

## **EN BANC**

**[ G.R. No. 124041, August 09, 1996 ]**

### **SULTAN AMER BALINDONG, PETITIONER, VS. COMMISSION ON ELECTIONS AND MAYOR CABIB A. TANOG, RESPONDENTS.**

#### **D E C I S I O N**

##### **MENDOZA, J.:**

Petitioner Sultan Amer Balindong seeks to annul the resolution, dated June 26, 1995, of the Commission on Elections (COMELEC), dismissing his petition to annul the proclamation of his opponent, herein private respondent Cabib A. Tanog, as mayor of Pualas, Lanao del Sur, and the resolution, dated March 12, 1996, of the COMELEC en banc, denying petitioner's motion for reconsideration.

Petitioner and private respondent were candidates for municipal mayor of Pualas, Lanao del Sur in the elections held on May 8, 1995. After the canvass, private respondent Tanog was credited with 2,271 votes, while petitioner was credited with 2,122 votes. Tanog thus led by a margin of 149 votes.

On May 17, 1995, petitioner filed in the COMELEC a Petition to Suspend and/or Annul Proclamation of respondent Cabib Tanog. He alleged that the polling place in Precinct No. 4 had been transferred from Barangay Lumbac to Barangay Talambo, both in the municipality of Pualas, without prior notice and hearing, with the result that voters in Lumbac, who were his supporters, were not able to cast their votes. Petitioner claimed that, over his objection, the Municipal Board of Canvassers (MBC) proceeded with the canvass, including therein the election return from Precinct No. 4.

On June 17, 1995, petitioner filed an Ex-Parte Motion to Set for Hearing and Supplemental Petition (hereinafter referred to as Supplemental Petition). He alleged that the election return from Precinct No. 4 was "obviously manufactured" and therefore should have been excluded from the canvass, because of "massive substitute voting" which could be established by a technical examination of the signatures and thumbmarks affixed in the List of Voters (C.E. Form No. 2) and Voters' Affidavits (C.E. Form No. 1) of Precinct No. 4. Petitioner, therefore, prayed that a technical examination of the signatures and thumbmarks in C.E. Forms No. 1 and 2 be ordered.

Indeed, it appears that in the morning of the election day, the members of the Board of Election Inspectors transferred the polling place of Precinct No. 4 from the Lumbac Primary School at Barangay Lumbac to the Pualas Elementary School in Barangay Talambo, on the ground that there was no existing public school or public building in Lumbac and free elections could not be insured in that place. The resolution of the Board of Election Inspectors transferring the polling place was signed by the chairman, the poll clerk, and the member, as well as by the two

watchers of the candidates for mayor,<sup>[1]</sup> although it is now claimed that petitioner's watchers were intimidated to sign the resolution.

Petitioner charged that supporters of private respondent Tanog filled out the ballots with the knowledge and approval of the members of the Board of Election Inspectors who were relatives of Tanog, the chairman being the wife of a nephew of Tanog and the poll clerk and member, his nieces. The two nieces in fact allegedly lived in private respondent's house. Petitioner filed a petition for the disqualification of the members of the Board on May 7, 1995, but, apparently, because of its proximity to the day of the election, it was not acted upon by the Office of the Municipal Election Officer.

On May 15, 1995, petitioner objected to the inclusion in the canvass of the election return from Precinct No. 4.<sup>[2]</sup> He submitted in support of his objection a complaint-affidavit signed by 63 voters who allegedly were not able to cast their votes during the election.<sup>[3]</sup> In that barangay, which he claimed is his bailiwick, petitioner obtained 11 votes, while private respondent obtained 178, or 167 more votes than petitioner.

Despite petitioner's objection, the returns of Precinct No. 4 were included in the canvass. As the final tally stood, Tanog received 2,271 votes, while Balindong, 2,122 votes. Tanog led by 149 votes. On May 16, 1995, he was proclaimed mayor of Pualas, prompting petitioner to file a Petition to Suspend and/or Annul Proclamation and a Supplemental Petition.

In its resolution dated June 26, 1996, the Second Division of the COMELEC dismissed the Petition to Suspend/Annul Proclamation and the Supplemental Petition for lack of merit, ruling that the grounds relied upon by the petitioner were proper for an election protest rather than a pre-proclamation controversy. The ruling was affirmed, on reconsideration, by the COMELEC en banc.

