

TOMAS T. BANAGA, JR., PETITIONER, VS. COMMISSION ON ELECTIONS AND FLORENCIO M. BERNABE, JR., RESPONDENTS.

G.R. No. 134696. July 31, 2000

Ponente: QUISUMBING, J.

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QUISUMBING, J.:

This special civil action for certiorari seeks to annul the en banc resolution of public respondent Commission on Elections promulgated on June 29, 1998, in a COMELEC special action case, SPA No. 98-383.

The factual antecedents of this case are as follows:

Petitioner and private respondent were the candidates for vice-mayor of the City of Parañaque in the May 11, 1998 election. On May 19, 1998, the city board of canvassers proclaimed private respondent, Florencio M. Bernabe, Jr., the winner for having garnered a total of Seventy One Thousand Nine Hundred Seventy Seven (71,977) votes of the total votes cast for the vice-mayorality position. On the other hand, petitioner, Tomas T. Banaga, Jr., received the second highest number of votes for the said position, with Sixty Eight Thousand Nine Hundred Seventy (68,970) of the total votes cast. Thus, the difference between the votes received by the private respondent and the petitioner is three thousand seven (3,007) votes.

Dissatisfied, petitioner filed with the COMELEC on May 29, 1998, an action denominated as "Petition to Declare Failure of Elections and/or For Annulment of Elections", [1] alleging that:

"3. xxx the local elections for the office of Vice-Mayor in the City of Parañaque, Metro Manila, held on 11 May 1998, amounts to a denigration of the expression of the true will of the people, as it was tainted with widespread election anomalies which constitutes election fraud. The local elections for the position of Vice-Mayor in the City of Parañaque, Metro Manila, was replete with election offenses, specifically vote buying and flying voters being allowed to vote. Moreover, during the canvassing of votes before the Board of Canvasser, numerous Election Returns were discovered to contain glaring discrepancies and are replete with blatant omissions, not to mention the fact that numerous election returns appeared to be tampered with. All told, it is readily apparent that the portion of the Election Returns pertaining to the position of Vice-Mayor in the City of Parañaque, appear to be altered, falsified or fabricated.

4. The will of the legitimate voters of the City of Parañaque were denigrated during the 11 May 1998 election as a consequence of the fact that an indeterminable number of flying voters were allowed to vote.

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5. The 11 May 1998 elections for local officials in the City of Parañaque has likewise been marred by massive vote buying. To cite but one example, in Precinct Nos. 111-112 at the Tambo Elementary School in the City of Parañaque, a certain Dennis Sambilay Agayan ("Agayan") was arrested for voting in substitution of registered voter Ramon Vizcarra. Agayan admitted before SPO1 Alberto V. Parena that he was paid One Hundred Fifty Pesos (P150.00) to vote at precincts No. 111-112 and use the name Ramon Vizcarra. As proof of the foregoing, attached hereto as Annex "E" is the Information dated 11 May 1998 filed against Agayan.

The magnitude of the vote buying in the 11 May 1998 local elections in the City of Parañaque, is such that the voters involved number in the thousands. Evidence in this regard shall be presented in the proper time.

6. Also, there have been several instances where purported voters were depositing more than one (1) ballot inside the ballot box. As evidence thereof, attached hereto as Annex "F" is the Affidavit of a certain Rosemarie Pascua of Barangay Baclaran, City of Parañaque.

7. The foregoing incidents alone actually suffices to establish that a failure of elections should be declared on the ground that the will of the electorate of the City of Parañaque has been denigrated. The elections for the office of the Vice-Mayor in the City of Parañaque, on 11 May 1998 cannot be considered as reflective of the true will of the electorate. However, the anomalies do not stop there.

8. In addition to the foregoing, during the canvassing of votes before the Board of Canvassers, it was discovered that numerous election returns contain glaring discrepancies and are replete with blatant omissions, not to mention the fact that several election returns appeared to be tampered with or appear to be fabricated. The Honorable Commission should seriously consider these anomalies specially on account of the fact that the lead of the respondent over the petitioner is a mere Three Thousand Seven (3,007) votes.

