

RESERVED:21.11.2023

DELIVERED:30.11.2023

Neutral Citation No. - 2023:AHC:225757

Court No. - 6

Case :- WRIT - C No. - 39462 of 2023

Petitioner :- Vindrawati Devi

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

Counsel for Petitioner :- Kamal Kishor Mishra,Ashok Kumar Tiwari,Sharad Rastogi

Counsel for Respondent :- C.S.C.,Ajay Singh,Atmaram Nadiwal,Dinesh Kumar Yadav

Hon'ble Mrs. Manju Rani Chauhan,J.

1. Heard Mr. Krishna Raj Singh along with Mr. Ashok Kumar Tiwari, learned counsel for the petitioner, Mr. Dinesh Kumar Yadav, learned counsel for respondent no.3 and Mr. Ravindra Kumar Tripathi, learned Standing Counsel for the State.

2. The writ petition has been filed challenging the order dated 26.10.2023 passed by Prescribed Authority, Sub-District Magistrate, Gorakhpur Mandal, District Maharajganj, in Suit No.05008 of 2021 whereby the order dated directing of recounting of votes has been passed.

3. Brief facts of the case are; the petitioner contested elections of Gram Pradhan in Gram Sabha Ahirauli, Post-Gaura Dubey, Vikas Khand Ghughli, Tehsil Sadar, District Maharajganj, which were held in the year 2021. The petitioner was declared elected by the Election Officer. Respondent no.3 lost the elections by one vote as he secured 596 votes whereas the petitioner secured 597 votes. Challenging the aforesaid elections on several grounds, respondent no.3 filed election petition under Section 12 (C) of U.P. Panchayat Raj Act, 1947, stating therein that on 19.04.2021 after completion of polling, the Presiding Officer (Peethasin Adhikari) prepared a report on

the information which was given by the agents of the election petitioner, which is as follows:-

बूथ से	वार्ड सं०	कुल मत	पोल हुआ मत
270	1,2,3	641	416
271	4,5,6	743	548
272	7,8,9	612	466
273	10,11,12	473	348
269	13,14,15	641	468
योग -5	15	3109	2246

Accordingly, out of total 3109 votes only 2246 votes were cast.

4. After recounting, total votes cast in favour of the petitioner was shown to be 597 and that secured by respondent no.3 were 596 and thus the petitioner was declared elected by margin of one vote. The data as prepared by the Election Officer showed that 100 invalid votes were cast, thus, according to the data as placed by the Election Officer total valid votes cast were 2238, invalid votes were 109, which totals to 2347 votes, thus, there is difference of 101 votes from total votes cast on the date of polling and that on the date of recounting. The aforesaid objection was raised by the election-petitioner but no attention was paid by the Election Officer.

5. Another ground taken in the election petition is that the valid votes cast in favour of the election petitioner were deliberately declared invalid in order to give benefit to the petitioner, as a result, the respondent no.3 lost the elections by margin of one vote.

6. The petitioner filed written statement/objection wherein he has denied averments as made by the election petitioner.

7. 13.12.2022 was the date fixed for the parties to produce evidence. The parties could not produce any evidence on the said date, therefore, after hearing the counsel for the parties, the order impugned dated 26.10.2023 has been passed, which is under challenge in the present writ petition.

8. Learned counsel for the petitioner submits that only on the basis of vague allegations regarding difference of 101 votes, without there being any evidence, and just believing on the assertion as made by the election petitioner, the order impugned directing for recounting of votes has been passed, which cannot be done in view of the settled position of law.

9. He further submits that it is well settled in catena of decisions of this Court as well as the Apex Court that the secrecy of ballot has to be maintained and order of recount cannot be passed as a matter of choice of the parties and it requires a very critical analysis of the material placed and in accordance with the procedure prescribed for deciding election disputes.

10. 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 of this Court in the case of **Surendra Singh v. State of U.P. and others**.

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

12. Learned counsel for the respondents, on the other hand, contended that the entire assertion made by the election-petitioner was duly proved and supported by evidence and the order of tribunal consequently did not suffer from any error of law.

