

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.4206 of 2014

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Anil Kumar Rai S/o Shri Ambika Rai, resident of village- Baladeo Itari, P.O. + P.S.
Fullidumar, District-Banka

.... Petitioner/s

Versus

1. The State of Bihar represented through the Collector-cum-District Election Officer (Panchayat), Banka, District-Banka
2. The Returning Officer, Block Fullidumar, District- Banka
3. The Assistant Reutrnng Officer, Fulidumar, District- Banka
4. The Secretary, Bihar State Election Commission, Bihar, Patna
5. Gautam Prakash S/o Shri Jai Prakash Narain Rai, resident of village- Badlachak (Rata Panchayat), P.O. Dhankudia, P.S. Balhar, District-Banka
6. Kaili Devi W/o Shri Ranjay Manjhi, resident of Village-Ramchandra, P.S. + P.O. Fullidumar, District - Banka
7. Dilip Kumar S/o Parmanand Yadav, resident of village-Kaitha, P.S. Fullidumar, District- Banka
8. Madharana Randhir Maharana S/o Shri Rudreshwari Prasad Yadav, resident of Village- Takkipur, P.S. Fullidumar, District - Banka
9. Nistar Yadav S/o Shri Maheshwari Prasad Yadav, resident of Village - Kaitha, P.S. Fullidumar, District - Banka
10. Rajesh Yadav S/o Shri Devan Yadav, resident of Village-Kaitha, P.S. Fullidumar, District- Banka

.... Respondent/s

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Appearance:

For the Petitioner/s : Mr. Shri Prakash Srivastava, Advocate
Mr. Sanjay Kumar Jha, Advocate
Mr. Satyaveer, Advocate

For the Respondent/s : Mr. Kumar Kaushik, Advocate
For the S.E.C. Mr. Amit Shrivastava, Advocate
Mr. Girish Kumar Pandey, Advocate

For the State : Ms. Namrata Mishra, G.A.-13
Mr. Alok Ranjan, AC to G.A.-13

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
CAV JUDGMENT

Date: 29-01-2015

This writ petition under Article 226 of the Constitution of
India has been filed for issuance of a writ in the nature of certiorari for
quashing the judgment and order dated 30.1.2014 passed by Sub-

Judge, 1st -Banka in Election Petition No. 2 of 2011 (Gautam Prakash vs. The State of Bihar & Ors.) whereby the court below as an election tribunal has been pleased to order for recount of the votes.

Facts are in a very narrow compass. The petitioner and the respondent second set as well as the respondent third set filed their nominations for contesting the election as member of the Panchayat Samiti-Fullidumar in the District of Banka from the Kaitha Gram Panchayat. The election was held on 21.5.2011 and the counting was scheduled on 27.5.2011 in which the petitioner was declared as the returned candidate and a certificate was issued pursuant thereto. The respondent no. 5 filed an election dispute under Sections 137 and 139 of the Bihar Panchayat Raj Act, 2006 (hereinafter referred to as 'the Act') questioning the election of the petitioner as member of the Panchayat Samiti giving rise to Election Petition No. 2 of 2011 praying for recount of the votes in all the 11 booths within the Panchayat Samiti and for declaration of the petitioner as a returned candidate as well as to set aside the certificate issued in favour of the writ petitioner. The election petition was allowed vide judgment and order dated 30.1.2014 with direction to the official respondent first set to recount the votes of all the booths within the Kaitha Gram Panchayat under Fullidumar Block and if the petitioner was found to be a winning candidate then the certificate be issued in his favour after

cancelling the earlier certificate issued in favour of the writ petitioner.

The petitioner being aggrieved is before this Court.

Mr. Shri Prakash Srivastava has appeared on behalf of the petitioner, the State and the State Election Commission are represented by the respective counsel while the private respondent-cum-election petitioner is represented by Mr. Kumar Kaushik.

