

Judgment reserved on 03.01.2023
Judgment delivered on 28.01.2023

Court No. - 34

Case :- WRIT - C No. - 31255 of 2022

Petitioner :- Tekchand

Respondent :- State Of U.P. And 6 Others

Counsel for Petitioner :- Dinesh Kumar Singh

Counsel for Respondent :- C.S.C.,Dinesh Kumar,Yogendra Nath Shukla

Hon'ble Saurabh Shyam Shamshery,J.

1. Petitioner before this Court is returned candidate who has defeated respondent No.4 with a margin of five votes in a Panchayat Election whereas respondents No. 5, 6 and 7 were also participated in election. Respondent No.4 Rajbeer filed an election petition under Section 12-C of Uttar Pradesh Panchayat Raj Act, 1947 (for short “**Act, 1947**”). After pleadings were exchanged, Election Tribunal by a judgment and order dated 23.10.2021 rejected claim of election petitioner for recounting on ground that he was failed to make out a case for recounting as pleadings and evidence were not sufficient to pass an order for recounting.

2. Election petitioner being aggrieved filed a revision petition challenging above referred order and by impugned order dated 22.09.2022, the order passed by Prescribed Authority in election petition was set aside with a direction of recounting. The petitioner herein has challenged the above order.

3. Sri R.K. Ojha, learned Senior Advocate assisted by Sri Dinesh Kumar Singh for petitioner has vehemently urged that Revisional Court has upset order passed by Election Tribunal on a flimsy ground that an objection was taken by election

petitioner at the time of counting was not considered by Election Officer as well as other defeated candidates have supported the claim of election petitioner, without appreciating factors relevant for directing recounting of votes, i.e. (i) a prima facie case must be established, (ii) material facts must be pleaded stating irregularities in counting of votes, (iii) a roving and fishing inquiry shall not be directed by way of an order for recounting of votes, (iv) an objection to said effect should be raised, and (v) secrecy of ballot papers should be maintained.

4. Learned Senior Advocate in support of his above submissions has placed reliance upon judgments of Supreme Court in cases of **Sadhu Singh vs. Darshan Singh and another, (2006) 6 SCC 255**; **Udey Chand vs. Surat Singh and another, (2009) 10 SCC 170** and **Surendra Singh vs. State of U.P. and others, 2011 SCC OnLine All 2721**.

5. Per contra, Sri Rahul Sripat, learned Senior Advocate assisted by Sri Dinesh Kumar for respondent No.4 (election petitioner) has also vehemently urged that election petitioner has specifically pleaded about irregularities in counting of votes and that the votes cast in favour of election petitioner were wrongly rejected as well as the votes which ought to have been rejected were counted in favour of returned candidate. The witnesses have supported specific stand taken by election petitioner before Election Tribunal and that though margin of victory is not a sole ground to disturb secrecy of ballot papers but if a case is made out that due to irregularities in counting

number of rejected votes are much more than margin of victory, an order of recounting can be passed.

6. Learned Senior Advocate appearing for respondent No. 4 has placed reliance on **Chandeshwar Saw v. Brij Bhushan Prasad, (2020) 12 SCC 70** and **Smt. Harmaya vs. State of U.P. and 5 others, 2017 SCC OnLine All 3332**.

7. Heard learned counsel for parties and perused record.

8. Before advertng to rival submissions, following paragraphs of recent judgment of this Court in case of **Smt. Sajida vs. Sub Divisional Magistrate, Kairana, District Shamli and 15 others, 2023 SCC OnLine All 11** would be relevant which is mentioned hereinafter -:

“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 v. Sheo Govind*, [\(1976\) 1 SCC 687](#):[AIR 1975 SC 2117](#) and *Ram Sewak Yadav v. Hussain Kamil Kidwai*, [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.

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)].”

9. In factual and legal background, firstly, I have carefully perused contents of election petition filed under Section 12-C of U.P. Panchayat Raj Act, 1947 and averment in regard to recounting is mentioned in paragraphs 4, 5 and 6 which are mentioned hereinafter -:

“4. यह कि चुनाव सम्पन्न हो जाने के बाद दिनांक 02/05/2021 को मतगणना प्रारम्भ की गयी। प्रथम राउण्ड में याची को 133 मत प्राप्त हुये व जितेन्द्र को 61 मत प्राप्त हुये व जयपाल को 3 मत प्राप्त हुये व टेकचन्द को 94 मत प्राप्त थ यादराम को 1 मत प्राप्त हुआ व 51 मतपत्रों को गलत तौर से निरस्त किया गया एवं दूसरे राउण्ड में जितेन्द्र को 48 मतपत्र प्राप्त हुये व जयपाल को 1 मत प्राप्त हुआ व टेकचन्द को 285 मतपत्र प्राप्त हुये दर्शाये गये व यादराम को कोई मतपत्र प्राप्त नहीं हुआ व याची को 243 मतपत्र प्राप्त हुये है 34 मतों को कैंसिल दर्शाया गया। इस प्रकार ग्राम मझोई बांगर के प्रधान की मतगणना में प्रथम राउण्ड में 341 व द्वितीय राउण्ड में 611 टोटल 952 वोटों की गिनती की गयी।

