

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.41 of 2015

In

Civil Writ Jurisdiction Case No. 2765 of 2013

1. Shanti Devi W/o Sri Bhagwan Singh Resident of Village Auliya Chak,
Post + P.S. Kako, District Jehanabad.

.... Appellant

Versus

1. Meena Devi-2 W/o Brijlal Yadav R/o Village Satanpur, P.O. AND P.S. Kako, District Jehanabad.
2. Bihar State Election Commission, Bihar, Patna.
3. The District Returning Officer-cum-Collector, Jehanabad.
4. Assistant Returning Officer/Returning Officer @ Gram Panchayat Election, Gram Panchayat Kako East, Office of Returning Officer Kako, P.O. + P.S. Kako, District Jehanabad.
5. Surbila Kumari W/o Surendra Kumar Resident of Village Pahalbiggha, P.S. Kako, District Jehanabad.
6. Anita Kumari Son of Satyendra Kumar Resident of Village Kothila, P.O. AND P.S. Kako, District Jehanabad.
7. Asha Devi W/o Chandrashekhar Prasad R/o Village Chhoti Kako, P.O. AND P.S. Kako, District Jehanabad.
8. Indu Devi W/o Sidhnath Prasad R/o Village Pahal Bigha, P.O. AND P.S. Kako, District Jehanabad.
9. Urmila Devi W/o Munarik Prasad R/o Village Pahal Bigha, P.O. AND P.S. Kako, District Jehanabad.
10. Usha Devi W/o Amrendra Kumar R/o Village Auliya Chaik, P.O. AND P.S. Kako, District Jehanabad.
11. Anju Devi W/o Ram Pravesh Prasad R/o Village Islamchak Sah Moha Chak, P.O. AND P.S. Kako, District Jehanabad.
12. Kiran Devi W/o Vinod Yadav R/o Village Satanpur, P.O. AND P.S. Kako, District Jehanabad.
13. Geeta Devi W/o Surendra Prasad R/o Village Samaspur, P.O. AND P.S. Kako, District Jehanabad.
14. Nitu Devi W/o Ramdhar Singh R/o Village Pahal Bigha, P.O. AND P.S. Kako, District Jehanabad.
15. Geeta Devi W/o Krishnadeo @ Mohan R/o Village Kothia, P.O. AND P.S. Kothiya, District Jehanabad.
16. Pan Kumari W/o Ramashray Yadav R/o Village Pahal Bigha, P.O. AND P.S. Pahal Bigha, District Jehanabad.
17. Punam Devi W/o Uday Yadav R/o Village Satanpur, P.O. AND P.S. Kako, District Jehanabad.
18. Pushpa Devi W/o Jitendra Prasad R/o Village Pahal Bigha, P.O. AND P.S. Kako, District Jehanabad.
19. Pramila Devi W/o Rajesh Yadav R/o Village Gulami Chak, P.O. AND P.S. Kako, District Jehanabad.
20. Priyanka Devi W/o Santosh Kumar R/o Village, P.O. AND P.S. Kako, District Jehanabad.
21. Phulwa Devi W/o Raj Kishore Yadav R/o Village Satanpur, P.O. AND P.S. Kako, District Jehanabad.
22. Barti Kumari W/o Awadhesh Yadav R/o Village Satanpur, P.O. AND P.S. Kako, District Jehanabad.

