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**HIGH COURT OF CHHATTISGARH, BILASPUR****WPC No. 1565 of 2015**

1. Santosh Kumar Nishad S/o Bahurram Nishad, Aged About 37 Years R/o Village & Post Patewa, P.S. Patewa, Tahsil & District Mahasamund Chhattisgarh

**---- Petitioner****Versus**

1. State Of Chhattisgarh Through The Sub Divisional Officer (Revenue)/Prescribed Officer Under The Chhattisgarh Panchayat Raj & Gram Swaraj Adhiniyam 1993, Mahasamund Chhattisgarh
2. Sanjeev Sinha, S/o Late Shri Vyas Narayan Sinha, Aged About 35 Years R/o Village & Post Patewa, P.S. Patewa, Tahsil & District Mahasamund Chhattisgarh
3. Ajay Sahu S/o Lala Ram Sahu, Aged About 23 Years R/o Village & Post Patewa, P.S. Patewa, Tahsil & District Mahasamund Chhattisgarh
4. Doman Sahu , S/o Anandram Sahu , Aged About 22 Years R/o Village & Post Patewa, P.S. Patewa, Tahsil & District Mahasamund Chhattisgarh
5. Bhoj Kumar Sahu, S/o Chunnulal Sahu, Aged About 35 Years R/o Village & Post Patewa, P.S. Patewa, Tahsil & District Mahasamund Chhattisgarh
6. Returning Officer (Panchayat), Mahasamund, Block & Tahsil Mahasamund, District Mahasamund Chhattisgarh
7. Presiding Officer, Booth No. 125, Lecturer (Panchayat), Government Higher Secondary School, Pachodus, PO Pacheda, Tahsil & District Mahasamund Chhattisgarh
8. Presiding Officer, Booth No. 126, Lecturer (Panchayat), Government Higher Secondary School, Mungaser, PO Mungaser, Tahsil Bagbehera, District Mahasamund Chhattisgarh

Note: The respondents No.6 to 8 have been impleaded as by name before the SDO, but their impleadment is by post itself is sufficient, thus they are impleaded by post, not by name in the instant writ petition.

**---- Respondent**

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| For Petitioner      | Shri Vivek Shrivastava, Advocate |
| Respondent /State   | Shri Majid Ali, Panel Lawyer     |
| For Respondent No.2 | Shri Manoj Paranjape, Advocate   |

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**Hon'ble Shri Justice Prashant Kumar Mishra**

**C A V Order**

**28/1/2016**

1. Challenge in this petition filed under Article 226 of the Constitution of India, is to the order dated 18.08.2015 passed by the Election Tribunal i.e. Sub Divisional Officer (Revenue), Mahasamund, whereby, the Election Tribunal has directed for holding a recount.
2. In the election of Sarpanch of Gram Panchayat, Patewa conducted on 04.02.2015, the writ petitioner secured 314 votes and the respondent No.2 (Election Petitioner) secured 313 votes. Thus, the petitioner was declared elected by margin of one vote. The respondent No.2 preferred election petition alleging that initially he was shown to have secured 314 votes and the petitioner had secured 313 votes and there was a dispute with regard to proper counting at booth numbers 125 & 126. According to the election petitioner, the writ petitioner had secured 175 votes in booth number 125 which was subsequently interpolated and was shown to have secured 177 votes, therefore, the election deserves to be set-aside and a recount may be held.

3. The writ petitioner submitted his reply before the election tribunal and contested the election petition. By denying all the averments, he stated that no mistake has been committed in counting of ballots, therefore, the election petition deserves to be dismissed.
4. The election tribunal proceeded to examine the witnesses produced by both the parties without framing the issues and has, thereafter, passed the impugned elaborate and detailed order directing holding of recount.
5. Shri Vivek Shrivastava, learned counsel appearing for the petitioner, would submit that the election petition has been tried without framing the issues, which is contrary to the law laid down by this Court in **Parvatia v. Padmini and others<sup>1</sup>**, **Ajuram v. Shatruhan Sahu and others<sup>2</sup>**, **Prem Kunwar v. State of Chhattisgarh and others<sup>3</sup>**, and **Balaram Rathore v. State of Chhattisgarh and others<sup>4</sup>**.
6. Per contra, Shri Manoj Paranjpe, learned counsel appearing for respondent No.2/election petitioner, would refer to **Kali Prasad Agarwalla (Dead by LRs.) and others v. Bharat Coking Coal**