Mr. Shri Prakash Srivastava appearing on behalf of the petitioner has primarily questioned the judgment of the election tribunal on the following grounds:

(a) Rule 79 of the Bihar Panchayat Election Rules, 2006 (hereinafter referred to as 'the Rules') is mandatory and filing of an application before the Returning Officer is a condition precedent for maintaining an Election Case before the Tribunal by an aggrieved party. It is with reference to the provisions underlying Rule 79 submitted that sub-rule (1) requires the candidate or his agent to make a written application before the Returning Officer or the officer authorized by him / her for recounting the votes by stating the grounds on which the candidate prays for recount. It is submitted that such application can either be accepted or rejected by the Returning Officer and in either case he has to assign reasons for the same and if the application for recounting is allowed then he shall get the ballot papers recounted and amend the result accordingly, if required. He

submits that since no such application was filed by the election petitioner before the Returning Officer or the authorized officer under Rule 79(1) of the Rules hence the election petition itself was not maintainable.

In support of his submission learned counsel has relied upon a Bench decision of this Court reported in **2013(4) PLJR 533 (Ram Anandi Sahni vs. State of Bihar)**. With reference to paragraph-4 of the judgment he submits that the guiding factors under which an inspection of ballot recount can be ordered is taken note of in this paragraph and until the tribunal is satisfied with the grounds, he cannot direct for a roving enquiry. With reference to paragraph 20 to 22 of the judgment it is stated that the relevance of Rule 79 has been recognized as well as the principles for recount has been discussed and which are admittedly missing in the present case.

(b) Learned counsel has also questioned the judgment and order of the election tribunal on the ground that the election petition does not contain any pleadings or grounds on which the recount is prayed and even if paragraph-10 to 13 of the election petition placed at Annexure-1 to the writ petition is treated to be the grounds on which the election petitioner sought recount then also, in absence of any evidence led by the petitioner to support such pleadings, the direction for recount given by the election tribunal by the judgment

and order impugned, would amount to holding a roving enquiry which is impermissible in law.

The argument of Mr. Srivastava has been contested by learned counsel for the respondents but the main challenge is led by Mr. Kumar Kaushik appearing for the election petitioner. It was the argument of Mr. Kumar Kaushik that a non-filing of any application for recount before the Returning Officer would not ipso facto disentitle the aggrieved candidate from maintaining an election petition until such time that he is not able to support the prayer with reasonable grounds. He submits that a tribunal is not precluded to order for a recount simply on grounds that no such application was filed by the election petitioner before the Returning Officer as required under Rule 79 of the Rules.

Learned counsel for the petitioner in support of his submission has referred to the judgment of the Supreme Court rendered in the case of **Ramrati vs. Saroj** reported in (1997) 6 SCC page 66 to submit that although considering similar provisions in the Madhya Pradesh Panchayat Raj Act and the Rules framed thereunder, it was held that filing of an application for recounting before the Returning Officer was an essential pre-condition for maintaining an election petition before the tribunal but this opinion was over turned in the subsequent judgment of the Supreme Court reported in (2003) 1



SCC 108 (Sohan Lal vs. Babu Ganghi) and it was held that it would not be correct to hold that a tribunal cannot direct recounting of votes unless the party has first applied in writing for recounting of votes. Learned counsel has also referred to a judgment of the Supreme Court rendered in the case of **Chandrika Prasad Yadav vs. State of Bihar** reported in **2004(3) PLJR (SC) 133: (2004) 6 SCC 331** and with reference to paragraph 25 of the judgment he has submitted that the Supreme Court while examining the statutory provisions of the Bihar Panchayat Election Rules has held that a non-filing of an application before the Returning Officer would not preclude the election tribunal to go into the question of requirement of issuing a direction for recounting.

Learned counsel has next referred to a judgment of this Court reported in **2006(1) PLJR 91 (Shahabuddin vs. State)** and with reference to paragraph 10-12 of the judgment it was submitted that purity of election is an overriding aspect in every election and has precedence over the procedural requirement.

It is submitted that during the course of trial in the election petition the respondent had filed several duly stamped ballots which were cast in favour of the election petitioner but were not included in the recounting and which was sufficient to demonstrate the corrupt practices that had gone into the process of counting and it is in these

circumstances that the order of the tribunal has been passed which suffers from no infirmity. He thus submits that in the circumstances explained there was absolutely no error in the exercise of jurisdiction by the election tribunal in ordering the recount.