23. Basmatiya Devi W/o Manoj Kumar R/o Village Bhelu Bigha, P.O. AND P.S. Kako, District Jehanabad.
24. Manju Devi W/o Om Prakash R/o Village Pahal Bigha, P.O. AND P.S. Kako, District Jehanabad.
25. Meena Devi W/o Sudarshan Yadav R/o Village Kothiya, P.O. AND P.S. Kako, District Jehanabad.
26. Rajeshwari Devi W/o Ashok Yadav R/o Village Satanpur, P.O. AND P.S. Kako, District Jehanabad.
27. Rinku Kumari W/o manoj Prasad R/o Village Pahal Bigha, P.O. AND P.S. Kako, District Jehanabad.
28. Rashami Kumari W/o Umesh Prasad R/o Village Bhelu Bigha, P.O. AND P.S. Kako, District Jehanabad.
29. Lakshminiya Devi W/o Surendra Pd. R/o Village Islamchak, P.O. AND P.S. Kako, District Jehanabad.
30. Shakuntala Devi W/o Sarju Yadav R/o Village Gulamichak, P.O. AND P.S. Kako, District Jehanabad.
31. Shanti Devi-1 W/o Kamdeo Yadav R/o Village Gulamichak, P.O. AND P.S. Kako, District Jehanabad.
32. Sitabiya Devi W/o Surendra Yadav R/o Village Islamchak, P.O. AND P.S. Kako, District Jehanabad.
33. Sima Devi W/o Sube Yadav R/o Village Gulami Chak, P.O. AND P.S. Kako, District Jehanabad.
34. Sunita Devi-1 W/o Upendra Yadav R/o Village Takiya Par, P.O. AND P.S. Kako, District Jehanabad.
35. Sunita Devi-2 W/o Awadhesh Prasad R/o Village Kothiya, P.O. AND P.S. Kako, District Jehanabad.
36. Sunita Kumari W/o Rajiv Kumar R/o Village Pahal Bigha, P.O. AND P.S. Kako, District Jehanabad.

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Rajendra Narayan, Sr. Advocate
With Mr. Anish Chandra, Advocate.

For the State Election Commission: Mr. Amit Shrivastava

For the Respondents : Mr. S.B. K. Mangalam
& Mrs. Anita Kumari, Advocates

CORAM: HONOURABLE MR. JUSTICE I.A. ANSARI

and

HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

C.A.V. ORDER

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

6 24.06.2015

This is an appeal under Clause 10 of the Letters Patent of the Patna High Court against an order, passed by learned single Judge in CWJC No. 2765 of 2013, whereby and

whereunder, while allowing the writ application filed by Respondent No.5 herein, the learned Tribunal has set aside the judgment and order, dated 28.1.2013, passed by the Election Tribunal-cum-Munsif, Civil Court, Jehanabad (hereinafter referred to as the Tribunal) in Election Petition No. 6 of 2011.

2. The appellant herein had preferred an Election Petition before the Election Tribunal seeking cancellation of election of Respondent No.4 to the post of Mukhiya of Gram Panchayat Kako East under the District of Jehanabad, which was allowed in her favour by the Election Tribunal. The Tribunal, by its order, dated 28.01.2013, cancelled/quashed the certificate issued by the Returning Officer in favour of Respondent No.4 as returned candidate, declared the appellant elected as Mukhiya of the said Panchayat and, accordingly, directed the Election Commissioner to issue certificate in her favour. The order of the Election Tribunal came to be assailed by Respondent No.4 herein, by filing a writ petition, giving rise to CWJC No. 2765 of 2013, which has been allowed by learned single Judge by order, dated 04.12.2014, which is under appeal herein.

3. Facts of the case, for the purpose of adjudication, are short. The appellant, Respondent No.5 and other Respondents (Respondent Nos. 6 to 36), had contested the



election for the post of Mukhiya of Gram Panchayat Kako East, wherein the appellant was declared elected and a certificate was accordingly issued and handed over to her by the Returning Officer on 14.5.2011. It is the plea of the appellant, which is not in dispute, that the appellant filed an application on the same date before the Returning Officer for recount of votes upon which an Inquiry was conducted and recount was held. Upon recount of votes, the appellant was found to have obtained 397 votes as against 372 votes obtained by Respondent No.5. It is not in dispute that Respondent No.5 was declared elected by the Returning Officer with 383 votes in his favour as against 372 votes in favour of the appellant. It is the case of the appellant herein that despite the fact that the Returning Officer had ordered for recount, he allowed the result to be declared on the basis of original counting and, accordingly, result was declared in favour of Respondent No.5 and certificate was issued without awaiting the outcome of recount. The appellant, thereafter, filed election petition, giving rise to Election Case No.6 of 2011, before the Election Tribunal-cum-Munsif, Civil Court, Jehanabad. The Tribunal framed altogether 8 Issues for the purposes of adjudication including Issue No.3, namely, as to whether the Returning Officer had the jurisdiction to direct for recount.