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<sup>1</sup> 2005 (2) CGLJ 335

<sup>2</sup> WPC No.2583 of 2011 (Decided on 28.08.2012)

<sup>3</sup> AIR 2011 Chhattisgarh 62

<sup>4</sup> AIR 2011 Chhattisgarh 134

**Ltd. and others<sup>5</sup>, Sayeda Akhtar v. Abdul Ahad<sup>6</sup>, Kalyan Singh Chouhan v. C.P. Joshi<sup>7</sup> and Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari and another<sup>8</sup>**, to argue that in case where both the parties are aware of each others case and have adduced evidence without raising any protest regrading non-framing of issues, the order for recount does not call for any interference.

7. The procedure for trial of an election petition filed under Section 122 of the Chhattisgarh Panchayat Raj Adhiniyam, 1993 is governed under the Chhattisgarh Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 (for short “the Rules, 1995”). Rule 11 of the Rules, 1995 reads thus :

**“11. Procedure before the specified officer and his powers.-** (1) Subject to the provisions of these rules, every election petition shall be enquired into by the specified officer **as nearly, as may be**, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits:

Provided that it shall only be necessary for the specified officer to make a memorandum of the substance of the evidence of any witness examined by him.

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<sup>5</sup> AIR 1989 SC 1530

<sup>6</sup> (2003) 7 SCC 52

<sup>7</sup> AIR 2011 SC 1127

<sup>8</sup> (2014) 5 SCC 312

(2) The specified officer, shall have the powers which are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters:-

- (a) discovery and inspection.
- (b) enforcing the attendance of witnesses, and requiring the deposit of their expenses;
- (c) compelling the production of document;
- (d) examination of witnesses on oath;
- (e) reception of evidence taken on affidavit; and
- (f) issuing commission for examination of witnesses and summoning and examining suo moto any person whose evidence, appears to him to be material.”

8. Interpreting the above provisions, this Court in **Parvatia** (supra) **Ajuram** (supra), **Prem Kunwar** (supra) and **Balaram Rathore** (supra) has held that for trial of an election petition, framing of issues and examination of witnesses, would be necessary as provided under Order 14 Rule 1 of the Code of Civil Procedure, 1908 (for short 'the CPC').

9. While dealing with the matter arising out of trial of election petition under the Representation of the People Act, the Supreme Court has highlighted prerequisites of directing a recount in an election petition and the need of framing issues and further the effect of non-framing of issues when the parties have led evidence knowing fully well each others case. The following has been held by the Supreme Court in **Kalyan Singh Chauhan** (supra) :

14. During the trial of an election petition, it is not permissible for the court to permit a party to seek a roving enquiry. The party

must plead the material fact and adduce evidence to substantiate the same so that the court may proceed to adjudicate upon that issue. Before the court permits the recounting, the following conditions must be satisfied:

- (i) The Court must be satisfied that a prima facie case is established;
- (ii) The material facts and full particulars have been pleaded stating the irregularities in counting of votes;
- (iii) A roving and fishing inquiry should not be directed by way of an order to recount the votes;
- (iv) An opportunity should be given to file objection; and
- (v) Secrecy of the ballot requires to be guarded. (Vide : Dr. Jagjit Singh v. Giani Kartar Singh & Ors. AIR 1966 SC 773; Suresh Prasad Yadav v. Jai Prakash Mishra & Ors., AIR 1975 SC 376; M. Chinnasamy v. K.C. Palanisamy & Ors., AIR 2004 SC 541; Chandriak Prasad Yadav v. State of Bihar & Ors., AIR 2004 SC 2036; Tanaji Ramchandra Nimhan v. Swati Vinayak Nimhan, AIR 2006 SC 1218; Gursewak Singh v. Avtar Singh & Ors., AIR 2006 SC 1791; and Baldev Singh v. Shinder Pal Singh & Anr. (2007) 1 SCC 341).

