

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WPC No. 1712 of 2015**

- Lain Das S/o Shri Lagan Das, Aged About 42 Years Up Sarpanch, Gram Panchayat Hunkara, R/o Village Hunkara Thana & Tahsil Katghora, Civil & Revenue District Korba Chhattisgarh

---- Petitioner**Versus**

1. State Of Chhattisgarh Through The Secretary Panchayat Department Mahandi Bhawan Capital Complex, New Raipur, District Raipur Chhattisgarh
2. Smt. Urmila Kanwar, W/o Purshottam Singh Kanaawr, Aged About 40 Years R/o Village Hunkara Thana & Tahsil Katghora, Civil & Revenue District Korba Chhattisgarh
3. Presiding Officer, Gram Panchayat Hunkara, Up Sarpanch Election, Thana & Tahsil Katghora, Civil & Revenue District Korba Chhattisgarh
4. Returning Officer, Tahsildar Katghora, Gram Panchayat Hunkara, Up Sarpanch Election, Thana & Tahsil Katghora, Civil & Revenue District Korba Chhattisgarh
5. Sub Divisional Officer, Revenue Katghora, District Korba Chhattisgarh
6. Tahsildar Katghora, District Korba Chhattisgarh

---- Respondent

For Petitioner : Shri Sunil Sahu, Advocate.
 For Respondent/State : Miss Tripti Rao, Panel Lawyer.
 For Respondent No.2 : Shri Aditya Khare, Advocate.

Hon'ble Shri Justice Prashant Kumar Mishra**Order On Board****19/01/2016**

1. The petitioner has called in question the legality and validity of the

order passed by the Election Tribunal i.e. the Sub Divisional Officer (Revenue) Katghora, who has allowed the Election Petition under Section 122 of the Panchayat Raj Adhiniyam, 1993 (for short 'the Act') preferred by respondent No.2.

2. The Election Tribunal has set aside the election of the petitioner as Up Sarpanch of Gram Panchayat Hunkara, Tehsil Katghora, District Korba for which she was elected on 23.2.2015.
3. Respondent No.2 preferred Election Petition on the ground that in the election of Up Sarpanch, she and the petitioner had obtained 6 votes each, therefore, the votes secured by both the candidates being equal, the Presiding Officer should have proceeded to draw of lots in accordance with Rule 16 (7) (ii) of the Chhattisgarh Panchayat (Up-Sarpanch, President and Vice President) Nirvachan Niyam, 1995 (for short 'the Rules, 1995'). The Presiding Officer committed illegality in opting to proceed to decide the winner by a toss of coin. The petitioner submitted his reply to the Election Petition and thereafter the Election Tribunal did not frame any issue or recorded evidence of the parties but proceeded straightway to decide the Election Petition.
4. Learned counsel for the petitioner would refer to the law laid down by this Court in the matters of **Parvatia Vs. Padmini & others** {2005 (2) CGLJ 335} and **Dropati Yadav Vs. Smt. Sushila Devi Sahu & Others** {WPC No.825/2015, decided on 16.11.2015} to argue that the Election

Tribunal should have framed issues and recorded evidence of the parties before proceeding to decide the election petition. He would submit that the procedure contained in Rule 11 of the Chhattisgarh Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 (for short 'the Election Petitions Rules') having not been followed, the impugned order deserves to be set aside.

5. Learned State Counsel and learned counsel for respondent No.2 as well would submit that in the case at hand, there was no allegation of commission of any corrupt practice or such other plea which would require submission of oral evidence and it is only about violation of the Rules, therefore, the Election Tribunal has rightly decided the election petition on the basis of pleading of the parties.
6. In the case at hand, the parties did not join issue on any of the pleadings before the Election Tribunal. The requirement to struck an issue under Order 14 Rule 1 of the CPC would arise when the facts pleaded by the plaintiff are disputed by the defendants and a triable issue has arisen. In cases where the parties are not at variance on any factual aspect of the matter but the decision on the suit is based only on proof of violation of any rule, framing of issue may not be required in such cases. There is no dispute about the legal principles laid down by this Court in the matter of **Parvatia** and **Dropati Yadav** (Supra). However, those were the cases where the election petitions were filed alleging corrupt practices or on such grounds which would require oral evidence to be

led by the parties.

