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SLP(C)No. 8411 OF 2004

ITEM No.209 Court No. 1 SECTION XIA
A/N MATTER

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Civil) No.8411/2004
(From the judgement and order dated 12/02/2004 in WP 5503/02
of The HIGH COURT OF ORISSA AT CUTTACK)

JAYANTA SAMAL Petitioner (s)

VERSUS

KULAMANI BEHERA & ANR. Respondent (s)

(With prayer for interim relief and office report)
(For Final Disposal)

Date : 24/09/2004 This Petition was called on for hearing today.

CORAM :
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE G.P. MATHUR
HON'BLE MR. JUSTICE P.P. NAOLEKAR

For Petitioner (s)Mr. Janaranjan Das,Adv.
Mr. Swetaketu Mishra, Adv.
Ms. Moushumi Gahlot, Adv.

For Respondent (s)Mr. Jana Kalyan Das,Adv.

UPON hearing counsel the Court made the following
O R D E R

Leave granted.

The appeal is allowed in terms of the signed order.

No order as to costs.

(D.P. WALIA) (VIJAY DHAWAN)
COURT MASTER COURT MASTER

(Signed Order is placed on the file)

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6279 OF 2004
[arising out of SLP(C) No. 8411 of 2004]

Jayanta Samal... Appellant

vs.

Kulamani Behera & Anr.... Respondents

O R D E R

Leave granted.
Elections to the office of Sarpanch of Kenduapada Panchayat in the State of Orissa were held on 23rd February, 2002 under the provisions of the Orissa Gram Panchayat Act. The result was declared on 28th February, 2002. The appellant secured 1578 votes while the respondent No. 1 secured 1644 votes. Accordingly, the respondent No. 1 was declared elected.
The appellant filed an election petition laying challenge to the election of the respondent and seeking a declaration that the election of the respondent be declared null and void and the appellant be declared to have been elected. One of the prayers made in the election petition was seeking re-count of the votes cast at the election. It was alleged in the election petition, inter alia:

"8.That at the time of counting the supporters of OP No. 1 at the instance of OP No. 1 over powered polling staff including Presiding Officer in all the booths, dominated entire scenario of counting and mobilised Presiding and Polling Officers to play into their hands, whims and caprices. About two hundred votes which would have been rejected were counted in favour of OP No. 1 and about two hundred votes which would have been counted in favour of petitioner were rejected. The Polling Agents of petitioner in all the booths were manhandled and assaulted by the supporters of OP No. 1 when they raised voice of protest.

9.That the petitioner filed petition before Election Officer before official announcement of result for re-examining and recounting of votes i.e. Ballots cast in respect of election for the post of Sarpanch, but Election Officer turned down the appeal of petitioner and did not re-examine and recount the votes."