Dealing with this issue, the learned Tribunal came to a conclusion, at paragraph 10 of its judgment dated 28.01.2013, that it was well within the jurisdiction of the Returning Officer to direct recounting if, upon a complaint, the Returning Officer finds substance in the complaint. Having held so, the Election Tribunal considered the outcome of recount, according to which appellant had secured 397 as against 372 secured by the respondent No.5, and, on that basis, declared the appellant elected for the post of Mukhiya of the concerned Gram Panchayat with a direction to forfeit the certificate of election issued in favour of Respondent No.4 and to hand over the certificate of election to the appellant.

4. Respondent No.5 challenged the said judgment of the Tribunal by filing a writ petition before this Court under Article 226 of the Constitution of India giving rise to CWJC No. 2765 of 2013, as noted above, asserting therein, that Respondent No.4 had secured 383 votes as against 372 votes secured by the appellant and on that basis, the Returning Officer had granted certificate of election to her. Respondent No.4 took a plea in the writ petition that no objection was raised by any one at the time of issuance of certificate in her favour as the returned candidate. She further asserted that as a matter of fact, the Returning Officer



could not have ordered for recount in the absence of reasons assigned in the application filed by the appellant for seeking recount. This is also to be noted that after respondent no.4 was declared elected and certificate to this effect was issued, the Senior Deputy Collector-cum- Observer, Panchayat Election, vide its letter dated 15.5.2011, addressed to the District Election Officer-cum-District Magistrate, Jehanabad, had informed about discrepancies in counting votes, observing therein, that as a matter of fact, the appellant had secured 397 votes whereas, Respondent No.4 had secured 372 votes on the basis of recount. Respondent No.5 also took a plea before the Writ Court that the Returning Officer became *functus officio* after declaration of election and issuance of certificate in favour of Respondent No.4 and, therefore, the Returning Officer had no jurisdiction to order for recount of the votes.

5. Notices were issued to the parties in the writ proceeding and after hearing the contesting parties, learned Single Judge allowed the writ petition by the order under appeal mainly on two grounds. Firstly, the learned Single Judge held that no recount could have been ordered by the Returning Officer on the basis of the application filed by the appellant inasmuch as the application did not contain any ground though mentioning of



the ground seeking recounting a pre condition for exercise of jurisdiction under Rule 79 of the Bihar Panchayat Election Rules, 2006 (hereinafter referred as '2006 Rules'). Learned Single Judge further held that in any event, the Returning Officer did not have any jurisdiction to entertain an application for recount after issuance of certificate in favour of Respondent No.5 on 14.5.2014. It is in this background that the present Letters Patent has been preferred by the appellant, being aggrieved by the order, dated 04.12.2014, passed by the learned Single Judge.

6. Mr. Rajendra Narayan, learned senior Counsel appearing on behalf of the appellant, has submitted that there was ample evidence, before the Election Tribunal, in support of the fact that appellant had filed the application for recount before declaration of result and issuance of certificate in favour of Respondent No.5. He accordingly submits that the Returning Officer committed an illegality, while issuing the certificate though he had already passed an order for recount. He further submits that this is no more in dispute that appellant secured much more votes than Respondent No.5 in the said election and in a situation, where the Election Tribunal, after taking into account this admitted fact, directed for forfeiture of certificate issued in favour of Respondent no.5 and for issuance of such



certificate in favour of the appellant, writ Court ought not to have interfered inasmuch as, such interference, according to Mr. Narayan, has resulted into a perpetuating illegality inasmuch as a person, who got less votes would continue to hold the post of Mukhiya. He has further submitted that writ jurisdiction, being equitable jurisdiction, should have been exercised by the learned Single Judge keeping in mind the well established principles of equity, in the background of peculiar facts and circumstances of the case, where the appellant had, admittedly, secured more votes than Respondent No.5.