The COMELEC en banc held that the transfer of the polling place of Precinct No. 4 was illegal because it was made only by agreement of the watchers of the candidates and the members of the Board of Election Inspectors, the District Officer of the DECS, the Municipal Treasurer and an Election Officer, without notice and hearing and in violation of the prohibition against transfers less than 45 days before a regular election, as provided in §§ 153-154 of the Omnibus Election Code (OEC). The COMELEC, therefore, ordered its Law Department to investigate the matter and determine the parties responsible for it.

The COMELEC held, however, that a failure of election could not be declared because for such a declaration to be proper under §6 of the OEC, two conditions must concur, namely, (1) that no voting has taken place in the precinct on the date fixed by law or, even if there was voting, the election results in a failure to elect; and (2) that the votes not cast would affect the result of the election.<sup>[4]</sup> The COMELEC ruled that neither of these conditions existed in the case at bar, because the election actually took place in Precinct No. 4 and, although it appeared that 66 voters were not able to vote, their votes, even if counted in petitioner's favor, could not overcome private respondent's margin of 149.

Hence, this petition for certiorari. Petitioner contends that the COMELEC gravely

abused its discretion in refusing to annul the results in Precinct No. 4 despite its finding that the transfer of the polling place was not in accordance with law and to order a technical examination of the signatures and thumbmarks in the List of Voters and in the Voters' Affidavits.

On March 19, 1996, we issued a temporary restraining order, ordering private respondent to cease and desist from exercising the duties and functions of the Office of the Mayor of Pualas, Lanao del Sur, until further orders from this Court. Upon further consideration of the petition, in light of the comments separately filed by respondents, it is now our opinion that petitioner's remedy is not to seek the annulment of private respondent's proclamation but, if at all, to file an election protest against private respondent.

*First.* The mere fact that the transfer of polling place was not made in accordance with law does not warrant a declaration of failure of election and the annulment of the proclamation of the winning candidate, unless the number of uncast votes will affect the result of the election. Thus, in *Co v. COMELEC*,<sup>[5]</sup> we upheld the transfer of polling places ordered by the Election Registrar four days before the election, allegedly because the teachers, who were members of the Board of Election Inspectors, were afraid of reported terrorists' plans to disrupt the elections in the affected areas. Only barangay captains in the areas were notified of the change. Despite claims that the transfer of polling place was illegal, because it was made in disregard of §§ 152, 153, and 154 of the OEC, and that it had resulted in the disfranchisement of 15,000 voters, we upheld the COMELEC in refusing to declare a failure of election, it appearing that the disfranchised voters were only 2,978 and represented only 22.6% of the entire electorate, and their votes would not affect the result of the election even if they were counted.

In the case at bar, although the COMELEC declared the transfer of the polling place to be illegal, the fact is that only 66, out of 255 registered voters in Precinct No. 4, were not able to vote. Assuming that all the 63 signatures on the affidavit<sup>[6]</sup> submitted by petitioner were authentic and that the 63 voters who signed the complaint-affidavit would have voted for petitioner, their votes would increase petitioner's 2,122 votes to 2,185 only, which is still less than private respondent's total of 2,271 votes. The additional votes would not have materially affected the results of the election so as to warrant a declaration of failure of election.

*Second.* It is contended that if a technical examination of the List of Voters and the Voters' Affidavits had been ordered, the COMELEC would have discovered massive substitute voting which would convince it that indeed the election return from Precinct No. 4 is "obviously manufactured" within the meaning of §243(c) of the OEC. This contention is without merit. As we recently ruled in *Loong v. COMELEC*,<sup>[7]</sup> "as long as the returns appear to be authentic and duly accomplished on their face, the Board of Canvassers cannot look beyond or behind them to verify allegations of irregularities in the casting or the counting of the votes. Corollarily, technical examination of voting paraphernalia involving analysis and comparison of voters' signatures and thumbprints thereon is prohibited in pre-proclamation cases which are mandated by law to be expeditiously resolved without involving evidence aliunde and examination of voluminous documents which take up much time and cause delay in defeat of the public policy underlying the summary nature of pre-proclamation controversies." If the technical examination of the Voters' List and