Not only there was a prayer for re-count of votes contained in the election petition, the appellant had also filed an application praying for re-count of the votes. On 7th September, 2002, the Election Tribunal observed that the prayer for re-count made by the appellant was pre-mature and the same should be taken up for consideration after the evidence was recorded.
After the evidence had been recorded, on 16th September, 2002, the appellant once again pressed for his prayer for re-count being taken up for consideration and allowed. The Election Tribunal allowed the prayer forming an opinion that although the appellant had failed to adduce evidence regarding exact number of votes improperly rejected and/or improperly accepted, yet a case for examination of the ballot papers and holding a re-count was made out. The Election Tribunal directed the records of the ballots to be summoned and being subjected to re-count in the presence of the parties.
Feeling aggrieved by the order dated 16th September, 2002, the respondent preferred a revision in the court of Additional District Judge. The learned Additional District Judge upheld the order of the Election Tribunal and dismissed the revision. Feeling aggrieved thereby, the respondent preferred a writ petition in the High Court under Article 227 of the Constitution. The High Court allowed the respondent's petition and set aside the order of the Election Tribunal directing re-count of votes. During the course of its order, the High Court has observed that the jurisdiction to permit re-count of votes was exercised contrary to the well-settled parameters laid down for exercise of such a jurisdiction. The High Court also held that one of the issues pending for the consideration of the Election Tribunal was as to whether the election petition was barred by time and before deciding that issue an order for re-count should not have been made.
Feeling aggrieved by the order of the High Court, the appellant has filed this appeal by special leave.
Having heard the learned counsel for the parties, we are satisfied that the order of the High Court has to be set aside, inasmuch as in the facts and circumstances of this case the High Court ought not to have exercised its supervisory jurisdiction for setting aside the order of the Election Tribunal which was upheld in revision.
In a recent decision of this Court in T.A. Ahammed Kabeer vs. A.A. Azeez and Others, 2003 (5) SCC 650, this Court has held that the success of a winning candidate should not be lightly set aside and the secrecy of the ballot must be zealously guarded. The onus lies on the election petitioner to make out a case for re-count of votes. However, at the same time, very strict proof of the circumstances making out a case for re-count should not be insisted on by unduly stretching the rule, for the purity of the election process needs to be preserved unpolluted so as to achieve the predominant goal of democracy that only he should represent the constituency who has been chosen by the majority of the electors. It has also been held that once a case for re-count has been made out, the Election Tribunal acquires jurisdiction to direct and pe

rmit re-count of votes and pursuant to that order once a re-count has taken place the result of re-count cannot be ignored and has to be given effect to.

In the case at hand, the Election Tribunal was satisfied that a case for re-count based on the averments made in the election petition and the application seeking re-count supported by evidence adduced, was made out. Though the order passed by the Election Tribunal is not a very elaborate one but it does reflect the application of mind by the Election Tribunal to the pleadings and the evidence available on record and based thereon a conclusion having been arrived at that a case for examination of ballot papers and their re-count, was made out. The order was upheld in revision. In exercise of limited jurisdiction conferred on the High Court under Article 227 of the Constitution, the orders of the Election Tribunal and the revisional court were not available to be interferred with. Incidentally, we would like to note that pursuant to the order passed by the Election Tribunal re-count has taken place and it has been found that the appellant has secured 72 more valid votes which increases the number of votes secured by the appellant so as to exceed the number of valid votes secured by the respondent.

It was submitted by the learned counsel for the respondent that prior to re-count the votes have been tampered with and record in this regard is available before the Election Tribunal. That plea is still available to be urged by the respondent at the time of final hearing. The respondent can always urge before the Election Tribunal that in view of the record of votes having been tampered with before the re-count was ordered and took place, the result of re-count is liable to be ignored. But that is a plea which is to be urged before the election Tribunal and the Election Tribunal may, on being satisfied of the substance in the plea so urged, ignore the result of re-count from consideration.

So far as the plea as to limitation, that is, the election petition having been filed after expiry of period of limitation is concerned, it is stated at the Bar that condonation of delay has also been sought for by the election petitioner. The plea of limitation, in these circumstances, raises a mixed issue of law and fact. Evidence has been recorded on all the issues which will be heard and decided in one go, at the end. The fact that such an issue is awaiting decision, does not take away the jurisdiction of Tribunal to order a re-count in a case in that regard having been made out.

For the foregoing reasons, the appeal is allowed. The impugned judgment of the High Court dated 12th February, 2004 is set aside. The Election Tribunal shall proceed ahead with the hearing of the election petition and decide the same in accordance with law and expeditiously.

No order as to costs.

We make it clear that we have not expressed any opinion on any of the issues, including one on the plea of limitation, which are at large before the Election Tribunal. We have only upheld the legality and correctness of the order of the Election Tribunal permitting re-count of the votes.

.....CJI (R.C. LAHOTI)

.....J
(G.P. MATHUR)

.....J
(P.P. NAOLEKAR)

New Delhi;
September 24, 2004.