7. Mr. Narayan has further submitted that even if there was omission to mention specific grounds in the application filed by the appellant for recount, the decision of the Returning Officer to order for recount could not be questioned as the fact remains that upon recount, discrepancies were detected and the appellant was found to have secured much more votes than the Respondent No.4.

8. In support of his submission, Mr. Narayan has placed reliance upon Supreme Court's decision in *A Neelalohithadasan Nadar vs. George Mascrene and others*, reported in *1994 Supp (2) SCC 619*, to contend that purity of election should be the paramount consideration in larger public



interest in a democratic society and has reiterated that once the Returning Officer himself found discrepancies in counting of votes and found clerical mistake, as would be apparent from record, he ought not to have issued the certificate of election in favour of Respondent No.5 and Tribunal rightly interfered in such circumstance. He has also relied upon an unreported order of Division Bench of this Court in case of *Kailash Singh Vs. The Bihar State Election Commission and Ors in LPA No. 661 of 2001*, relevant portion of which has been quoted in paragraph 14 in Division Bench judgment of this Court reported in **2009 (3) PLJR 933 (Sanjay Kumar Vs. State of Bihar & Ors.):-**

“Learned counsel stated the appellant submitted that- the result has been declared and a certificate has been issued in terms of Rules (for short the Rules) framed under the Bihar Panchayat Raj Act, the Returning Officer has no power to review or recall his order and in that view of the matter the cancellation of the certificate and declaration of the result in favour of respondent no.5 are without jurisdiction. In support of his submission, he relied upon two judgments one of the Apex Court in the case of Kuntesh Gupta vs. Hindu Kanya Mahavidyalaya, reported in (1987) 4 SCC 525 and the other of this cause in the case of Bisheshwar Singh Vs. Sub-Divisional Magistrate, reported in AIR 1974 Patna 7.

So far as the legal proposition as urged by the learned counsel for the appellant is concerned, it is well settled that the creature of the statute cannot review or recall his order unless the statute so provides in exercise of judgment or quasi-judicial power. So far, as the administrative orders are concerned, they can be reviewed or recalled provided while reviewing or recalling such orders,

principle of natural justice are followed. Under the provisions of the Act, no doubt there is no provision that once the result has been declared, the Returning Officer can review or recall the order, but the question which arises for consideration in this case is as to whether in exercise of Article 226 of the Constitution order should be set aside by this Court on the said ground.

In this case, the records were called for by the learned single Judge and it was found that there was clerical mistake and that has been rectified by the Returning Officer. Rule 81 of the Rules itself provides that the Returning Officer has to declare such candidate successful, who has secured maximum number of votes. The Returning Officer found clerical mistake in the sense that the person, who had secured lesser number of votes, was declared successful. Even if it be assumed that in absence of such power under the Act, the Returning Officer cannot review or recall the result once declared but if this Court in exercise of the jurisdiction under Article 226 of the Constitution will interfere with the order of the Returning Officer, then that interference will amount to allowing the illegality earlier committed to be perpetuated. Thus, it is not a fit case to exercise the equitable jurisdiction in the favour of the appellant.

It is made clear that these observations have been made for the purpose of the disposal of the present appeal and the same will not prejudice or affect the case of the appellant in the election petition challenging the aforesaid order.”

9. Reliance has been further placed by Mr. Narayan on another judgment of single Bench of this Court, in the case of **Sahabuddin Vs. State of Bihar & Ors**, reported in **2006 (1) PLJR 91**, to reiterate his submission that principle of purity of election should have overriding effect over any other consideration.

10. Mr. S.B.K. Manglam, learned counsel appearing on behalf of respondent no.5, on the other hand, has empathetically contended that :-

(a) There was no application filed by the appellant before the Returning Officer for recount before declaration of result and issuance of election certificate.

(b) The application, which the appellant submitted for recount after the process of election was over, did not comply with the mandatory requirement of Rule 79 of the Rules, which was sans any ground for recount.

