

NURHUSSEIN A. UTUTALUM, PETITIONER, VS. COMMISSION ON ELECTIONS AND ARDEN S. ANNI, RESPONDENTS.

G.R. Nos. 84843-44. January 22, 1990

Ponente: MELENCIO-HERRERA, J.

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MELENCIO-HERRERA, J.:

Petitioner, Nurhussein A. Ututalum, prays for the reversal, on the ground of grave abuse of discretion, of the 19 April and 31 August 1988 Resolutions of public respondent Commission on Elections (COMELEC), in Case Nos. SP 87-469 and 87-497, which declined to reject the election returns from all the precincts of the Municipality of Siasi, Sulu, in the last 30 May 1987 Congressional elections and to annul respondent Arden S. Anni's proclamation.

The undisputed facts follow:

1. Petitioner Ututalum and private respondent, Arden S. Anni, were among the candidates in the last 30 May 1987 Congressional elections for the Second District of Sulu. 30 May was the date reset by the COMELEC from the 11 May 1987 elections.
2. The election returns from Siasi showed that Petitioner Ututalum obtained four hundred and eighty-two (482) votes while respondent Anni received thirty-five thousand five hundred and eighty-one (35,581) votes out of the thirty-nine thousand eight hundred and one (39,801) registered voters (pp. 13, 187,). If the returns of Siasi were excluded, Petitioner Ututalum would have a lead of 5,301 votes.
3. On 4 June 1987, during the canvass of votes, Petitioner Ututalum, without availing of verbal objections, filed written objections to the returns from Siasi on the ground that they "appear to be tampered with or falsified" owing to the "great excess of votes" appearing in said returns. He then claimed that multiplying the 42 precincts of Siasi by 300 voters per precinct, there should have been only 12,600 registered voters and not 36,663 voters who cast their votes, thereby exceeding the actual authorized voters by 23,947 "ghost voters." (In his Petition, however, he admits that an error was committed since "in the May 30, 1987 elections, Siasi had 148 precincts" (p. 6,). He then prayed for the exclusion from the canvass of any election returns from Siasi.
4. On the same day, 4 June, the Provincial Board of Canvassers of Sulu dismissed petitioner's objections because they had been "filed out of time or only after the Certificate of Canvass had already been canvassed by the Board and because the grounds for the objection were not one of those enumerated in Section 243 of the Election Code" (See Order, p. 155, Rollo). Also on the same day, 4 June 1987, petitioner filed with the Board of Canvassers his Notice of Appeal from said Resolution to the COMELEC.
5. On 5 June 1987, petitioner filed his first Petition with the COMELEC seeking a declaration of failure of elections in the Municipality of Siasi and other mentioned municipalities; that the COMELEC annul the elections in Siasi and conduct another election thereat; and order the Provincial Board of Canvassers to desist from proclaiming any candidate pending a final determination of the Petition.

6. On 8 June 1987, the Provincial Board of Canvassers forwarded Petitioner's appeal as well as its Order dismissing the written objections to the COMELEC, with the request for authority to proclaim Respondent Anni as the winning candidate.

7. On 11 June 1987, in Case No. SPC 87-180, the COMELEC resolved that there was no failure of elections in the 1st and 2nd Districts of Sulu except in specified precincts in the 1st District.

8. On 14 June 1987, the Sulu Provincial Board of Canvassers proclaimed respondent Anni as the winner. He subsequently took his oath of office and entered upon the discharge of its functions in July 1987.

9. On 16 June 1987, petitioner filed a second Petition with the COMELEC praying for the annulment of Respondent Anni's proclamation and for his own proclamation as Congressman for the Second District of Sulu.

10. While those two Petitions were pending, one Lupay Loong, a candidate for Governor of Sulu, filed a verified Petition with the COMELEC to annul the List of Voters of Siasi, for purposes of the election of local government officials (docketed as SPC Case No. 87-624, p. 9, Rollo). This Petition was opposed by Respondent Anni. Petitioner Ututalum was not a party to this proceeding.

On 16 January 1988, the COMELEC issued, in said SPC 87-624, a Resolution annulling the Siasi List of Voters "on the ground of massive irregularities committed in the preparation thereof and being statistically improbable", and ordering a new registration of voters for the local elections of 15 February 1988 (p. 41, Rollo).

Said Resolution was affirmed by this Court in *Anni vs. COMELEC*, G.R. No. 81398, 26 January 1988 (p. 43, Rollo). A new Registry List was subsequently prepared yielding only 12,555 names (p. 228, Rollo).