On the issue of lack of pleadings supporting recount, Mr. Kaushik has referred to a decision of the Supreme Court reported in **(1999) 2 SCC 217 (H.D. Revanna vs. G. Puttaswamy Gowda & Ors.)** and with reference to paragraph-24 to 27 of the judgment it was submitted that the pleadings in an election petition is not to be construed strictly and if the averments made are capable of being taken to its logical conclusion, the pleadings cannot be rejected on this count alone.

I have heard learned counsel for the parties and I have perused the materials on record. The two issues which fall for consideration in this case are as follows:

- (a) Whether Rule 79 is mandatory or directory & whether a filing of an application before the Returning Officer or the officer authorized by him, is a condition precedent to maintaining an election petition under Rule 137 of the Bihar Panchayat Raj Act, 2006 read with Rule 106 of the Rules; and
- (b) If Rule 79 is held to be directory then whether there were grounds available for the election

tribunal for directing recount.

Whereas it is the contention of Mr. Srivastava relying upon the judgment of Ram Anandi Sahni (supra) to submit that taking note of the judgment rendered in the case of Chandrika Prasad Yadav (supra), this Court has held the provision to be mandatory and that a filing of an application before the Returning Officer or officer authorized by him is a condition precedent to maintaining an election petition, the argument has been contested by Mr. Kaushik relying upon the judgment of Sohan Lal (supra) and Chandrika Prasad Yadav (supra).

It is a well settled legal maxim that a judgment is an authority on the issue which falls for consideration and not which logically flows therefrom. No doubt the judgment rendered in the Case of Ram Anandi Sahni (supra) emanates from a judgment and order of an election tribunal directing for recount of the votes and in which process the learned Judge has examined the settled principles under which such prayer can be allowed but the issue whether Rule 79 is mandatory or is a directory provision and whether a filing of an application accompanied with the grounds before the Returning Officer, is a condition precedent to maintain an election petition, was neither raised nor fell for adjudication before the Court. In fact paragraph-22 of the judgment reflects that it is the power of the



election observer to order for a recount which fell for consideration before the Bench and although while examining this issue the Court has referred to the cardinal principles for ordering a recount as well as the foundations on which an application can be made but the issue posed before this Court was not an issue for adjudication by the Bench. In the aforesaid view of the matter, the reliance by Mr. Srivastava on the bench decision of Ram Anandi Sahni (supra) to submit that Rule 79 is a mandatory provision stands concluded, is not correct.

On the contrary, this specific issue fell for consideration in the case of Chandrika Prasad Yadav (supra) when the Supreme Court while examining identical provisions as it existed under the Bihar Panchayat Election Rules, 1995 framed under the Bihar Panchayat Raj Act, 1993 and while upholding that the provisions of Rule 79 serves a salutary purpose yet kept the field open by observing that a mere non-filing of an application before the Returning Officer by itself would not preclude the election tribunal to go into the question of requirement of issuing a direction for recount. Paragraph-25 and 26 of the judgment would be relevant for consideration in the present case and which runs as under:

“25. Rule 79 as noticed hereinbefore enables a candidate to file an appropriate application for re-counting of votes. Rule 79 unlike rules framed by other States does



not say that such an application would not be maintainable after declaration of the votes polled by the parties or prior thereto. Such an application, therefore, can be filed at any point of time. The very fact that sub-rule (3) of Rule 79 provides for amendment of the result relating to the votes polled by the respective candidates and as such amended result is required to be announced in the prescribed form under sub-rule (2) of Rule 79, the same itself is a pointer to the fact that even after announcement of result an application for re-counting would be maintainable. It may be true that only because such an application had not been filed before the Returning Officer by itself may not preclude the Election Tribunal to go into the question of requirement of issuing a direction for re-counting but there cannot be any doubt whatsoever that Rule 79 serves a salutary purpose. Counting of ballot papers in terms of the rules takes place in presence of the candidate or his counting agent. When an agent or a counting agent or the candidate himself notices improper acceptance or rejection of the ballot papers, he may bring the same to the notice of the prescribed authority. As noticed hereinbefore, in a given case, an application for re-counting either before announcement of the result or thereafter, would be maintainable. Once an application is filed by an agent or a counting agent or the candidate himself pointing out the irregularities committed by the officers appointed for counting the ballot papers, immediate redressal of grievances would be possible.