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9. Moreover, several Election Returns are found to have glaring discrepancies which may materially alter the results of the election for the office of Vice-Mayor in the City of Parañaque.

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10. Finally, what seriously casts doubt on the legitimacy of the elections for the office of the Vice-Mayor in the City of Parañaque is the fact that the results thereof are statistically improbable. A case in point is precinct number 483 where petitioner shockingly is supposed to have received zero (0) votes. Petitioner is the incumbent Vice-Mayor of the City of Parañaque. It is, thus, impossible that he will receive zero (0) votes in any given precinct."^[2]

Petitioner asked the COMELEC for the following reliefs:

"1. After trial, judgment be rendered as follows:

1.1 Declaring a failure of elections, or declaring the annulment of the elections, for the office of the Vice-Mayor in the City of Parañaque, Metro Manila;

1.2. Annulling the proclamation of the respondent as the elected Vice-Mayor of the City of Parañaque, Metro Manila, during the 11 May 1998 elections; and

1.3. Declaring that special elections should be held for the office of Vice-Mayor in the City of Parañaque, Metro Manila.

2. Alternatively, in the remote event that the Honorable Commission does not render judgment as aforesaid, an order be issued to the Treasurer of the City of Parañaque to bring and present before this Honorable Commission on or before the day of the hearing of the Election Protest, the ballot boxes, copies of the registry lists, election returns, the minutes of election in all precincts, and the other documents used in the local elections for the Office of the Vice-Mayor held on 11 May 1998 in the said City, for the Honorable Commission to re-examine and revise the same; and

3. After due trial judgment be rendered as follows:

3.1. The election of respondent FLORENCIO M. BERNABE, JR., for the office of Vice-Mayor in the City of Parañaque, Metro Manila be annulled;

3.2. The petitioner, TOMAS T. BANAGA, JR., be adjudged as the duly elected Vice-Mayor in the City of Parañaque, during the 11 May 1998 local elections; and

3.3. The expenses, costs and damages incurred in these proceedings be assessed against the respondent.

Other just and equitable reliefs are likewise prayed for."^[3]

On June 29, 1998, the COMELEC dismissed petitioner's suit. It held that the grounds relied upon by petitioner do not fall under any of the instances enumerated in Section 6 of the Omnibus Election Code. The election tribunal concluded that based on the allegations of the petition, it is clear that an election took place and that it did not result in a failure to elect.^[4]

Considering that a motion for reconsideration of a COMELEC en banc ruling is prohibited, except in a case involving an election offense,^[5] and aggrieved by the COMELEC's dismissal of his suit, petitioner timely filed the instant petition for certiorari with this Court.

Before us, petitioner now claims that the COMELEC committed grave abuse of discretion amounting to lack or excess of jurisdiction when it dismissed his petition *motu proprio* without any basis whatsoever and without giving him the benefit of a hearing. He contends that:

I

THE PETITION DATED 28 MAY 1998 IS ESSENTIALLY AN ELECTION PROTEST. HENCE, THE COMELEC COULD NOT LEGALLY DISMISS THE ENTIRE PETITION MERELY ON THE GROUND THAT THERE WAS ALLEGEDLY NO FAILURE OF ELECTION IN THE CITY OF PARANAQUE DURING THE 11 MAY 1998 ELECTIONS.

II

THE AUTHORITY RELIED UPON BY THE COMELEC AS BASIS FOR THE DISMISSAL OF THE PETITION DATED 28 MAY 1998, THAT OF EDWIN SAR[D]EA, ET. AL. V. COMELEC, ET. AL., AND MITMUG V. COMELEC, ARE NOT APPLICABLE TO THE CASE AT BAR CONSIDERING THAT ASIDE FROM BEING AN ELECTION PROTEST, THE SAID PETITION SEEKS THE ANNULMENT OF AN ELECTION PURSUANT TO THE DOCTRINE LAID DOWN BY THE HONORABLE SUPREME COURT IN LOONG V. COMELEC.^[6]

Clearly, the issue for our resolution is whether or not public respondent acted with grave abuse of discretion in dismissing petitioner's petition, in the light of petitioner's foregoing contentions.

