

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

Civil Revision No.1080 of 2014

Date of decision : 28.03.2016

Naib Singh

.....Petitioner

Versus

**Presiding Officer, Election Tribunal (Deputy Commissioner),
Sangrur and others**

...Respondents

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

- 1. Whether Reporters of the local papers may be allowed to see the judgment ? Yes*
- 2. To be referred to the Reporters or not ? Yes*
- 3. Whether the judgment should be reported in the Digest? Yes*

Present: Mr. H.S. Aujla, Advocate for
Mr. Gurjinder Singh Chahal, Advocate for petitioner.

Mr. Rajbir Singh and Mr. Sanjiv Goyal, Advocates
for respondent No.2.

Mr. P.S. Mattewal, Additional Advocate General, Punjab for
respondents No.1, 2A, 3 and 4.

DARSHAN SINGH, J.

The present revision petition has been preferred against the order dated 05.02.2014 (Annexure P-1) passed by the learned Election Tribunal, Sangrur, whereby the recounting of the votes for the election to the office of Sarpanch of Gram Panchayat village Ghorrenav, Tehsil

Lehra, Distt. Sangrur, held on 03.07.2013 has been ordered by Block Development and Panchayat Officer, Sunam in the Court premises, Tehsil Complex, Sunam.

2. Respondent No.2 Balwinder Singh filed the election petition for setting aside the election of petitioner Naib Singh to the office of Sarpanch, Gram Panchayat village Ghorrenav, Tehsil Lehra, Distt. Sangrur. The said petition was contested by the petitioner.

3. After recording the evidence, the learned Election Tribunal passed the impugned order (Annexure P-1) for recounting of the votes.

4. Learned counsel for the petitioner contended that an election petition seeking recounting of the ballot papers must contain adequate statement of all the material facts on the basis of which the irregularity or illegality in counting the votes is founded. The Tribunal must be prima facie satisfied that in order to decide the dispute and to do the complete and effectual justice between the parties, the recounting of the votes is imperatively necessary. To support his contentions, he relied upon cases ***Udey Chand Vs. Surat Singh and another 2009(4) RCR (Civil) 821*** and ***M. Chinnasamy Vs. K.C. Palanisamy and others 2004(1) RCR (Civil) 303***. He contended that recounting of the votes cannot be ordered as a matter of course or on mere asking by the defeated candidate. The secrecy of the ballots is paramount and sanctity of secrecy of the votes has to be preserved. A very strong ground should be made out by the person seeking recounting of the votes. He relied upon cases

Kirpal Singh Vs. Preet Mohinder Singh 1999(4) RCR (Civil) 248 and P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen and others AIR 1989 SC 640.

5. He contended that in the instant case, respondent No.2 has not been able to make out any case for recounting of the votes. Respondent No.2 has admitted that he was very much present in the room where the counting of the votes was going on. So, it is not a case where the counting of the votes was at the back of respondent No.2. There is no material on record to show that he has raised any objection with respect to the mode of counting. Nothing has been mentioned in the petition as well as evidence adduced by respondent No.2 that there was any irregularity in the rejection of the votes. No complaint has been moved by respondent No.2 to the higher authorities about any irregularity or illegality in the counting of the votes. All the pleas raised in the petition and the evidence are the result of an afterthought.

6. He further contended that the petitioner has been declared elected by 193 votes. Only 43 votes were rejected being invalid. In view of this large margin, the recounting will be a fruitless exercise. He further contended that in the impugned order, the learned Tribunal has not mentioned on what ground the case for recounting of the votes is made out. Thus, he contended that the impugned order is illegal.

7. On the other hand, learned counsel for respondent No.2 contended that there is sufficient material on record to establish that the counting of the votes was illegal. He contended that the Presiding Officer

and his staff did not allow respondent No.2 and his agent to enter the room to see the ballot box while breaking the seals. They were asked to remain outside the said room. After breaking the seals they were not shown the ballot papers and were made to sit at a distance in the room. Respondent No.2 was not made aware about the counting of the votes. The cancelled ballot papers were not shown to respondent No.2. He further contended that the votes polled in favour of respondent No.2 were wrongly counted in favour of the petitioner. Respondent No.2 has made the request to the Presiding Officer for recounting of the votes but the said request was rejected. He contended that all these allegations are fully supported from the statements of respondent No.2 Balwinder Singh (PW-2) and his polling agent Major Singh (PW-1). Their statements have not been rebutted by the petitioner.