23. There may be an exceptional case wherein the parties proceed to trial fully knowing the rival case and lead all the evidence not only in support of their contentions but in refutation thereof by the other side. In such an eventuality, absence of an issue would not be fatal and it would not be permissible for a party to submit that there has been a mis-trial and the proceedings stood vitiated. (vide: Nagubai Ammal & Ors. v. B. Shama Rao & Ors., AIR 1956 SC 593; Nedunuri Kameswaramma v. Sampati Subba Rao, AIR 1963 SC 884; Kunju Kesavan v. M.M. Philip & Ors., AIR 1964 SC 164; Kali Prasad Agarwalla (dead) by L.Rs. & Ors. v. M/s. Bharat Coking Coal

Ltd. & Ors., AIR 1989 SC 1530; Sayed Akhtar v. Abdul Ahad (2003) (7) SCC 52 (AIR 2003 SC 2985); and Bhuwan Singh v. Oriental Insurance Co. Ltd., AIR 2009 SC 2177).

10. In **Arikala Narasa Reddy** (supra), once again dealing with an election petition, the Supreme Court held thus :

16. There may be an exceptional case where the parties proceed to trial fully knowing the rival case and lead all the evidence not only in support of their contentions, but in refutation of the case set up by the other side. Only in such circumstances, absence of an issue may not be fatal and a party may not be permitted to submit that there has been a mis-trial and the proceedings stood vitiated. (Vide: Kalyan Singh Chouhan v. C.P. Joshi).

11. In **Kali Prasad Agrawalla (Dead by LRs.)** (supra), the following has been held by the Supreme Court :

18. It was, however, urged for the appellants that there is no proper pleading or issue for determination of the aforesaid question and the evidence let in should not be looked into. It is too late to raise this contention. The parties went to trial knowing fully well what they were required to prove. They have adduced evidence of their choice in support of the respective claims. That evidence has been considered by both courts below. They cannot now turn round and say that the evidence should not be looked into. This is a well accepted principle.

12. Similar expression like “**as nearly as may be**” occurring in Rule 11 (1) finds place in several constitutional and statutory provisions. The said expression finding place in Article 332 (2) has been considered by the Supreme Court in **R.C. Poudyal v.**

**Union of India and Others**<sup>9</sup> wherein the following has been held

in para 187 :

187. In clause (3) of Article 332, the words “as nearly as may be” have been used. These words indicate that even in the matter of reservation of seats for Scheduled Castes and Scheduled Tribes it would be permissible to have deviation to some extent from the requirement that number of seats reserved for Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State shall bear the same proportion to the total number of seats as the population of the Scheduled Castes or the Scheduled Tribes in the State in respect of which seats are so reserved, bears to the total population of the State. The non-obstante clause in Article 371-F read with clause (f) of the said article enlarges the field of deviation in the matter of reservation of seats from the proportion laid down in Article 332 (3). The only limitation on such deviation is that it must not be to such an extent as to result in tilting the balance in favour of the Scheduled Castes or the Scheduled Tribes for whom the seats are reserved and thereby convert a minority into majority. This would adversely affect the democratic functioning of the legislature in the State which is the core of representative Democracy. Clause (a) of sub-section (1-A) of Section 7 of the 1950 Act provides for reservation of twelve seats in an Assembly having thirty-two seats, i.e., to the extent of about 38 per cent seats for Sikkimese of Bhutia-Lepcha origin. The said provision does not, therefore, transgress the limits of the power conferred on Parliament under Article 371-F(f) and it cannot be said that it suffers from the vice of unconstitutionality.”

(Emphasis supplied)

13. In **Soneswar Borah v. Nagen Neog and others**<sup>10</sup>, the expression “as nearly as may be” in the Representation of People Act dealing with the procedure in the election petition has been interpreted to hold thus in para 2 :

“2. A short question which arises for consideration is whether a Judge is required to sign the deposition of the witness in an election case. S.87 (1) of the 'Act' runs:

“Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits.”