While petitioner may have intended to institute an election protest by praying that said action may also be considered an election protest, in our view, petitioner's action is a petition to declare a failure of elections or annul election results. It is not an election protest.

First, his petition before the COMELEC was instituted pursuant to Section 4 of Republic Act No. 7166 in relation to Section 6 of the Omnibus Election Code. Section 4 of RA 7166 refers to "postponement, failure of election and special elections"^[7] while Section 6 of the Omnibus Election Code relates to "failure of election". It is simply captioned as "Petition to Declare Failure of Elections and/or For Annulment of Elections".

Second, an election protest is an ordinary action while a petition to declare a failure of elections is a special action under the 1993 COMELEC Rules of Procedure as amended. An election protest is governed by Rule 20 on ordinary actions, while a petition to declare failure of elections is covered by Rule 26 under special actions.

In this case, petitioner filed his petition as a special action and paid the corresponding fee therefor. Thus, the

petition was docketed as SPA-98-383. This conforms to petitioner's categorization of his petition as one to declare a failure of elections or annul election results. In contrast, an election protest is assigned a docket number starting with "EPC", meaning election protest case.

Third, petitioner did not comply with the requirements for filing an election protest. He failed to pay the required filing fee and cash deposits for an election protest. Failure to pay filing fees will not vest the election tribunal jurisdiction over the case. Such procedural lapse on the part of a petitioner would clearly warrant the outright dismissal of his action.

Fourth, an en banc decision of COMELEC in an ordinary action becomes final and executory after thirty (30) days from its promulgation, while an en banc decision in a special action becomes final and executory after five (5) days from promulgation, unless restrained by the Supreme Court.[8] For that reason, a petition cannot be treated as both an election protest and a petition to declare failure of elections.

Fifth, the allegations in the petition decisively determine its nature. Petitioner alleged that the local elections for the office of vice-mayor in Parañaque City held on May 11, 1998, denigrates the true will of the people as it was marred with widespread anomalies on account of vote buying, flying voters and glaring discrepancies in the election returns. He averred that those incidents warrant the declaration of a failure of elections.[9]

Given these circumstances, public respondent cannot be said to have gravely erred in treating petitioner's action as a petition to declare failure of elections or to annul election results.

The COMELEC's authority to declare a failure of elections is provided in our election laws. Section 4 of RA 7166 provides that the COMELEC sitting en banc by a majority vote of its members may decide, among others, the declaration of failure of election and the calling of special election as provided in Section 6 of the Omnibus Election Code. Said Section 6, in turn, provides as follows:

Section 6. Failure of Elections. --- If, on account of force majeure, violence, terrorism, fraud or other analogous causes the election in any polling place has not been held on the date fixed, or had been suspended before the hour fixed by law for the closing of the voting, or after the voting and during the preparation and the transmission of the election returns or in the custody or canvass thereof, such election results in a failure to elect, and in any of such cases the failure or suspension of election would affect the result of the election, the Commission shall, on the basis of verified petition by any interested party and after due notice and hearing, call for the holding or continuation of the election not held, suspended or which resulted in a failure to elect on a date reasonably close to the date of the election not held, suspended or which resulted in a failure to elect but not later than thirty days after the cessation of the cause of such postponement or suspension of the election or failure to elect."