As indicated hereinbefore, while filing such an application the basis for making a request for re-counting of votes is required to be disclosed. The Returning Officer is statutorily enjoined with a duty to entertain such an application, make an inquiry and pass an appropriate order in terms of sub-rule (2) of Rule 79 either accepting in whole or in part such requests or rejecting the same wherefor he is required to assign sufficient or cogent reasons. In the event such an application is allowed either in whole or part, he is statutorily empowered to amend the results also.”

“26*. Ordinarily, thus, it is expected that the statutory remedies provided for shall be availed of. If such an opportunity is not availed of by the election petitioner; he has to state the reasons therefor. If no sufficient explanation is furnished by the election petitioner as to why such statutory remedy was not availed of, the Election Tribunal may consider the same as one of the factors for accepting or rejecting the prayer for re-counting. An order of the prescribed authority passed in such application would render great assistance to the Election Tribunal in arriving at a decision as to whether a prima facie case for issuance of direction for re-counting has been made out.”

*Ed.: Para 26 corrected vide Corrigendum No. F.3/Ed.B.J./73/2004 dated 17-8-2004.

The position stands clarified by the Supreme Court with reference to the law then prevalent in the State of Bihar and which



legal position continues to subsist in the Statute Book even under the repealed enactment of the Bihar Panchayat Raj Act, 2006 and the election rules framed thereunder. It would thus not detain this Court any further to hold that the provisions of Rule 79 are neither mandatory nor a filing of an application before the Returning Officer, is a condition precedent for maintaining an election petition. However, this opinion is also accompanied with a rider and in such a situation twin obligation is cast on the election petitioner, namely(a) of explaining why he did not choose to exhaust the remedy so provided to him under Rule 79 of the Rules; and (b) the grounds raised by him in the election petition should be persuasive enough for the tribunal to uphold the prayer for recount and which direction should not be in the nature of a fishing enquiry. The law summarized by the Supreme Court in the case of **Bhabhi vs. Shiv Govind** reported in **AIR 1975 SC 2117** as to the circumstances in which a recount can be directed by an election tribunal stands discussed in paragraph-4 of the judgment rendered in the case of Ram Anandi Sahni (supra) which are as follows:

“4.

“Thus on a close and careful consideration of the various authorities of this Court from time to time it is manifest that the following conditions are

imperative before a Court can grant inspection, or for that matter sample inspection, of the ballot papers:-

- (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 to 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.

If all these circumstances enter into the mind of the Judge and he is satisfied that these conditions are fulfilled in a given case, the exercise of discretion would undoubtedly be proper.”

On examination of the principles laid down under the judgments of this Court and the Apex Court it is eloquently clear that the doors of an aggrieved candidate is not shut on his mere failure to draw the attention of the Returning Officer by filing an appropriate application under Rule 79 of the Rules but nonetheless he yet has a duty to explain the reasons for such lapse in the election petition which should be persuasive enough and even the grounds which he raises before the election tribunal to pray for a recount, should be substantive enough and should be supported with material evidence inviting a direction for recount.

In view of my discussion on issue (a) above, the contention of Mr. Srivastava that Rule 79 is mandatory and a filing of an application before the Returning Officer is essential before an election petition can be maintained, cannot be upheld and is rejected.

This would bring this Court to the second issue raised by Mr. Srivastava as to the complete absence of pleadings and grounds as well as lack of material evidence for inviting a direction for recount

from the election tribunal.