(Emphasis added)

The provisions in S.87(1) of the 'Act' shows that the whole of the Civil Procedure Code is not fully applicable. The S.87(1) provides that the proceeding should be tried “as nearly as may be” in accordance with the procedure applicable under the Code of Civil Procedure. The reasons for using the expression “as nearly as may be” appears to be that u/s.86(7) of the 'Act', endeavour is to be made to conclude the trial of of an election petition within 6 (six) months from the date on which the election petition is presented and if the technicalities of the Code is followed the trial may not be concluded expeditiously. The technicalities of the Code should not make the progress of the trial of an election petition difficult. However, it must be consistent with the interests of justice. As such, the expression “as nearly as may be” shows only an approximation. In the other words, an election Court shall be guided by the spirit of the Code, but shall not be bound by the letter of the Code.”

(Emphasis supplied)

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10 AIR 1987 Gauhati 11

14. In the matter of **Jai Shankar Prasad, Advocate v. State of Bihar and others**<sup>11</sup>, it has been held thus in para 4 :

4.....The expression “as nearly as may be” itself suggests that the proportion of 50% of the service members is not exact but approximate and is meant not to be mandatory but directory. The said proviso does not, in terms, say that in no case and at no point of time, the said proportion should either go above, or fall below 50%. In the very nature of things, a strict adherence to the said direction is not practicable at any particular point of time.....

15. By placing reliance upon several decisions of the Supreme Court and the provisions of the Rules, 1995, extreme recently this Court in **Lain Das v. State of Chhattisgarh and others**<sup>12</sup>, held thus in para 11 :

11. The settled legal position while interpreting the expression “as nearly as may be” is that while applying the provision, it would be permissible to have deviations to some extent from the requirement which is to be followed as nearly as may be. In the context of procedure for trial of election petition, the following procedure prescribed in the Code of Civil Procedure as nearly as may be only means that adherence to the procedure prescribed in the CPC for trial of a suit, while trying election petition would mean that it is to be followed in approximation. In other words, the Election Tribunal shall be guided by the spirit of the Code but shall not be bound by the letter of the Code. It is specifically observed by the Gauhati High Court in **Soneswar Borah** (Supra) that the reason for using the expression “as nearly as may be” appears to be that under Section 86(7) of the Representation of People Act, endeavour is

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<sup>11</sup> AIR 1993 SC 1906

<sup>12</sup> WPC No.1712 of 2015 (Decided on 19.01.2016)

to be made to conclude the trial of election petition within 6 months and if the technicalities of the Code is followed, trial may not be concluded expeditiously. Thus, in a given case, when the facts are admitted and the only question before the Election Tribunal is of application of the Rules on admitted set of facts, deviation from holding a regular trial by framing issues and recording evidence of the parties may be permissible.....

16. In view of the above, it would appear that applicability of Order 14 Rule 1 of the CPC for holding trial of an election petition, is by virtue of Rule 11 of the Rules, 1995. The procedure prescribed for holding trial of a civil suit as provided in the CPC would apply to an election petition, as nearly, as may be. The expression has been interpreted by the Supreme Court to mean, applicability in approximation and not in mandatory terms, therefore, deviation in a given case is permissible.
17. The Supreme Court in **Kali Prasad Agarwalla (Dead by LRs.)** (supra), **Sayed Akhtar** (supra), **Kalyan Singh Chouhan** (supra) and **Arikala Narasa Reddy** (supra), has held that when the parties have gone in trial knowing each others case fully well and adduced evidence, they could not fall back to raise a plea that the issues were not framed, therefore, evidence is not admissible or that the trial is vitiated.
18. Considering that applicability of the CPC is as nearly, as may be and not *mutatis mutandis* and the non vitiation of trial of a suit only because some issue was not framed although the parties were aware of each others case fully well, in the facts and circumstances of the case, this Court would reach to the

conclusion that both the parties have pleaded each others case in detail in the election petition and the reply to the election petition and were, thus, aware of each others case quite well. The Election Tribunal allowed them to adduce evidence and both the parties participated without any demur, therefore, non framing of issues while holding a trial would not be fatal for the election petition and an order holding of recount by passing a detailed order is not vitiated.

19. As a sequel, the writ petition being bereft of merit is liable to be and is hereby dismissed.

Sd/-

Judge

Prashant Kumar Mishra

Gowri