

Judgement Reserved on 7.2.2023

Delivered on 9.2.2023

Court No. - 34

Case :- WRIT - C No. - 4417 of 2023

Petitioner :- Sonmati

Respondent :- State Of U.P. And 4 Others

Counsel for Petitioner :- Vivek Prasad Mathur, Sr. Advocate

Counsel for Respondent :- C.S.C., Ganesh Kumar, Ghazanfar
Abbas, Vivek Saran

Hon'ble Saurabh Shyam Shamshery, J.

1. Heard Sri Vinay Kumar Khare, learned Senior Counsel assisted by Sri Vivek Prasad Mathur, learned counsel for petitioner and Sri Vivek Saran, learned counsel for respondents.

2. The heading of impugned order (Antarim Aadesh), whereby order for recounting was passed and election petition was kept for final decision, therefore, it being an interlocutory order, same could be challenged by way of filing a Writ Petition under Article 226 of the Constitution of India, therefore, preliminary objection that impugned order ought to have been challenged by way of filing a revision petition is hereby rejected. (See **Mohd. Mustafa Vs. Up Ziladhikari, Phoolpur, Azamgarh & Ors, 2007 (6) AWC 5536**, wherein the question referred was answered by the Full Bench that "*A revision under Section 12-C(6) of the Act shall lie only against a final order passed by the Prescribed Authority deciding the election application preferred under Section 12-C(1) and not*

against any interlocutory order or order of recount of votes by the Prescribed Authority.”)

3. Learned Senior Counsel appearing on behalf of petitioner has submitted that:

(a) Petitioner is a returned candidate (Gram Pradhan) who has secured 672 votes whereas respondent no.5 (Election Petitioner) remained as runner up with 668 votes.

(b) Respondent no.5 has filed an Election Petition which was lacking with material facts and particulars regarding allegations of illegal acceptance and illegal rejection of ballot papers during counting.

(c) There was no documentary proof that election petitioner has made any complaint regarding irregularities during counting before the Election Officer.

(d) Election Tribunal without considering that it cannot conduct a roving inquiry has further erred in taking few sentences from the cross-examination of representative of the petitioner to conclude that allegation that few votes were illegally rejected was admitted.

(e) Learned Senior Counsel has placed reliance on a judgment of Supreme Court in ***Bhabhi Vs. Sheo Govind & Ors, AIR 1975 Supreme Court 2117***, wherein it has been held that “*The Court would be justified in ordering a recount of the ballot papers, only where :*

“(1) the election-petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded;

(2) 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

(3) The Court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties."

4. Per contra, learned counsel for respondents has submitted that:

(a) Election Petition has material particulars in regard to illegal rejection of ballot papers and has referred paragraph (5) of election petition wherein it has also been mentioned that:

"मतदान कर्मियों द्वारा मतगणना करते समय मतपत्रों को अलग-अलग चुनाव निशान पर रख कर मतपत्रों को गड्डी बना रहे थे उस समय मतगणना कर्मियों द्वारा प्रतिवादी संख्या-1 के चुनाव चिन्ह पर केवल अंगूठा लगा था जिस पर मोहर नहीं लगी थी ऐसे मत पत्र को भी बैधमानकर प्रतिउत्तरदाता संख्या-1 के गड्डी ने रखकर गणना किया गया तथा याची के पक्ष में कुछ मत पत्र इस आधार पर अवैध कर दिया गया कि अंगूठे का निशान एवं मोहर दोनों लगे हैं। जिसे अवैध मतों की गड्डी में रखकर गणना किया। इस आधार पर मतगणना कर्मियों द्वारा नियमों का उलंघन करते हुए प्रतिवादी संख्या-1 को 4 मतों से विजयी घोषित कर दिया। याची के अभिकर्ता जब मतदान कर्मियों एवं प्रतिउत्तरदाता द्वितीयपक्ष से पुर्न मतगणना कराये जाने हेतु इस आधार पर अनुनय विनय किया कि प्रार्थी के पक्ष में पड़े हुये कुछ मत जिस पर अंगूठा एवं मोहर दोनों थे उसे मतगणना कर्मियों द्वारा जानबूझकर अवैध करार कर दिया है। और प्रतिउत्तरदाता संख्या-1 के चुनाव निशान पर अंगूठा लगे हुए मत को जिस पर मोहर नहीं लगा था उसे बैध मानकर प्रतिउत्तरदाता संख्या 1 के गड्डी में रखकर गणना किये हैं।"

(b) A complaint was made on behalf of election petitioner at the time of counting before election officer, but neither it was taken on record nor any cognizance was taken.

(c) In cross-examination, representative of petitioner (elected candidate) has specifically admitted that few ballot papers were illegally rejected, therefore, considering that margin of victory was only of four votes, Election Tribunal has rightly directed for recounting.

(d) Learned counsel for respondents further submitted that since on the basis of evidence adduced, allegations of irregularity in counting was prima-facie established which afforded a good ground for believing that there was a mistake in counting, as such there was no error in the order of recounting.