8. He further contended that from the affidavit filed by Ram Singh, the Block Development and Panchayat Officer, Andana at Moonak, on the basis of direction issued by this Court, it also comes out that no proceedings as mandated by Rule 33 of the Punjab Panchayat Election Rules, 1994 (hereinafter called the 'Rules') has been conducted at the start of counting or thereafter. The signatures of respondent No.2 were also not obtained on the proceedings which negates his presence. Thus, he contended that the impugned order passed by the learned Election Tribunal for ordering the recount of the votes, which is otherwise essential to do the complete justice between the parties, does not suffer from any illegality. To support his contentions, he relied upon

cases *Gursewak Singh Vs. Avtar Singh and others* 2006(2) RCR (Civil) 463, *Darshan Singh Vs. Deputy Commissioner-cum-President Officer, Election Tribunal and others* 2000(3) RCR (Civil) 271, *Gurtej Singh Vs. Darbara Singh* 2000(2) RCR (Civil) 525, *Sadhu Singh Vs. Darshan Singh and another* 2006(4) RCR (Civil) 55, *Liyakat Vs. Kanhiya Lal and others* 2006(4) RCR (Civil) 731, *Gurnam Bindra Singh Vs. Kulwant Singh and others* 2010(4) RCR (Civil) 367, *Ajaib Singh Vs. Presiding Officer, Election Tribunal Mansa and others* 2015(4) PLR 628, *Deepak Sharma Vs. Hardeep Kaur and others* 2014(4) LAR 85, *Mander Singh Vs. Mangal Singh* 2000(4) RCR (Civil) 494 and *Manjeet Kaur Vs. The Presiding Officer and others* CR No.535 of 2015 decided on 21.12.2015.

9. I have duly considered the aforesaid contentions.

10. Respondent No.2 Balwinder Singh has filed the election petition to challenge the election of petitioner Naib Singh to the office of Sarpanch of village Ghorrenav, Tehsil Lehra, Distt. Sangrur held on 3.7.2013. Total 2358 votes were polled. 43 votes were cancelled. There were 2315 valid votes. Petitioner Naib Singh got 1254 votes. Respondent Balwinder Singh got 1061 votes. Petitioner Naib Singh was declared elected by 193 votes.

11. In the election petition, the relevant allegations with respect to the recounting of the votes are that at the time of breaking the seals of the ballot boxes, respondent No.2 was not allowed to enter the room and to see that process and they were asked to remain outside the

polling room; that after breaking the seals of the boxes, when the counting started, respondent No.2 was not shown the ballot papers and he was made to sit in a far away room; that he was not given any information regarding counting of the ballot papers and bundles of 50/50 votes were prepared; that some ballot papers were cancelled which were not shown to respondent No.2; that the ballot papers polled in favour of respondent No.2 were also counted in favour of the petitioner; and that the Presiding Officer and his fellow officials declined the request of respondent No.2 for recounting the votes. These are the grounds pleaded in the petition, on the basis of which the recounting of the votes has been claimed. The Hon'ble Supreme Court in case *Sadhu Singh Vs. Darshan Singh and another* (supra) has laid down that the following factors are relevant for directing the recounting of the votes:-

1. prima facie case must be established;
2. material facts must be pleaded stating in irregularities in counting of votes;
3. a roving and fishing inquiry shall not be directed by way of an order for recounting of votes;
4. an objection to be said effect should be raised; and
5. secrecy of ballot papers should be maintained.

12. Rule 33 of the Rules reads as under:-

"33. Counting of votes (Section 66).-- (1) In a Sabha area where there is only one polling Station, the Returning Officer shall follow the [procedure set out in sub-rule (2)] for the counting of votes and declaration of result for election to the Gram Panchayat.

