

Court No. - 6

Case :- WRIT - C No. - 15569 of 2023

Petitioner :- Sanju

Respondent :- State Of U.P. And 5 Others

Counsel for Petitioner :- Shailendra Singh

Counsel for Respondent :- C.S.C,Chandra Bhushan Yadav,Diwakar Singh

Hon'ble Mrs. Manju Rani Chauhan,J.

1. List is revised. None appears on behalf of respondent no. 4. As per office report dated 25.10.2023, service upon respondent nos. 5 & 6 is sufficient, but no one has put in appearance on their behalf even in the revised call, as also learned counsel for the respondent no. 4 is not present. Learned Standing Counsel for the State is present.

2. On 16.05.2023 following order was passed by this Court:

“Heard Sri Shailendra Singh learned counsel for the petitioner and Sri V.K.Singh, learned senior counsel assisted by Sri Diwakar Singh, learned counsel for respondent no.4 and the learned standing counsel for the respondents.

Present writ petition has been filed against the order dated 15.4.2023 by which recounting of votes has been ordered.

Learned counsel for the petitioner submits that the petitioner was declared winning candidate in the election of Gram Panchayat, Amdariya therefore respondent no.4 filed an election petition with a prayer for recounting of votes which is covered under section 12-C of U.P. Panchayat Raj Act. In support thereof he relief upon paragraph nos. 8,9 and 10 of the judgment of this Court in Sushil Kumar vs. State of U.P. (2019 (144) RD 737). He further submits that winning of the petitioner by one vote is not a good ground for passing the impugned order for recounting.

Rebutting the said submission learned counsel for the respondent no.4 submits that impugned order for recounting has rightly been passed on the grounds mentioned in paragraphs 10 and 11 of the election petition, which is annexed as Annexure 1 to the writ petition.

Matter requires consideration.

Issue notice.

Notices on behalf of respondent nos. 1,2 and 3 have been accepted by the office of the learned chief standing counsel. Sri Diwakar Singh has accepted notice on behalf of respondent no.4. Let notice be issued to

respondent nos 5 and 6 by registered post returnable at an early date. Steps be taken within two weeks.

The respondents are directed to file counter affidavit within six weeks. Rejoinder affidavit, if any, be filed within two weeks thereafter.

List as fresh on 12.7.2023.

In the meantime recounting may be done as directed by the impugned order but result shall be kept in sealed cover with the District Magistrate concerned. The result of the recounting of votes shall not be declared till the next date of listing.”

3. On 26.10.2023 this Court passed the following order:

“List revised. None appears on behalf of learned counsel for the respondents. Learned Standing Counsel is present.

By the order dated 16.05.2023, recounting of votes was to be done, however, the result of recounting of votes was not to be declared till the next date of listing.

Learned Standing Counsel submits that recounting of votes has been done.

Let the result of recounting of votes, which is in "sealed envelope", be placed before this Court by 06.11.2023.

Put up as fresh on 06.11.2023.”

4. In compliance of the aforesaid order dated 26.10.2023, a sealed envelop has been placed and opened before the Court. Keeping a photocopy of the same, on the record, the envelop is returned to Sri Shyam Singh, learned Standing Counsel.

5. Heard Sri Abhishek Singh, learned Advocate holding brief of Sri Shailendra Singh, learned counsel for the petitioner, Sri Shyam Singh, learned Standing Counsel for the State, and perused the record.

6. The instant writ petition has been filed by the petitioner with a prayer to quash an order dated 15.04.2023 passed by respondent no. 3 vide which an order directing recounting has been passed.

7. Brief facts of the case are that the elections of Gram Panchayat Amdariya, District Ballia were held on 02.05.2021, wherein the petitioner was declared elected. The defeated candidate, i.e., respondent

no. 4, namely, Kalawati filed an election petition mainly on the following grounds which are in three folds:

- (i) Two invalid votes of the petitioner were treated as valid and, therefore, she was shown to have secured 668 votes;
- (ii) One valid vote of the election petitioner, i.e., respondent no. 4, namely, Kalawati was declared invalid and she was shown to have secured 667 votes and,
- (iii) The electoral list was said to be defective as in the said list, 61 voters were minor and some names of persons who have already died, were shown.