(c) Order for recount of votes was passed by the Returning Officer after the result was declared and certificate was issued in favour of Respondent No.5 as returned candidate. The Returning Officer became *functus officio* once he declared the result and handed over the election certificate to Respondent No.4 and any action taken by him subsequent to handing over the certificate, with respect to the election, is wholly without jurisdiction and out come of such exercise can have no sanctity in the eyes of law.

11. Defending the order passed by the learned Single Judge, Mr. Mangalam has contended that learned Single Judge, while disposing of the writ application, rightly refused to remand



the matter back to the Election Tribunal to complete the exercise of recount itself as the application for recount did not contain any ground. He has placed reliance upon a Division Bench decision of this Court, in the case of ***Raj Kishor Shukla Vs. Banwari Yadav and Ors.***, reported in ***2008(1) PLJR 592***, in support of his submission that the requirement of assigning ground for recount is mandatory.

12. In support of his submission, contending that Rule 79 of the Rules is *pari materia* Rule 63 of the Conduct of Election Rules, 1961 framed under Representation of Peoples Act, 1951, Mr. Mangalam has relied upon a Supreme Court decision, in the case of ***Charan Singh Vs. Shiv Ram Verma & Ors.***, reported in ***1975 (4) SCC 393***. Further, in support of his submission that the Returning Officer became *functus officio* once he declared the election result and issued election certificate, Mr. Mangalam has placed reliance upon a Division Bench decision of this Court, in the case of ***Sanjay Kumar Vs. State of Bihar & Ors.***, reported in ***2009 (3) PLJR 933***. He has placed reliance upon a Constitution Bench judgment of the Supreme Court in the case of ***Dr. Jagjit Singh Vs. Giani Kartar Singh & Ors.***, reported in ***AIR 1966 SC 773***, to submit that once the Returning Officer completes the result-sheet and signs it, no



application for recount could be entertained. Placing reliance upon the Supreme Court decision in case of ***Chandrika Prasad Yadav Vs. State of Bihar & Ors.***, reported in (2004) 6 SCC 331, Mr. Mangalam has submitted that presence of grounds, in the application seeking recount under Rule 79(2) of the Rules, is *sine qua non* for exercise of power by the Returning Officer for recount of votes. He has further submitted, with reference to the said judgment, that it is imperative for the Returning Officer to pass an appropriate order assigning reasons accepting such request for recount either in whole or in part. He has contended that there is no order on record passed by the Returning Officer for recount of votes containing reasons. He has also placed reliance upon another Supreme Court judgment in the case of ***Ramrati Devi Vs. Saroj Devi & ors*** reported in (1997) 6 SCC 66 as well as in the case of ***Virendra Nath Gautam vs. Satpal Singh & Ors.***, reported in (2007) 3 SCC 617.

13. Mr. Manglam, learned counsel, appearing on behalf of respondent no.4, appears to be right in his submission that no recount of votes could have been ordered or done in the absence of grounds disclosed in the application seeking recount, in the light of mandatory provisions under Rule 79 of Bihar Panchayat Election Rules, 2006, which lays down the



procedure for recount of votes and requires that a candidate and, in his absence, election agent, at the end of counting, can apply for recount of votes, on the grounds stated in the application, to be submitted, in writing, to the Returning Officer. It is only after reasons are assigned in the application seeking recount that the Returning Officer acquires jurisdiction to consider such application and accept it or reject it. He has rightly relied upon a Division Bench decision of this Court in case of ***Raj Kishor Shukla Vs. Banwari Yadav and Ors.*** (supra) in support of this submission. Once the recount could not have been ordered in the absence of reasons assigned, the outcome of such recount would, as a natural corollary, be inconsequential. The plea, raised on behalf of the appellant, that once the recount was in fact done and, on the basis of recount, it was evident that the appellant had secured much more votes than respondent no.4, the learned single Judge ought not to have interfered with the decision of the Tribunal, declaring the appellant as returned candidate, cannot at all be accepted. We are of the definite view that, on the basis of the application, which respondent no.4 had filed for recount, no recount could not have been ordered in the absence of any reasons assigned therein seeking recount.

