by the election agent of respondent No. 6 for recount and scrutiny of ballot papers of all the candidates but later on, he illegally modified his order and directed for the recount of ballot papers only without opening the bundles of the ballot papers of counting the same. The election petitioner alleged that if a general recount and scrutiny of the ballot papers had been done as directed by the Returning Officer respondent No. 6 would have been found to have polled majority of valid votes. On the pleading of the parties a number of issues were framed but before the High Court the parties confined their case to recount of ballot papers.

2. The High Court by its order dt. April 23, 1986 directed recount and scrutiny of all the ballot papers polled by the candidates at all the polling stations including the rejected ballot pappies and postal ballot papers. While giving directions for the recount and scrutiny of the ballot papers learned single judge of the High Court issued the following directions :

I, therefore, consider it just and necessary to direct recount of all the ballot papers polled by all the candidates at all the polling stations as also the rejected ballot papers and the postal ballot papers after rescrutiny of each of the ballot papers. At the end of the recount now ordered, even if any extra votes are found polled in favour of the first respondent, the same shall not be added to him as laid down by their Lordships of the Supreme Court In the four decisions referred to supra.

In pursuance to the directions of the High Court, scrutiny and recount of all the ballot papers was done and thereafter the appellant was declared to have polled 38204 votes while respondent No. 6 was held to have polled 38260 votes.

3. In view of the result of the recount and scrutiny of the ballot papers the High Court by its order dt. Sept. 30, 1986 set aside the appellant's election and declared respondent No. 6 as duly elected.

4. Shri Shanti Bhushan, learned Counsel for the appellant urged that since a general recount and scrutiny of all the ballot papers of all the candidates including the valid and invalid votes had been done, the High Court should have given benefit of the additional votes which the appellant had secured during recount and scrutiny of the ballot papers and it should have rejected the votes

recorded on invalid ballot papers in favour of respondent No. 6. Had that been done, the appellant would have been found to have polled majority of valid votes and his election could not have been set aside and respondent No. 6 could not be declared duly elected. He further urged that if invalid votes counted in favour of respondent No. 6 had been excluded, the appellant would have still continued to have polled majority of votes.

5. Dr. Y.S. Chitale, learned Counsel for respondent No. 6 urged that since the appellant had failed to file a recriminatory petition under Section 97 of the Act, the High Court was justified in refusing to give benefit of additional votes found in appellant's favour and the High Court was justified in refusing to reject the invalid ballot papers counted in favour of respondent No. 6. He urged that in the absence of a recriminatory petition it is not open to the returned candidate to claim additional votes during the counting or to raise objection against the validity or invalidity of ballot papers counted in favour of the unsuccessful candidate. Dr. Chitale placed reliance on this decision of this Court in Jabar Singh v Genda Lal . where a Constitution Bench held that if the returned candidate does not file a recriminatory petition as required by Section 97 of the Act, he cannot take objection to the claim made for the declaration of an unsuccessful candidate. In other words the Constitution Bench held that in the absence of recriminatory notice under Section 97 rejected votes of the returned candidate could not be scrutinised by the court and he could not have the benefit of valid votes wrongly rejected by the Returning Officer. In that case the Court held that in absence of recriminatory petition the High Court had no jurisdiction to reconsider the rejected voles quo the returned candidate. Raja Gopala lyyangar, J. dissented with the majority view, and he opined that in the absence of recriminatory petition the returned candidate is not powerless to establish to the satisfaction of the tribunal or the court that notwithstanding improper reception or rejection of the particular votes alleged by the petitioner his election was not materially affected and for that purpose the returned candidate could establish that though a few votes were wrongly counted in his favour, still a large number of his own votes were counted in favour of other candidates or that the ballot papers which contained valid votes for him, have been improperly counted in favour of defeated candidate other than the election petitioner. The learned judge spelt out this view even in the absence of a recriminatory notice under Section 97 of the Act, on an analysis of Section 101 of the Act.

6. In P. Malsichami v M. Andi Ambalam. the election petitioner alleged breach of many of the election rules and claimed relief of total recount, the returned candidate raised no objection to the recount. After recount the result of the candidate was set aside and the respondent to the election petition was declared duly elected having received majority of valid voles. The returned candidate raised a plea before this Court that if the votes which had been wrongly counted in favour of the respondent had been excluded the result of the election could not be set aside. An attempt was made before this Court to distinguish the case of Jabar Singh on the ground that in a case where there was a total recount of all the ballot papers of all the candidates Section 97 had no application as the returned candidate in that event was not leading any evidence. A Division Bench of this Court repealed the contention holding that in the absence of a recriminatory petition under Section 97 the contention of the returned candidate could not be accepted and there was no justification for reconsidering the view of the Court in Jabar Singh's case by a larger Bench.

7. In Arun Kumar Base v Mohd. Furkan Annan and Ors. . this Court again refused to count the rejected ballot papers of the returned candidate on the plea of non-filing of recriminatory petition, in view of the law laid down in Jabar Singh's case.