7. In **Parvatia** and **Dropati Yadav** (Supra), this Court has considered the scope and application of Rule 11 of the Election Petitions Rules. The said Rule 11 is reproduced hereunder for ready reference:-

“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.

(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. 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 Vs. Union of India and Others** {1994 Supp (1) Supreme Court Cases 324} 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.”

9. In the matter of **Soneswar Borah Vs. Nagen Neog and others** {AIR 1987 GAUHATI 11}, 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.”

10. In the matter of **Jai Shankar Prasad, Advocate Vs. State of Bihar and others** {AIR 1993 SC 1906}, it has been held in para-4 thus:-

“.....
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.....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.....”

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 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. Interpretation of Rule 11 in the matters of **Parvatia** and **Dropati Yadav** (Supra) was on different set of facts and are thus not applicable in the facts of the present case. Those cases are thus distinguishable on facts.

12. Rule 16 (7) (ii) of the Rules, 1995 clearly provides that in case of equality, the election shall be decided by the lot to be drawn by the Presiding Officer and the candidate on whom the lot falls shall be declared to have been duly elected. Thus, in case of equality of votes, the only mode prescribed under the Rules for deciding winner is by draw of lot. Any other method of declaring winner is neither prescribed nor contemplated under the Rules.

13. In the matter of **Smt. Amarvati Vs. State of Chhattisgarh & Others** {AIR 2015 CHHATTISGARH 18}, the issue was when the rules provided for method of voting on No Confidence Motion by way of secret ballot, the procedure adopted by the Presiding Officer to conduct voting by taking recourse to show of hands was permissible or not. This Court held in paras-13 to 15 thus:-

“13. The legal position emerging from the two judgments i.e. *Automobile Products of India Employees' Union* (AIR 1990 SC 1159) and *Jaenendrakumar Phoolchand Daftari*, (AIR 1994 SC 586), quoted above, appears settled that when the rules provide for a particular method of voting and does not leave it to the discretion of the Presiding Officer, the said method of voting is mandatory and no other method of voting is permissible. When the rules provide for method of voting by show of hands or by secret ballot, in the said eventuality also, the Presiding Officer shall take recourse to show of hands unless the members present demand for taking recourse to voting by secret ballot.

14. In *Meera Sahni Vs. Lieutenant Governor of Delhi and others*, (2008) 9 SCC 177 : (AIR 2009 SC (Supp) 760), the Supreme Court, after referring its several decisions, has held that an action to be taken in a

particular manner as provided by a statute, must be taken, done or performed in the manner prescribed and in no other manner.

15. In the case at hand, the rules provide for only one method of voting i.e. by secret ballot without leaving anything to the discretion or desire of the Presiding Officer or the members present in the meeting. Any other method of voting appears impermissible under the rules. Therefore, the Presiding Officer could not have decided that since all the members are in favour of the motion by show of hands, the secret ballot is not necessary. Since the rules do not leave it to the choice or discretion of the Presiding Officer, the procedure adopted by the Presiding Officer to conduct voting by taking recourse to show of hands is illegal.”

14. The argument raised by learned counsel for the petitioner that all the parties having consented to declare the result by a toss of coin, therefore, there is no illegality, is fully dealt with and answered in the Supreme Court judgment in the matter of **Automobile Products of India Employees' Union Vs. Association of Engineering Workers, Bombay and others** {AIR 1990 SC 1159}, wherein it has been held that consent of the parties to follow the procedure which is against the mandatory provisions of the Act cannot cure the illegality.

15. It is settled law that the writ Court should not interfere with the order passed by the subordinate Tribunal or authority merely for the reason that some wrong is committed. The writ Court should do complete justice between the parties and should not intervene merely on technical grounds.

16. For the foregoing, this Court has no hesitation in holding that even

when the issues have not been framed by the Election Tribunal, the impugned order does not call for any interference.

17. Accordingly, the writ petition is dismissed.

Sd/-
Judge
(Prashant Kumar Mishra)

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