There are three instances where a failure of election may be declared, namely, (a) the election in any polling place has not been held on the date fixed on account of force majeure, violence, terrorism, fraud or other analogous causes; (b) the election in any polling place has been suspended before the hour fixed by law for the closing of the voting on account of force majeure, violence, terrorism, fraud or other analogous causes; or (c) after the voting and during the preparation and transmission of the election returns or in the custody or canvass thereof, such election results in a failure to elect on account of force majeure, violence, terrorism, fraud or other analogous causes. In these instances, there is a resulting failure to elect. This is obvious in the first two scenarios, where the election was not held and where the election was suspended. As to the third scenario, where the preparation and the transmission of the election returns give rise to the consequence of failure to elect must as aforesaid, is interpreted to mean that nobody emerged as a winner.[10]

Before the COMELEC can act on a verified petition seeking to declare a failure of election two conditions must

concur, namely (1) no voting took place in the precinct or precincts on the date fixed by law, or even if there was voting, the election resulted in a failure to elect; and (2) the votes not cast would have affected the result of the election.[11] Note that the cause of such failure of election could only be any of the following: force majeure, violence, terrorism, fraud or other analogous causes.

We have painstakingly examined the petition filed by petitioner Banaga before the COMELEC. But we found that petitioner did not allege at all that elections were either not held or suspended. Neither did he aver that although there was voting, nobody was elected. On the contrary, he conceded that an election took place for the office of vice-mayor of Parañaque City, and that private respondent was, in fact, proclaimed elected to that post. While petitioner contends that the election was tainted with widespread anomalies, it must be noted that to warrant a declaration of failure of election the commission of fraud must be such that it prevented or suspended the holding of an election, or marred fatally the preparation and transmission, custody and canvass of the election returns. These essential facts ought to have been alleged clearly by the petitioner below, but he did not.

In *Mitmug vs. COMELEC*,^[12] petitioner instituted with the COMELEC an action to declare failure of election in forty-nine precincts where less than a quarter of the electorate were able to cast their votes. He also lodged an election protest with the Regional Trial Court disputing the result of the election in all precincts in his municipality. The COMELEC denied *motu proprio* and without due notice and hearing the petition to declare failure of election despite petitioner's argument that he has meritorious grounds in support thereto, that is, massive disenfranchisement of voters due to terrorism. On review, we ruled that the COMELEC did not gravely abuse its discretion in denying the petition. It was not proven that no actual voting took place. Neither was it shown that even if there was voting, the results thereon would be tantamount to failure to elect. Considering that there is no concurrence of the conditions seeking to declare failure of election, there is no longer need to receive evidence on alleged election irregularities.

In *Sardea vs. COMELEC*,^[13] all election materials and paraphernalia with the municipal board of canvassers were destroyed by the sympathizers of the losing mayoralty candidate. The board then decided to use the copies of election returns furnished to the municipal trial court. Petitioner therein filed a petition to stop the proceedings of the board of canvassers on the ground that it had no authority to use said election returns obtained from the municipal trial court. The petition was denied. Next, he filed a petition assailing the composition of the board of canvassers. Despite that petition, the board of canvassers proclaimed the winning candidates. Later on, petitioner filed a petition to declare a failure of election alleging that the attendant facts would justify declaration of such failure. On review, we ruled that petitioner's first two actions involved pre-proclamation controversies which can no longer be entertained after the winning candidates have been proclaimed. Regarding the petition to declare a failure of election, we held that the destruction and loss of copies of election returns intended for the municipal board of canvassers on account of violence is not one of the causes that would warrant the declaration of failure of election. The reason is that voting actually took place as scheduled and other valid election returns still existed. Moreover, the destruction or loss did not affect the result of the election. We also declared that there is failure of elections only when the will of the electorate has been muted and cannot be ascertained. If the will of the people is determinable, the same must as far as possible be respected.

These aforecited cases are instructive in the resolution of the present case because they involve similar actions and issues. No error could be attributed to public respondent for its reliance on these precedents.