13. Heard learned counsel for the parties.

14. The question of recounting of votes the position of law has been crystalized in a catena of cases by the Supreme Court starting from **Bhabi Vs. Sheo Govind and others AIR 1975 SC 2117** 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."

A Full Bench of this Court in **Ram Adhar Singh v. District Judge, Ghazipur and others, 1986 (2) RD 151 (FB)** held that the authorities while hearing the election petition under the provision of U.P. Panchayat Raj Act 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 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."

15. In the light of aforesaid decisions, the right of a defeated candidate to assail the validity of an election result and seek recounting of the votes is subject to the basic principle that the secrecy of the ballot is sacrosanct unless the defeated candidate alleges and is able to substantiate by means of evidence that a prima facie case of a high degree exists for the recounting of the votes. The solitary rule is, that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be broken unless there is a prima facie case and that a genuine case is made out. The justification for an order or re-examination of ballot papers and recounting of the votes is not to be arrived at from hindsight or by the result of the recount of the votes. The justification for recounting of the votes must be made out from the material available on the record.

16. The order of recount of votes must stand or fall on the nature of averments made and evidence adduced before the order of recount was made and not from the results emanating from recounting. The aforesaid has been held in the case of **P. K. K. Shamsudeen vs. K.A.M. Mappillai Mohindeen And Others, (1989) 1 Supreme Court Cases 526.**, relevant paragraphs of the aforesaid judgement as 13, 14 and 15 are reproduced herein below:-

"13. Thus the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from high sight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election petitioner on the threshold before an order for recount of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a

prima facie case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or court should not order the recount of votes.

14. Viewed in the light of these well enunciated principles, we find that the petitioner has neither made such averments in the petition nor adduced evidence of such a compulsive nature as could have made the Tribunal reach a prima facie satisfaction that there was adequate justification for the secrecy of ballot being breached in the petitioner's case. Factors urged before us by Mr. Padamanabhan such as that the first respondent had accepted the correctness of the recount, and that he had conceded his defeat and wanted a re-election to be held cannot constitute justifying materials in law for the initial order of recount of votes made by the Tribunal.

15. Mr. Padamanabhan also contended that the purpose and object of the election law is to ensure that only that person should represent the constituency who is chosen by the majority of the electors and that is the essence of PG NO 958 democratic process, and this position has been observed by a Bench of this Court in their order of reference of the case of N. Gopal Reddy v. Bonala Krishnamurty & Ors., CA No.3730(NCE) of 1986 reported in JT 1987(1) SC-406 and hence it would be a travesty of justice and opposed to all democratic canons to allow the first respondent to continue to hold the post of the President of the Panchayat when the recount disclosed that he had secured 28 votes less than the petitioner. We are unable to sustain this contention because as we have stated earlier an order of recount of votes must stand or fall on the nature of the averments made and the evidence adduced before the order of recount is made and not from the results emanating from the recount of votes.”

17. The main ground taken by learned counsel for the election-petitioner i.e. respondent no.3 is the difference of 101 votes and that the election-petitioner has lost the election by margin of one vote but the basis of such allegations has not been disclosed.

18. In the case of **Chandrika Prasad Yadav v. State of Bihar and others**, (2004) 6 SCC 331, an order of recounting of votes can be passed when following conditions are fulfilled:

“(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.”

19. It is settled 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 would affect election result materially. In the present case, in the body of election petition, vague assertions have been made regarding difference of 101 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 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.

20. This Court finds that the impugned order dated 26.10.2023 suffers from illegality as there is no justification or prima facie satisfaction recorded by Presiding Officer prior to passing the order directing for recounting of votes, thus, impugned order cannot be sustained and is **quashed**.

21. The Election Tribunal is directed to decide election petition within three months, from the date of production of certified copy of this order, in accordance with the provisions of relevant Act and Rules, without granting any unnecessary adjournment to either of the parties.

22. The writ petition stands **allowed** accordingly.

Order Date :-30.11.2023

Rahul.