8. A written statement was filed by the petitioner rebutting all allegations as made in the election petition. After analysing case of the petitioner, averments as made by the election petitioner and the rebuttal as done by the petitioner by filing written statement, the Presiding Officer framed six issues and has decided to pass the order dated 15.04.2023 directing for recounting, which is under challenge in the present writ petition.

9. Learned counsel for the petitioner submits that the court would be justified in ordering recounting of ballot papers only where the election petition contains an adequate statement of material facts on which the allegations of irregularity or illegality in counting are found, and if on the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting and if the court trying the petition is prima facie satisfied then making of such an order will imperatively be necessary to decide the dispute and to do complete and effectual justice between the parties. In support of his submissions, learned counsel for the petitioner

has relied upon a judgement of the Supreme Court in the case of **Mahendra Pal v. Shri Ram Dass Malanger & Ors**¹.

10. Learned counsel for the petitioner next contends that an order for inspection of ballot papers cannot be granted to support vague pleas, not supported by material facts or to fish out evidence to support such pleas. The case must be set out with some provisions supported by averments of material facts and mere allegation that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection. Reference has been made in this regard to a judgement of Full Bench of this Court in the case of **Ram Adhar Singh v. District Judge**².

11. Learned counsel for the petitioner further submits that allegations which have been made, must not only be clearly made but also be proved by cogent evidence and the narrow margin of votes undoubtedly, is an important factor to be considered, but the same would not by itself vitiate the counting or justify recounting. In support of his submission, he has placed reliance on a judgement of this Court in the case of **Surendra Singh v. State of U.P. and others**³.

12. Thus, such an election petition with vague and indefinite allegations, without there being any basis to prove the aforesaid situation, cannot be entertained and the order directing for recounting is liable to be aside.

13. It is settled position of law that an election petition cannot be filed on the ground of defective electoral list as finalized after the elections have already been held on the basis of final electoral roll.

14. Learned counsel for the respondents, on the other hand, submits that the entire allegations as made in the election petition were duly

1 (2002) 3 SCC 457

2 Civil Misc. Writ Petition No. 11079 of 1983

3 Civil Misc. Writ Petition No. 3701 of 2011, Decided on 24.01.2011

proved and supported by evidence and the order of Tribunal consequently does not suffer from any error of law.

15. I have heard learned counsel for the parties and perused the record.

16. The position of law regarding the issue of recounting of votes has been crystalized in a catena of cases by the Supreme Court starting from **Bhabi Vs. Sheo Govind and others**⁴, in which, the Supreme Court held:

"(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;

(2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be Supported by adequate statements of material facts;

(3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount ;

(4) That the Court must come to the conclusion that in order grant prayer for inspection it is necessary and imperative to do full justice between the parties;

(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and

(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials."

17. A Full Bench of this Court in **Ram Adhar Singh v. District Judge, Ghazipur and others**⁵, has held that the authorities while hearing the election petition under the provision of U.P. Panchayat Raj Act, 1947 can be permitted to look into or can direct the inspection of the ballot papers only upon the existence of two conditions, namely;

"1. that the petition for setting aside an election contains the grounds on which the election of the respondent is being questioned as also the

4 AIR 1975 SC 2117

5 1986 (2) RD 151 (FB)

summary of the circumstances alleged to justify the election being questioned on such ground; and

2. the authority is, *prima facie*, satisfied on the basis of the materials produced before it that there is ground for believing the existence of such ground and that making of such an inspection is imperatively necessary for deciding the dispute and for doing complete justice between the parties."

18. In the case of **Ram Sewak v. H.K. Kidwai**⁶, the Supreme Court held in Paragraph No. 7 as follows:

"6. An order for inspection may not be granted as a matter of course : having regard to the insistence upon the secrecy of the ballot papers, the court would be justified in granting an order for inspection provided two conditions are fulfilled:

(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and

(ii) the Tribunal is *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary.

But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection."

19. Thus the proposition with respect to inspection has been repeated in a catena of decisions of this Court as well as Supreme Court, namely, that inspection of ballot papers and counterfoil should be allowed very sparingly and only when it is absolutely essential to determine the issue and the Court should not exercise the power of directing for recounting in such a way so as to enable the election petitioner to indulge in a roving enquiry with a view to fish out material for declaring the election to be void.