(2) The Presiding Officer shall, as soon as practicable, after the close of the poll and in the presence of any candidate or polling [agent,]

who may be present:-

- (a) (inspect) and also allow an opportunity to candidates or their polling agents to inspect the ballot-boxes and their seals to satisfy themselves that they are in order;
- (b) open the ballot-box after checking the mark or marks made on the box and the label affixed, takes out the ballot papers from the box and arrange them in (convenient) bundles, separating the ballot-papers which he deems valid from those he rejects;
- (c) allow the candidates and their agents who may be present, reasonable opportunity to inspect all ballot-papers, which is in the opinion of the Presiding Officer, are liable to be rejected but shall not allow them to handle those or any other ballot-papers. The Presiding Officer shall on every ballot-paper which is rejected, endorse the word "rejected" and record briefly on such ballot-papers the grounds for its rejection. A brief record shall be kept of the serial numbers of all ballot-papers (rejected;)
- (d) (d) count the valid votes given in each candidate with the aid of Mittal Manju 2014.05.12 16:42 I attest to the accuracy and integrity of this document Chandigarh CR No.454 of 2014 persons appointed to assist in the counting of votes and declare the election of the candidate who is found to have obtained the largest number of valid votes, or, if more than one member is to be elected for the Gram Panchayat, then the candidates who are found to have obtained the largest number of valid votes shall be declared to have been (elected; and)
- (e) (after) the counting of ballot-papers contained in all the ballot-boxes has been completed, the Returning Officer shall record a statement in Form IX showing the total number of votes polled by each candidate."

13. As per the legal position emerging from the case law cited at bar the order for recounting cannot be made as a matter of course on the mere asking of the defeated candidate, strong prima facie

circumstances to suspect the purity, propriety and legality in the counting of the votes should be made out. The Tribunal must be prima facie satisfied on the basis of evidence adduced in support of the allegations that in order to decide the dispute and to do the complete and effectual justice between the parties making of such an order was imperatively necessary. The Hon'ble Supreme Court in case ***Udey Chand Vs. Surat Singh and another*** (supra) has laid down as under:-

“9. Before advertng to the merits of the issue raised by the parties with reference to the statutory provisions, it would be appropriate to bear in mind the salutary principle laid down in the election law that since an order for inspection and re-count of the ballot papers affects the secrecy of ballot, such an order cannot be made as a matter of course. Undoubtedly, in the entire election process, the secrecy of ballot is sacrosanct and inviolable except where strong prima facie circumstances to suspect the purity, propriety and legality in the counting are made out. The importance of maintenance of secrecy of ballot papers and the circumstances under which that secrecy can be breached, has been considered by this Court in several cases. It would be trite to state that before an Election Tribunal can permit scrutiny of ballot papers and order re-count, two basic requirements viz. (i) the election petition seeking re-count of the ballot papers must contain an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded, and (ii) on the basis of evidence adduced in support of the allegations, the Tribunal must be prima facie satisfied that in order to decide the dispute and to do complete and effectual justice between the parties, making of such an order is imperatively necessary, are satisfied.”

14. In case ***M. Chinnasamy Vs. K.C. Palanisamy and***

others (supra), the Hon'ble Supreme Court has laid down as under:-

“44. Furthermore, the High Court has not arrived at a positive finding as to how a prima facie case has been made out for issuing a direction for recounting. It is well- settled that prima facie case must be made out for scrutiny and recounting of ballot papers where it is of the opinion that the errors are of such magnitude as to materially affect the election. [See M.R. Gopalakrishan vs. Thachady Prabhakaran- 1995 Supp.(2) SCC 101].”

15. In case **P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen and others** (supra), the Hon'ble Apex Court has laid down as under:-

“13. Thus the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from high sight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election petitioner on the threshold before an order for recount of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or court should not order the recount of votes.”

16. This Court in case **Gurnam Bindra Singh Vs. Kulwant Singh and others** (supra) has laid down that in case the recounting of

votes cannot be ordered on the ground of equity and the election petitioner is required to make out categorical averment in the election petition and make out a prima facie case which can win the confidence of the Court for the purpose of ordering recount of the votes.