8. But in Janardan Dattuappa Bondre, Etc. v Govind Shiv Prasad Chaudhary and Ors.. Etc . the High Court had refused to grant the benefit of 250 votes to the returned candidate while recounting, in view of the absence of recriminatory notice under Section 97. A Division Bench of this Court held that the claim of the returned candidate that he should be granted benefit of 250 votes cast in his favour although placed in another candidate's package was justified and his claim could not be rejected in the absence of recriminatory notice under Section 97 as the claim of the returned candidate did not involve reconsideration of the validity of the votes. This view of the Division Bench is not strictly in accordance with the principles laid down in Jabar Singh's case. It is evident that the Bench was convinced that the view taken by the High Court was unjust and unreasonable, therefore, it granted benefit of 250 votes to the returned candidate even in the absence of recriminatory petition.

9. In Bhag Mal v Ch. Parbhu Ram and Ors.. the High Court on recount of ballot papers of the returned candidate and the election petitioner who was an unsuccessful candidate set aside the election of the returned candidate and declared the election petitioner as duly elected candidate. The High Court refused to grant benefit of 8 more votes to the returned candidate which had been wrongly rejected by the Returning Officer on the ground that the returned candidate had not filed recriminatory petition under Section 97 of the Act. If the benefit of 8 votes which had been wrongly rejected by the Returning Officer had been given to the returned candidate his election could not be set aside. In appeal the returned candidate before this Court urged that the High Court committed error in setting aside his election and declaring the respondent as duly elected by ignoring the will of the electOrs. The majority rejected the plea of the returned candidate, in view of Jabar Singh's case and it dismissed the appeal and upheld the order of the High Court. Sabyasachi Mukharji, J. in his dissenting judgment observed as under :

The purpose of the Act is to safeguard that one who obtains majority of valid votes by proper and due process of law alone should represent the constituency and will of the people. All the legal provisions and the procedures of the enactment should be so construed as to ensure that purpose. It would really be a mockery to the procedure of law in a situation where it is demonstrated duly in the Court that a person who obtained four votes less than the other next candidate should be declared elected in preference to the others and allowed to represent the constituency. It is not an appeal to any abstract justice nor an appeal to equity but is to emphasize that procedure should be so construed that these rules of procedure such as Section 97subserve the wishes of the voters.

10 Having considered the matter at some length we are of the opinion that when a general recount and scrutiny of all the ballot papers is directed by the High Court, it would be unjust and unreasonable and contrary to the will of the electors, to deny benefit of valid votes cast in favour of the returned candidate or to ignore invalid votes counted by the Returning Officer as having valid votes in favour of the unsuccessful candidate and to set aside the election of the returned candidate The purpose and object of the election law is to ensure that only that person should represent the

constituency who is chosen by the majority of the electOrs. This is the essence of democratic process. The provisions of the Act and the Rules framed thereunder also ensure that will of the majority must prevail. Counting invalid votes in favour of the unsuccessful candidate and refusing to grant benefit of valid votes to the returned candidate would amount to interference with the electors will. We are therefore in agreement with the view expressed by Sabyasachi Mukharji, J.

Section 97(1) reads as under:

When in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election;

Provided that the returned candidate or such other party, as aforesaid shall not be entitled to give such evidence unless he has, within fourteen days from the date of commencement of the trial, given notice to the High Court of his intention to do so and has also given the security and the further security referred to in Section 117 and 118 respectively,

11. A plain reading of the aforesaid section indicates that a notice of recrimination is to be given to the High Court by the returned candidate within a stipulated time if he desires to adduce evidence to prove that the election of the candidate in whose favour a declaration may have been asked would be void. The proviso to Section 97(1) further indicates that the returned candidate is not entitled to give such evidence unless he gives notice within 14 days from the date of the commencement of the trial to the High Court. It is relevant to note that Section 97 does not require notice of recrimination to be given to the election petitioner; instead it is to be given to the High Court. Absence of recriminatory notice does not prejudicially affect the candidate in whose favour relief of declaration may have been claimed. Moreover when the returned candidate points out the validity or invalidity of ballot papers already on record, he is not tendering any evidence before the Court as contemplated bySection 97 of the Act; instead he is referring to the material which is already on record. If the High Court takes cognizance of such a material on record without a notice under Section 97 we do not think that the High Court would commit a jurisdictional error.

12. In the instant case there is no dispute that during the recount and scrutiny of the ballot papers, the appellant was found to have polled additional 47 valid votes but the High Court refused to give benefit of those votes to him. Similarly it was found that 74 votes counted in favour of respondent No. 6 were invalid and liable to be rejected yet the High Court refused to reject those ballot papers; instead it counted those votes in favour of respondent No. 6 and in pursuance thereof respondent No. 6 was found to have polled majority of votes. "This apparently is unjust, unreasonable and contrary to the electors will and desire. This result has ensued it! view of the principles laid down in Jabar Singh's case.

13. We have expressed our view in brief without going into further details as in our opinion the majority view in Jabar Singh's case requires reconsideration. Let the papers of the appeal be laid before the Chief Justice for refereeing the matter to a larger Bench preferably a Bench of seven

Judges as it requires consideration of the decision of a Constitution Bench of five Judges.