5-यह कि याची द्वारा चुनाव की साजिश की बाबत सभी अधिकारियों का अवगत कराया गया व गड़ड़ियों के बारे व निरस्त मतों की बाबत सही तरीके से पुनः मतगणना कराये जाने हेतु अवगत किया गया। परन्तु मतगणना अधिकारी कोई बात सुनने को तैयार नहीं हुये तथा यह कहकर तथा फटकारकर चुप कर दिया गया कि तुम्हे कोई परेशानी हो तो याचिका दायर कर देना।

6- यह कि मतगणना में विपक्षी सं० 1 के द्वारा मतगणना अधिकारियों से साजिश द षडयंत्र से मतपत्रों की जो गड्डी बनायी गयी थी उक्त गड्डियों का कम या ज्यादा के आधार पर तैयार किया गया व अलावा इसके मतपत्रों की गिनती के दौरान याची के पक्ष में पड़े सही मतपत्रों का निरस्त कर दिया गया व विपक्षी सं० 1 के निरस्त मतपत्रों को सही मान लिया गया। उक्त मतगणना के दौरान जब याची के एजेन्द्र द्वारा इस प्रकार मतगणना अधिकारी को गलत गड्डी बनाने व निरस्त मतपत्रों का सही आकलन न करने की बात कहा गया तो मतगणना अधिकारी द्वारा याची को डाट फटकारकर चुप करा दिया गया तथा यह कह दिया गया यदि तुम्हें आपत्ति है तो याचिका दायर कर देना।”

10. In written statement, returned candidate/petitioner herein has denied above referred averments with a specific assertion that no document was placed in support of contention that any objection was raised during counting by election petitioner.

11. I have carefully perused statement of witnesses recorded by Election Tribunal.

12. Rajbeer, election petitioner has stated in his statement that he has no knowledge about number of votes polled in favour of each candidate as well as number of votes cancelled. He was not present at the time of counting and averments in election petition were based on instructions given by her agent whereas declaration made in election petition is contrary that averments made in election petition were based on his knowledge as well as on legal advice.

13. Respondent No.2 Lokmani who was agent of election petitioner has stated that written complaint made by him was not received, however, nothing has come on record that there

were material irregularities in recounting or averments made in election petition were true.

14. Election Tribunal has considered entire material on record and found that essential requirement for recounting that there must be a case that irregularity was committed in counting should not be based on a vague allegation. In revision petition, Revisional Authority though noted law on recounting in paragraph 15 of impugned order, however, only on ground that, complain during counting was not noted, number of votes rejected were much more than winning margin and only in order to give confidence to voters, impugned order was passed. Relevant part of impugned order is mentioned hereinafter -:

“इस प्रस्तुत मामले में याचिका में यह स्पष्ट अभिवचन है कि मतपत्रों को निरस्त करने में अनियमितता बरती गयी है। इस अभिवचन के समर्थन में मतगणना के समय उपस्थित याची के एजेंट का साक्ष्य है और मतगणना के समय विरोध दर्ज कराने और विरोध के बाद भी तत्समय पुनः मतगणना न करने तथा पुलिस का भय दिखाने के साक्ष्य के प्रति विपक्षी के एजेंट की पुष्टिकारक प्रतिपरीक्षा भी है। उपरोक्त स्थिति व बहुत कम अन्तर से जीत होना। तथा जीत के अन्तर के सापेक्ष कई गना मतों का निरस्त होना, निरस्त मतों के निरीक्षण की बावत अधिकारी की प्रथम दृष्टया संतुष्टि के लिए पर्याप्त है। मुख्य आरोप निरस्त मतों के गलत निरस्तीकरण से सम्बन्धित है, इसलिए निरस्त मतों का पुनः निरीक्षण और पुनः गणना मतदान की गोपनीयता को प्रभावित करने वाली नहीं है। ऐसा निरीक्षण और ऐसी गणना मतदान के प्रति विश्वसनीयता और न्याय के प्रति विश्वास के लिए आवश्यक है। मात्र निरस्त मतों का निरीक्षण और गणना याची को कोई ऐसा आधार उपलब्ध कराने में सक्षम प्रतीत नहीं हो रहा है कि वह पूरे चुनाव को ही शून्य घोषित कराने के लिए किसी साक्ष्य की खोज कर सके। निष्कर्षतः यह प्रस्तुत प्रकरण निरस्त मतों के निरीक्षण और पुनः गणना के लिए आवश्यक विधिक कसौटियों पर सफल साबित हो रहा है।”

15. Above referred finding are based only on a vague assertion that a written complaint was not accepted, however, there is no documentary proof to it, even it is deemed that written complaint was refused to be received, there must be material facts supported by evidence that irregularity was committed.

16. As discussed above, witnesses have no knowledge even about number of votes declared invalid and how it was wrongly declared invalid. Therefore, in absence of such specific assertion with a support in their evidence, as discussed above, Revisional Court has exercised its jurisdiction to recounting only on basis of roving inquiry without any substantial material supported by statements by election petitioner or her agent and has erred in disturbing the well reasoned order passed by Election Tribunal.

17. Accordingly, impugned order dated 22.09.2022 is set aside. Petition stands **allowed**.

Order Date :- January 28, 2023
Nirmal Sinha

[Saurabh Shyam Shamshery, J.]