14. Further, once the election result was declared



and certificate in favour of the returned candidate came to be issued by the Returning Officer, the Returning Officer became *functus officio*. Mr. Narayan has raised an issue that before publication of result, the Returning Officer had already passed an order for recount. There is no material to come to this conclusion that the said order was passed before certificate was handed over to the returned candidate and even that would not have made the situation different. The submission, in our opinion, is not relevant for the purpose of the dispute involved in the present application, for, the Division Bench decision of this Court, in case of ***Raj Kishor Shukla Vs. Banwari Yadav*** (supra), has clearly held that the provisions of Rule 79 of the Rules are mandatory and categorically laid down that if requirement of disclosing the reasons is not complied with, in the application seeking recount, the Returning Officer cannot entertain the application.

15. Mr. Narayan has submitted that at least, the matter should have been remanded to learned Tribunal by the learned Single Judge for the purpose of recount by the Tribunal itself in the peculiar facts and circumstances of the case. We do not find substance in submission so made by Mr. Narayan, learned Senior Counsel, appearing on behalf of the petitioner, relying on Supreme Court decision in case of A

Neelalohithadasan Nadar Vs. George Mascrene and others

(supra). Though there cannot be two views over the proposition that purity of election should be paramount consideration in larger public interest in a democratic society, it is trite that election disputes need to be decided strictly as per the rules governing such election, which cannot be tinkered with on equitable considerations and principles, as has been laid down by the Division Bench decisions of this Court in case of ***Sanjay Kumar Vs. State of Bihar and Ors.*** (supra). The question, as regards recount of votes on the basis of an application containing no reasons, was not the subject matter of dispute in case of ***Neelalohithadasan*** (supra) and the *ratio* laid down therein has no application to the facts and circumstances of the present case. We observe that the purpose of Rule 79 of the Rules is to maintain purity of election so that the power of recount is not exercised arbitrarily without any basis and on mere askance of candidate or his agent.

16. Dealing with Rule 79 of Bihar Panchayat Election Rules, 1995, the Supreme Court, in case of ***Chandrika Prasad Yadav*** (supra), held in paragraph 20 as follows:-

“20. *It is well settled that an order of re-counting of votes can be passed when the 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 recounting of votes; and

(iv) an objection to the said effect has been taken recourse to”.

17. In our opinion, in view of the discussion held above, while filing an application under Rule 79 of the Rules, the basis for making a request for recounting of votes is mandatorily required to be disclosed and only thereafter, the Returning Officer is statutorily enjoined with the duty to entertain such application and pass appropriate orders. In the absence of the disclosure/basis for recount of votes, provisions of Rules 79(2) cannot be invoked and recount cannot be ordered. This has salutary purport to ensure that after conclusion of counting or during the process of counting, the parties to the election or even the body conducting such election proceed further in a reasonable manner leaving aside scope of arbitrariness or manipulations.

18. Similar provisions, existing in Rule 77 of the Madhya Pradesh Panchayat Election Rules, 1994, have been dealt with by the Supreme Court in case of **Ram Rati (Smt)** (supra), wherein the Supreme Court held that it is incumbent upon a candidate that if candidate was not present, to make an application in writing and give reasons in support thereof, while

seeking recount. The Supreme Court has explicitly held that if it is not done, then, the Tribunal or the Court is not empowered to direct recount or even after adduction of evidence and consideration of the alleged irregularities in counting. The Apex Court has held, in no uncertain terms, that essential condition or the condition precedent for sustaining an application for recounting is that an application has to be made, in writing, assigning reasons or grounds for seeking recount and Returning Officer should pass an order with reasons in support thereof. In the present case, both are lacking. In our opinion, learned Single Judge has rightly refused to interfere with the order of the learned Tribunal.

19. In view of the above, we do not find any merit in this appeal. This appeal is accordingly dismissed.

20. There shall be no order as to costs.

(Chakradhari Sharan Singh, J.)

I. A. Ansari, J.: I agree.

(I. A. Ansari, J.)

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