In *Loong vs. Comelec*,^[14] the petition for annulment of election results or to declare failure of elections in Parang, Sulu, on the ground of statistical improbability and massive fraud was granted by the COMELEC.^[15] Even before the technical examination of election documents was conducted, the COMELEC already observed badges of fraud just by looking at the election results in Parang. Nevertheless, the COMELEC dismissed the

petition for annulment of election results or to declare failure of elections in the municipalities of Tapul, Panglima Estino, Pata, Siasi and Kalingalang Calauag. The COMELEC dismissed the latter action on ground of untimeliness of the petition, despite a finding that the same badges of fraud evident from the results of the election based on the certificates of canvass of votes in Parang, are also evident in the election results of the five mentioned municipalities. We ruled that COMELEC committed grave abuse of discretion in dismissing the petition as there is no law which provides for a reglementary period to file annulment of elections when there is yet no proclamation. The election resulted in a failure to elect on account of fraud. Accordingly, we ordered the COMELEC to reinstate the aforesaid petition. Those circumstances, however, are not present in this case, so that reliance on Loong by petitioner Banaga is misplaced.

Petitioner argues that the COMELEC should not have treated his prayer for annulment of elections as a prayer for declaration of failure of elections.[16] This argument is plainly gratuitous as well as immaterial. A prayer to declare failure of elections and a prayer to annul the election results for vice mayor in this case are actually of the same nature. Whether an action is for declaration of failure of elections or for annulment of election results, based on allegations of fraud, terrorism, violence or analogous cause, the Omnibus Election Code denominates them similarly.[17] No positive gain will accrue to petitioner's cause by making a distinction without a difference.

Finally, petitioner claims that public respondent gravely abused its discretion when it dismissed his petition *motu proprio*. However, the fact that a verified petition has been filed does not mean that a hearing on the case should first be held before COMELEC can act on it. The petition to declare a failure of election and/or to annul election results must show on its face that the conditions necessary to declare a failure to elect are present. In their absence, the petition must be denied outright.[18] Public respondent had no recourse but to dismiss petition. Nor may petitioner now complain of denial of due process, on this score, for his failure to properly file an election protest. The COMELEC can only rule on what was filed before it. It committed no grave abuse of discretion in dismissing his petition "to declare failure of elections and/or for annulment of elections" for being groundless, hence without merit.

WHEREFORE, the instant petition is DISMISSED. The assailed RESOLUTION of public respondent is AFFIRMED. Costs against petitioner.

SO ORDERED.

Davide, Jr., C.J., Melo, Puno, Vitug, Kapunan, Mendoza, Panganiban, Purisima, Buena, Gonzaga-Reyes, Ynares-Santiago, and De Leon, Jr., JJ., concur.

Bellosillo, J., on official leave.

Pardo, J., no part.

[1] The Petition is dated May 28, 1998.

[2] Rollo, pp. 38-49.

[3] *Id.* at 49-51.

[4] *Id.* at 29-30.

[5] Section 1 (d), Rule 13, 1993 COMELEC Rules of Procedure, as amended.

[6] Rollo, p. 10.

[7] Republic Act 7166, Section 4. Postponement, Failure of Election and Special Elections.--- The postponement, declaration of failure of election and the calling of special elections as provided in Sections 5, 6 and 7 of the Omnibus Election Code shall be decided by the Commission sitting en banc by a majority vote of its members. The cause for the declaration of a failure of election may occur before or after the casting of votes or on the day of election. xxx

[8] COMELEC Rules of Procedure, Rule 18, Section 13 (a), (b).

[9] Rollo, pp. 39-43.

[10] Typoco vs. COMELEC, GR-136191, November 29, 1999, p. 9.

[11] Mitmug vs. COMELEC, 230 SCRA 54, 60 (1994).

[12] Mitmug vs. COMELEC, 230 SCRA 54 (1994).

[13] Sardea vs. COMELEC, 225 SCRA 374 (1993).

[14] 257 SCRA 1 (1996).

[15] Id. at 31-32.

[16] Rollo, p. 20.

[17] Loong vs. COMELEC, 257 SCRA 1, 16, 23 (1996).

[18] Mitmug vs. COMELEC, 230 SCRA 54, 61 (1994).

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