17. In the instant case, the main plea raised by respondent No.2/election petitioner to claim the recounting of the votes was that he was not allowed to enter the room and see the ballot box while breaking the seals. They were asked to remain outside the room and after breaking the seals the ballot papers were not shown to him and he was made to sit at a distance in the room. It was also alleged that the cancelled ballot papers were not shown to respondent No.2, the votes polled in his favour were wrongly counted in favour of the petitioner and his request for recounting was turned down by the Presiding Officer. To support these allegations, respondent No.2 Balwinder Singh has stepped into the witness box as PW-2. In his affidavit Ex.PW2/A he has supported the aforesaid allegations. In the cross-examination he admitted that he belongs to Akali Dal (Badal) and at present there is government of Akali Dal in Punjab. He further admitted that prior to sealing the boxes the Presiding Officer had shown the empty boxes to him. His signatures as well as the signatures of his agents were obtained. He further deposed that at the time of counting either the candidates can sit or his counting agents can sit. He further deposed that result of the members was declared at 07:30 hours. Thereafter he was called inside. At the time of counting, he and Naib Singh were present inside the room. He further

deposed that respondents No.2A, 3 and 4 had conducted the counting. He further deposed that he did not sign the counting. The aforesaid admissions in the cross examination of the petitioner shows that he was very much present in the room where the counting of the votes were conducted. The votes were counted in his presence by respondent No.2A, 3 and 4. Though, he has not signed the proceedings.

18. PW-1 Major Singh, the polling agent of election petitioner/respondent No.2, has gone a step ahead even of the election petitioner. He has stated that none of their members was present at the time of counting of the votes for Sarpanch. Balwinder Singh was also not present. He was made to sit in the Veranda, whereas Balwinder Singh respondent No.2/election petitioner has categorically stated that he and Naib Singh were present in the room at the time of the counting. He further deposed that they did not lodge any complaint to anyone that they were not allowed to sit in the room at the time of the counting. He further categorically admitted that they did not submit the written complaint to any senior officer regarding the incident taken place in the elections. The non-lodging of any complaint in this regard indicates that nothing of this sort had actually happened.

19. From the aforesaid evidence, it prima facie comes out that at the time of counting respondent No.2 Balwinder Singh the election petitioner was very much present in the room where the votes were being counted. Votes were also counted in his presence by respondent No.2A, 3 and 4. There is no material on record to show that any objection was

raised by respondent No.2 with respect to any irregularity or illegality in the counting of the votes. Even after the result was declared, he did not make any complaint to the higher authorities against the conduct of respondents No.2A, 3 and 4 pointing out any alleged irregularity or illegality committed by them in the process of counting of the votes. It is also nowhere pleaded and proved as to how the rejection of 43 votes was illegal. The petitioner has taken the stand that he was not informed about the counting and he even did not know with how many votes Naib Singh was declared the winner. It is not prima facie believable that a candidate contesting the election will not be aware that with how many votes he lost the elections. These types of assertion in the testimony prima facie affects the credibility. It is not prima facie believable that the officials will be able to count the votes polled in favour of respondent No.2 in favour of the petitioner in the presence of the election petitioner without any hue and cry and objection from his side.

20. There is also no material on record to show that any request was made by the election petitioner to the Presiding Officer for recounting of the votes. Just oral/bald statement of the petitioner to this effect cannot be prima facie relied upon.

21. The learned Election Tribunal has just taken the statements made by the election petitioner/respondent No.2 and his witness on the face value to observe that the allegations mentioned in the election petition with respect to the illegality in the counting is proved without making even the prima facie evaluation. The statement made by

petitioner Naib Singh rebutting all the allegations has gone totally unnoticed. No reference of the statement made by petitioner has been given in the impugned order nor its effect has been discussed or taken into consideration. The learned Tribunal has not even taken into consideration the fact that the petitioner was declared elected by the margin of 193 votes. Only 43 votes were cancelled. Even if all the cancelled votes are counted in favour of respondent No.2/election petitioner, there will be no change in the ultimate result. As already discussed, the allegations that the votes polled in favour of respondent No.2 were counted in favour of the petitioner does not prima facie inspire any confidence as it cannot happen without any protest and objection from the side of respondent No.2 as he was very much present at the time of the counting.