11. Immediately after having been notified of the annulment of the previous Siasi List of Voters, Petitioner Ututalum filed a supplemental pleading with the COMELEC entreating that such annulment be considered and applied by the Commission in resolving his two Petitions against Respondent Anni (p. 319,).

12. On 19 April 1988, in a consolidated Per Curiam Resolution, the COMELEC (First Division) denied Petitioner Ututalum's two Petitions "for lack of merit, with the advise (sic) that he may file an election contest before the proper forum, if so desired." Declared the COMELEC inter alia:

"While we believe that there was padding of the registry list of voters in Siasi, yet to annul all the votes in this municipality for purposes of the May 30, 1987 elections would disenfranchise the good or valid votes. As held in *Espaldon vs. Comelec* (G.R. No. L-78987, August 25, 1987), this Commission is not the proper forum nor is it a proper ground in a pre-proclamation controversy, to wit:

"Padded voter's list, massive fraud and terrorism is clearly not among the issues that may be raised in a pre-proclamation controversy. They are proper grounds for an election protest."

Petitioner Ututalum is now before us assailing the foregoing Resolution.

Petitioner contends that the issue he raised before the COMELEC actually referred to "obviously manufactured returns," a proper subject matter for a pre-proclamation controversy and, therefore, cognizable by the COMELEC, in accordance with Section 243 of the Omnibus Election Code, which provides:

"Sec. 243. The following shall be the issues that may be raised in a pre-proclamation controversy:

"x x x

"c) The election returns were prepared under duress, threats, coercion or intimidation or they are obviously manufactured or not authentic; (emphasis supplied)

x x x"

Further, that the election returns from Siasi should be excluded from the canvass of the results since its original List of Voters had already been finally annulled; and, lastly, that there is no need to re-litigate in an election protest the matter of annulment of the Registry List, this being already a "fait accompli."

It is our considered view, however, that given the factual setting, it can not justifiably be contended that the Siasi returns, per se, were "obviously manufactured" and, thereby, a legitimate issue in a pre-proclamation controversy. It is true that in *Lagumbay vs. COMELEC* (L-2544, 31 January 1966, 16 SCRA 175), relied upon heavily by Petitioner Ututalum, this Court ruled that the returns are obviously manufactured where they show a great excess of votes over what could have been legally cast. The Siasi returns, however, do not show prima facie that on the basis of the old List of Voters, there is actually a great excess of votes over what could have been legally cast considering that only 36,000 persons actually voted out of the 39,801 voters. Moreover, the *Lagumbay* case dealt with the "manufacture" of returns by those charged with their preparation as shown prima facie on the questioned returns themselves. Not so in this case which deals with the preparation of the registry list of voters, a matter that is not reflected on the face of said returns.

Basically, therefore, petitioner's cause of action is the padding of the Siasi List of Voters, which, indeed, is not a listed ground for a pre-proclamation controversy.

"SEC. 243. Issues that may be raised in pre-proclamation controversy. — The following shall be proper issues that may be raised in a pre-proclamation controversy:

- (a) Illegal composition or proceedings of the board of canvassers;
- (b) The canvassed election returns are incomplete, contain material defects, appear to be tampered with or falsified, or contain discrepancies in the same returns or in other authentic copies thereof as mentioned in Sections 233, 234, 235 and 236 of this Code;
- (c) The election returns were prepared under duress, threats, coercion, or intimidation, or they are obviously manufactured or not authentic; and
- (d) When substitute or fraudulent returns in controverted polling places were canvassed, the results of which materially affected the standing of the aggrieved candidate or candidates."

As pointed out in *Espaldon vs. COMELEC*, L-78987, 25 August 1987:

"Padded voters' list, massive fraud, and terrorism are clearly not among the issues that may be raised in a pre-proclamation controversy. They are proper grounds for an election protest."

And as held in the case of *Bautista vs. COMELEC*, G.R. No. 78994, March 10, 1988:

"The scope of pre-proclamation controversy is limited to the issues enumerated under Section 243 of the Omnibus Election Code. The enumeration therein of the issues that may be raised in a pre-proclamation controversy is restrictive and exclusive" (see also *Sanchez vs. COMELEC*, G.R. No. L-78461, 12 August 1987, 153 SCRA 67).

But petitioner insists that the new Registry List should be considered and applied by the COMELEC as the legal basis in determining the number of votes which could be legally cast in Siasi. To allow the COMELEC to do so retroactively, however, would be to empower it to annul a previous election because of the subsequent annulment of a questioned registry in a proceeding where petitioner himself was not a party. This cannot be done. In the case of *Bashier vs. COMELEC* (L-33692, 24 February 1972, 43 SCRA 238), this Court categorically ruled:

"The subsequent annulment of the voting list in a separate proceeding initiated motu proprio by the

Commission and in which the protagonists here were not parties, cannot retroactively and without due process result in nullifying accepted election returns in a previous election simply because such returns came from municipalities where the precinct books of voters were ordered annulled due to irregularities in their preparation."