True as it is submitted by Mr. Srivastava, the election petition is not accompanied with any grounds although certain pleadings have been made in paragraph-10 to 19 of the election petition complaining to the manner of counting of votes. Whereas in paragraph-10 of the election petition present at Annexure-1 it is contended that since the margin of defeat was of only two votes hence there should be a recount on this ground; in paragraph-11 to 13 it is stated that the petitioner represented before the authorities including the Election Commission for recount but the recount was only carried out at booth nos. 12, 16 and 21 and that also not in presence of the Returning Officer. In paragraph-15 it is stated that some of the valid votes of the petitioner were not counted intentionally while some were rejected and some of the invalid votes of the winning candidate was treated valid. It is lastly stated at para-18 that during recount the petitioner was thrown out.

Whereas it was specifically contended by Mr. Shrivastava that no evidence was led by the petitioner to support these pleadings, these arguments have remained uncontested inasmuch as neither it could be demonstrated from the pleadings on record or the judgment impugned whether any such evidence had been led by the petitioner to support his prayer for recount except relying upon four ballots which



were led as Exhibit-1 to 1/C and which the election petitioner alleges to have been cast in his favour but were found scattered on the floor. Again no evidence was led by the election petitioner either before the election tribunal or before this Court to support whether any objection to this effect had been raised before the Returning Officer rather even the pleading is silent on this score in the election petition for there is no reference at all to these ballot papers relied upon during the course of hearing. Thus, what is pleaded remains unsupported by evidence and the evidence led does not find mention anywhere in the pleadings. Even though the records of counting were not led as exhibits in the suit but since they had been produced by the official respondent that the election tribunal examined the same and except for a passing reference as to some overwriting as also to the marginal difference in the winning margin, there is no other circumstance discussed by the election tribunal which justified a recount. That a narrowness in winning margin can hardly be a ground for recount unless the principles laid down for such exercise is satisfied stands well settled and reference is made to the judgment of **Chanda Singh vs. Choudhary Shiv Ram Verma** reported in (1975) 4 SCC 393 and **Mahendra Rai vs. State** reported in 2002(4) PLJR 552.

Insofar as the argument of Mr. Kaushik regarding preservation of purity of election and its overriding effect upon the



principles of recount is concerned, it is seen that the material facts appearing in the judgment of Shahabuddin (supra) were entirely distinct and in that case it was factually discernible that a number of voters of two Panchayats were common and the voter list was overlapping meaning thereby, the same set of voters had voted in two Panchayats. Since such infirmity was established in the said case that on the principles underlying maintenance of purity of election, the prayer for recount was allowed. Such is not the case in hand rather in the present case there is complete absence of evidence to support the prayer of the petitioner for recount and although such an opinion has been formed by the election tribunal upon examining the result sheet issued in Form-20(i) and Form-21 of the Bihar Panchayat Election Rules but except for a casual reference as to over writing, it is not a finding arrived at by the election tribunal that such over writing was sufficient either to order of recount or has materially affected the results. It is by now well settled that an election petition praying for recount cannot be allowed on vague and indefinite allegations much less in absence of material evidence supporting such prayer. Insofar as the case in hand is concerned except for oral evidence there is nothing to support the prayer of the petitioner and the material exhibits led by him does not even find mention in his election petition.

Another aspect which is apparently missing in the present

case is that although a pleading has been made at paragraph 11 and 12 of the Election Petition present at Annexure-1 that a prayer for recount was made before the authorities and following which recount was held at booth nos. 12, 16 and 21 but no evidence to support either the request or the recount effected, were led as evidence.

In the circumstances discussed, it is manifestly clear that the election tribunal has over stepped its jurisdiction to order for recount in absence of material evidence warranting such direction. This Court thus while rejecting the plea of the petitioner that Rule 79 is a mandatory provision and an application before the Returning Officer is a condition precedent to filing of an election petition, is persuaded enough to uphold his second challenge regarding complete absence of circumstances, grounds and evidence to order for a recount.

In result the judgment and order dated 30.1.2014 passed by Sub-Judge, 1st -Banka in Election Petition No. 2 of 2011 (Gautam Prakash vs. The State of Bihar & Ors.) can not be upheld and is accordingly set aside. The writ petition is allowed.

(Jyoti Saran, J)

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