20. In the present case there are vague allegations with respect to invalid votes of the petitioner being treated as valid as the same has not

6 AIR 1964 SC 1249

been supported by any evidence and there is no basis to show or prove the aforesaid fact. The other ground as taken in the present case by the election petitioner is of one valid vote of election petitioner being declared invalid which also has no legs to stand.

21. As regards the third ground in the election petition regarding defective electoral role, on the basis of which the election should be declared void, the same cannot be challenged in an election petition.

22. In a Full Bench decision of Allahabad High Court in the case of **Ghulam Mohiuddin v. Election Tribunal for Town Area Sakit**⁷, it has been held that after the electoral rolls have been finalized, the voting of a person whose name is on the electoral list, cannot be challenged as being void on the ground that he is minor and the same cannot be tried as an issue by an Election Tribunal in an election petition. Thus, a person enrolled in the electoral list by an authority empowered by law to prepare an electoral list, to include the name, is entitled to cast a vote unless he is disqualified and the election petition cannot be entertained on the ground of defective electoral roll as taken by the petitioner in the present case.

23. In the case of **Kunwar Nripendra Bahadur Singh v. Jai Ram Verma and others**⁸, it has been held that finality of electoral roll can be challenged in the election petition, if certain irregularities had taken place in preparation of electoral roll or if subsequent disqualification had taken place and the electoral roll had on that score not been corrected before the last hours of making nominations.

24. In the case of **Chandrika Prasad Yadav v. State of Bihar and others**⁹, an order of recounting of votes can be passed when following conditions are fulfilled:

7 AIR 1959 All 357 : 1959 All LJ 169 (FB)

8 (1977) 4 SCC 153

9 (2004) 6 SCC 331

- (i) a prima facie case;
- (ii) pleading of material facts stating irregularities in counting of votes;
- (iii) a roving and fishing inquiry shall not be made while directing re-counting of votes; and
- (iv) an objection to the said effect has been taken recourse to.

25. In the case of **Shyamdeo Pd. Singh v. Nawal Koshore Yadav**¹⁰, it has been held that defective electoral list cannot be a criteria for setting aside an election of a returned candidate. The similar view has been taken in the case of **Laxmi Kant Bajpai v. Haji and others**¹¹, wherein the Apex Court has gone to the extent of deciding the same that once the final electoral rolls are published and elections are held on the basis of such electoral rolls, it is not open to anyone to challenge the election from any constituency on the ground that the electoral rolls are defective.

26. In the case of **Wapansao v. N.L. Odyuo and others**¹², the Apex Court has again held that the finality of electoral roll cannot be challenged in the election petition.

27. Thus, once final electoral rolls are published and elections are held on the basis of such electoral roll which is not open to be challenged by anyone in an election petition on the ground that the electoral roll was defective as names of minors or dead persons have been included as in the present case. This precedent has been held by the Apex Court in the case of **Indrajit Barua and others etc. v. Election Commission of India and others**¹³.

28. It is a settled law that order of recounting cannot be passed only for the sake of it and on the basis of vague allegation, without specifying any particular irregularity in counting as well as, how it

¹⁰ (2000) 8 SCC 46

¹¹ (2010) 4 SCC 81

¹² AIR 1971 SC 2123

¹³ AIR 1986 SC 103

would affect election result materially. In the present case, in the body of election petition, vague assertions have been made regarding difference of votes, which are not substantiated by any means or otherwise on the basis of record available. Parties have to take proper pleadings by adducing evidence that by this particular irregularity or illegality, result of election has been materially affected. There is no dispute to the settled legal proposition that as a rule, relief not founded in pleadings should not be granted.

29. In the present case, the result of recounting as directed by the interim order of this Court (shown in the result produced in a sealed envelop opened by this Court) shows that the petitioner Sanju has secured 668 votes whereas Kalawati has secured 665 votes, therefore, as per the final result declared the petitioner is a winning candidate.

30. In view of the facts of the case in hand and settled proposition of law, this Court finds that the order impugned dated 15.04.2023 suffers from illegality as there is neither any justification nor prima facie satisfaction has been recorded by the Presiding Officer prior to passing the order directing for recounting of votes, thus, impugned order cannot be sustained and is hereby quashed. The election petition is directed to be decided expeditiously, preferably, within a period of three months from the date of production of a certified copy of this order.

31. The writ petition stands allowed accordingly.

32. No order as to costs.

Order Date :- 28.11.2023

DS

(Justice Manju Rani Chauhan)