Besides, the List of Voters used in the 1987 Congressional elections was then a validly existing and still unquestioned permanent Registry List. Then, it was the only legitimate roster which could be used as basis for voting. There was no prior petition to set it aside for having been effected with fraud, intimidation, force, or any other similar irregularity in consonance with Section 145 of the Omnibus Election Code.[1] That list must then be considered conclusive evidence of persons who could exercise the right of suffrage in a particular election (*Abendante vs. Relato*, 94 Phil. 8; *Medenilla vs. Kayanan*, L-28448-49, 30 July 1971, 40 SCRA 154).

Moreover, the preparation of a voters' list is not proceeding before the Board of Canvassers. A pre-proclamation controversy is limited to challenges directed against the Board of Canvassers, not the Board of Election Inspectors (*Sanchez vs. COMELEC*, ante), and such challenges should relate to specified election returns against which petitioner should have made specific verbal objections (Sec. 245, Omnibus Election Code; *Pausing vs. Yorac*, et al., G.R. No. 82700, 4 August 1988, *Endique vs. COMELEC*, G.R. Nos. 82020-21, 22 November 1988), but did not.

That the padding of the List of Voters may constitute fraud, or that the Board of Election Inspectors may have fraudulently conspired in its preparation, would not be a valid basis for a pre-proclamation controversy either. For, whenever irregularities, such as fraud, are asserted, the proper course of action is an election protest.

"Such irregularities as fraud, vote-buying and terrorism are proper grounds in an election contest but may not as a rule be invoked to declare a failure of election and to disenfranchise the greater number of the electorate through the misdeeds, precisely, of only a relative few. Otherwise, elections will never be carried out with the resultant disenfranchisement of the innocent voters, for the losers will always cry fraud and terrorism" (*GAD vs. COMELEC*, G.R. No. 78302, May 26, 1987, 150 SCRA 665).

Petitioner Ututalum's other submission is that the Siasi returns should be excluded since the List of Voters on which it was based has been conclusively annulled. He thus asks for the application of the rule on *res judicata*. This is neither possible. Aside from the fact that the indispensable requisites of *res judicata*, namely, identity of parties, of subject matter, and of cause of action are not all present, the ruling desired would, as the COMELEC had opined, disenfranchise the good and valid votes in the Congressional elections of 30 May 1987.

Finally, this Petition has to fail if only on the basis of the equally important doctrine enunciated in *Padilla vs. COMELEC* (L-68351-52, 9 July 1985, 137 SCRA 424), reiterated in *Baldo vs. COMELEC* (G.R. No. 83205, 14 July 1988) that:

"Where the respondent had already been proclaimed as the elected representative of the contested congressional district, and has long assumed office and has been exercising the powers, functions, and duties appurtenant to said office, the remedy of the petitioner lies with the House of Representatives Electoral Tribunal. The pre-proclamation controversy becomes moot and academic."

and in the more recent case of *Antonio vs. COMELEC* (G.R. NO. 84678, 29 March 1989):

"Where the winning candidates have been proclaimed, the pre-proclamation controversies cease. A pre-proclamation controversy is no longer viable at this point in time and should be dismissed. The proper remedy thereafter is an election protest before the proper forum. Recourse to such remedy would settle the matter in controversy conclusively and once and for all."

Having arrived at the foregoing conclusions, a discussion of the other peripheral issues raised has been rendered

unnecessary.

WHEREFORE, this Petition for Certiorari is hereby DISMISSED and the assailed Resolutions are AFFIRMED.
No costs.

SO ORDERED.

Fernan, C.J., Narvasa, Gutierrez, Jr., Cruz, Paras, Feliciano, Gancayco, Padilla, Bidin, Sarmiento, Cortes, Aquino, Medialdea, and Regalado, JJ., concur.

[1] SEC. 145. Annulment of permanent lists of voters. - Any book of voters not prepared in accordance with the provisions of this Code or the preparation of which has been effected with fraud, bribery, forgery, impersonation, intimidation, force, or any other similar irregularity or which list is statistically improbable may, upon verified petition of any voter or election registrar, or duly registered political party, and after notice and hearing, be annulled by the Commission; Provided, That no order, ruling or decision annulling a book of voters shall be executed within sixty days before an election.

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