22. The recounting of the votes cannot be ordered just for the satisfaction of the election petitioner and merely on his asking. In the affidavit filed by Ram Singh, the Block Development and Panchayat Officer, it is mentioned that no proceedings at the start of the counting as mandated under Rule 33 of the Rules was found in record and respondent No.2 has not signed the proceedings at any stage. As per Rule 33 of the Rules, there is no mandate that the Presiding Officer shall have to prepare the written proceedings at the start of the counting of the votes. Rule 33 Sub Rule (2) (e) simply provides that after the completion of the counting, the Returning Officer shall record a statement in Form IX showing the total number of the votes polled by each candidate.

However, if some written proceedings are recorded by the Presiding Officer while starting the counting the frivolous objections later on raised in the election petitions can be ruled out. Mere absence of such proceedings in the present case is no ground to prima facie substantiate the allegations mentioned in the petition to claim the recounting of the votes.

23. The cases relied upon by learned counsel for respondent No.2 to support the order passed by learned Election Tribunal are quite distinguishable on facts. In case ***Gursewak Singh Vs. Avtar Singh and others*** (supra) the margin of the votes was 104 whereas 147 votes were rejected. In case ***Darshan Singh Vs. Deputy Commissioner-cum-President Officer, Election Tribunal and others*** (supra) the margin was only of one vote and it was alleged that the votes were improperly rejected in violation of Rule 33 (c) of the Rules. In case ***Gurtej Singh Vs. Darbara Singh*** (supra) the allegations were that earlier the election petitioner was declared elected by 16 votes. Thereafter, the electric light was switched off and respondent No.1 was declared elected. 72 votes were declared invalid in illegal and unlawful manner. It was observed by this Court that if the said 72 votes were found rejected illegally and without compliance of the provisions of Rule 33 of the Rules, the election petitioner could be declared a winning candidate. But in the instant case, as already mentioned as the petitioner has been declared elected by 193 votes and even if all the 43 cancelled/rejected votes are counted in favour of the election petitioner, the result will remain the same. In case ***Sadhu***

Singh Vs. Darshan Singh and another (supra), there were margin of only 11 votes and 147 votes were declared invalid. In case ***Ajaib Singh Vs. Presiding Officer, Election Tribunal Mansa and others*** (supra) there was margin of 20 votes and 46 votes were improperly rejected. It was further held that the recounting has been ordered not for the satisfaction of the opposite candidate but to check the correctness of the allegations.

24. I fail to understand how case ***Deepak Sharma Vs. Hardeep Kaur and others*** (supra) supports the case of respondent No.2 as in that case it has been laid down as under:-

“19. * * * If the votes have been rejected without recording any reason it amounts to violation of Rule 33(c) and would vitiate the election. It is not the case set up by Hardeep Kaur that the ballot papers were wrongly rejected or the reasons for rejection were bad. The truth of the matter is that her duly authorized polling agents were present in the booths when the ballot boxes were opened and votes counted in the three booths. The complaint is that they were 10 to 12 feet away and not to tables and not that they were not present there at all or that the counting was done behind their back. If this were true then Hardeep Kaur can reasonably be expected to have raised a hue and cry there and then but she did not do so. Nor is there any evidence to suggest to the contrary.”

With the aforesaid observations, the order of recounting the votes was set aside. In this case also, it is an admitted fact that election petitioner was very much present in the room and counting was conducted in his presence but there is no material to show that he raised any objection there and then. Even after the result, no written complaint has been moved.

25. In case *Manjeet Kaur Vs. The Presiding Officer and others* (supra) there was margin of only 4 votes and 15 votes were cancelled. Thus, the aforesaid cases cannot advance the case of respondent No.2.

26. Thus, keeping in view my aforesaid discussion the impugned order passed by the learned Election Tribunal does not satisfy the parameters for recounting the votes laid down by the Hon'ble Apex Court in the cases referred above. Respondent No.2 has not been able to make out the strong prima facie case for claiming the recounting of the votes. Respondent No.2 has, thus, failed to substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of the votes being ordered by the Election Tribunal in the interest of justice. Therefore, the discretion exercised by the learned Tribunal to order recounting of the votes is palpably erroneous, which justify the interference by this Court in exercise of the powers under Article 227 of the Constitution of India.

27. Thus, the present petition is hereby accepted. The impugned order dated 05.02.2014 of recounting the votes is hereby set aside being not legal and factually justified. However, the parties are left to bear their own costs.

28.03.2016

sunil yadav

**(DARSHAN SINGH)
JUDGE**