5. Heard learned counsel for parties and perused the record.

6. Before considering rival submissions, few paragraphs of a judgment passed by this Court in **Writ-C No.294 of 2023, Smt. Sajida Vs. Sub Divisional Magistrate Kairana District Shamli/Prescribed Authority and 15 Ors, decided on 11.1.2023** would be apposite to mention and relevant paragraphs are 12, 15 and 16 states as follows:

" 12. It is well settled that it is important to maintain secrecy of ballot which is sacrosanct and it should not be allowed to be violated on frivolous, vague and indefinite allegations and before inspection is allowed, the allegations made against elected candidate must be clear and specific and must be supported by adequate statements of material facts (See, Bhabhi vs. Sheo Govind and others, AIR 1975 SC 2217 and

Ram Sewak Yadav vs. Hussain Kamil Kidwai and others, AIR 1964 SC 1249). The discretion conferred on Courts should be not exercised in such a way so as to enable election petitioner to indulge in a roving enquiry in order to fish out materials for declaring election to be void.

13.x x x

14.x x x

15. I have carefully perused the statements of witnesses recorded before Sub-Divisional Magistrate. Petitioner has not mentioned in categorical terms that she raised any objection during counting including the prayer to recount on specific ground and that her husband was not present at counting centre though in later part of cross-examination she referred about complaint that her polling agent has communicated her that some votes were wrongly rejected. Therefore, there is no specific averment with regard to number of votes which have been declared wrongly invalid and could materially affected the election. In this regard following paragraph of judgment passed by Supreme Court in M.R. Gopalakrishnan (supra) would be relevant:

"20. We now come to the third ground advanced by the learned counsel for the appellant that invalid votes were counted in favour of the returned candidate respondent No. 1 and that out of the total rejected votes of 1375, quite a large number of valid votes in favour of the appellant were rejected, which materially affected the result of the election. Learned counsel for the respondent submitted that the appellant has not set forth the concise statement of material

fact with regard to the allegation of counting invalid votes in favour of the respondent No. 1 nor has given any particulars of such invalid votes which are alleged to have been counted in favour of respondent No. 1 He also submitted that similarly there are no particulars with regard to the rejection of valid votes in favour of the appellant nor number of such votes in order to support the allegation that such rejection of valid votes in favour of the appellant materially affected the result of the election. In our opinion there is no substance in these submissions made by the learned counsel for the appellant. In fact the appellant has neither pleaded the details and the number of such invalid votes which were counted in favour of respondent No. 1 nor has given the particulars of the number of such valid votes in favour of die, appellant which were wrongfully rejected during the course of counting. This apart, the Returning Officer, Supervisors and other officials were also present in the counting hall throughout the process of counting and the observers also visited the counting hall, but neither the appellant nor any of his counting agents pointed out or objected either orally or in writing that invalid votes were counted in favour of the respondent No. 1 or valid votes in favour of the appellant were rejected. The evidence of the Returning Officer, PW 16 clearly goes to show that no such complaint was made by any one during the course of counting. In these facts and circumstances it is difficult to accept the allegations made by the appellant which seem to be only an after thought and without any evidence or material to support the same."

16. 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 illegal rejection of valid votes which are not substantiated either in examination of election petitioner or otherwise on the basis of record available. Parties have to take proper pleadings by adducing evidence that by particular irregularity of 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 [See, Arikala Narasa Reddy (supra)].”

7. In order to consider whether election petition has material particulars to make out a case of recounting, I have carefully perused contents of election petition, relevant portion has already been referred in preceding paragraph.

8. In the end of election petition, election petitioner has declared that contents of para nos. 1 to 7 were based on her personal knowledge, however, in her evidence by way of an affidavit (examination-in chief) in paragraph 3 she has declared that election petition was filed on basis of instructions given by her husband, therefore, declaration made in the election petition that averments made there in were based on her personal knowledge are contrary, therefore, the very basis of allegations made therein cannot be considered to be material particulars for the purpose of considering prayer for recounting.

9. There is other aspect of the case which requires consideration that petitioner i.e. returned candidate in paragraph 6 of written statement has specifically mentioned that on the request of election petitioner, recounting was done, ballot papers were recounted, but result remained the same and no further complaint was made by election petitioner. This averment was repeated in examination-in-chief as well as it was repeated in affidavit of husband of petitioner. However, in the entire impugned order, there is no whisper in this regard. Impugned judgment is based on alleged admission on behalf of representative of petitioner.

10. It is settled law that evidence has to be read in total and few sentence cannot be picked to suit in favour of either side. Case of the election petitioner has to stand on its own footing and as referred earlier, election petition is filed on the basis of instructions given by her husband, therefore, election petitioner has no personal knowledge about any irregularity. The entire basis of election petition becomes without any sufficient basis. Election Tribunal has considered the case in a way as it is conducting a roving inquiry which is impermissible and as held in **Sajida (supra)** that it is well settled that it is important to maintain secrecy of ballot which is sacrosanct and it should not be allowed to be violated on frivolous, vague and indefinite allegations and before inspection is allowed.

11. The election petitioner has failed to make out a clear and specific case for recounting and further it was not supported by any adequate statement, material facts as well as there was no evidence in support of allegations.

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12. In view of above discussions, impugned order dated 27.1.2023 suffers from illegality and is hereby set-aside and the writ petition is allowed.

Order Date :- 9.2.2023

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