

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No. 9224 of 2016

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Gopal Bhagat Son of Sri Raghubar Bhagat, Resident of village - Baheri East, P.S. Baheri, P.O. Baheri, District – Darbhanga.

.... Petitioner/s

Versus

1. The State of Bihar through the District Magistrate, Darbhanga.
2. The District Magistrate - Cum - Election officer (Panchayat) Darbhanga.
3. The Returning officer - Cum - Sub Divisional officer, Sadar Darbhanga.
4. The Returning officer, Baheri - Cum - Block Development officer, Jale.
5. The State Election Commission, Bihar.
6. The Secretary, State Election Commission, Bihar.
7. Nayeem S/o Md. Hakeem R/o Village+P.O- Baheri, Panchayat, Baheri, East , P.S.- Baheri, Block- Baheri, District- Darbhanga.
8. Ashok Kumar Mandal S/o Anand Mandal R/o Village+P.O.- Baheri, Panchayat Baheri East, P.S. Baheri, Block- Baheri, District-Darbhang.
9. Jaheed S/o Md. Jakir R/o Village+P.O. - Baheri, Panchayat Baheri East, P.S.- Baheri, Block- Baheri District- Darbhanga.
10. Ghuran Sharma S/o Ramchandra Sharma R/o Village+P.O.- Adavan, P.O. Thathopur, Panchayat-Thathopur, P.S. Baheri, Block- Baheri, District- Darbhanga.
11. Praveen Kumar Dev S/o Kamal Lal Dev R/o Village- Baheri, Panchayat Baheri West, P.S. -Baheri, Block -Baheri, District- Darbhanga.
12. Mahadev Mukhiya S/o late Madhuri Mukhiya R/o Vill+P.O.- Baheri, Panchayat Baheri, PS Baheri, Block Baheri, District- Darbhanga.
13. Manoj Lal Dev S/o Yugeshwar Lal Deo R/o Village- Pakri, Panchayat Baheri West, P.S. Baheri, Block Baheri, District- Darbhanga.
14. Md. Subhan S/o Md. Muslim R/o Village+P.O.- Badhauni, Panchayat Badhauni, P.S. Baheri, Block Baheri, District- Darbhanga.
15. Shanti Devi W/o Sukhnandan Mahto R/o Village+P.O. - Hathauri, Panchayat Hathauri South, P.S Hayaghat, Block- Baheri, District- Darbhanga.
16. Shivshankar Mandal S/o late Ganga Mandal R/o Village- Kharari, P.O. Kharari, Panchayat Hathauri South, P.S Hayaghat, Block- Baheri, District-Darbhang.
17. Sunil Kumar Mandal Son of Ganaur Mandal R/o Village+P.O. Badhauni, Panchayat Badhauni , PS Baheri, Block Baheri District- Darbhanga.

.... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Harendra Prasad Singh and Mr. Santosh Kumar, Advocates
For the SEC	:	Mr. Amit Shrivastava and Mr. Sanjeev Nikesh, Advocates
For the State	:	Mr. Ramadhar Singh, G.P. 25
For the Respondent No. 7	:	Mr. S.B.K. Mangalam, Advocate

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CORAM: HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH
ORAL JUDGMENT

Date: 04-05-2017



Heard Mr. Harendra Prasad Singh, learned counsel assisted by Mr. Santosh Kumar, learned counsel for the petitioner; Mr. Amit Shrivastava, along with Mr. Sanjeev Nikesh, learned counsel for the State Election Commission; Mr. Ramadhar Singh, learned GP-25 for the State and Mr. S. B. K. Mangalam, learned counsel for the respondent no. 7. Despite notice to the remaining private respondents, nobody appeared on their behalf when the matter was heard.

2. At the very outset, before making submissions, learned counsel for the petitioner expressed his apology on behalf of the petitioner and sought permission to delete paragraph no. 15.

3. Learned counsel for the respondents do not object.

4. In view thereof, permission is granted and the said paragraph no. 15 of the writ petition stands expunged.

5. The petitioner has moved the Court seeking the following reliefs:

“(1) quashing the Memo no.-Panchayat Nirvachan 30-110/2016-5175 Patna dated 09.06.2016 (Annexure-6) issued by and under the signature of the respondent no.- 6 whereby and whereunder the polling held on Booth No. -257 and 258 of Pradeshik Nirvachan Kshetra Sankhya-25 (Baheri 8/3) for the post of Zila Parishad Sadasya has been cancelled and has ordered for holding repoll on 15.06.2016 on both the said booths (ii) and for commanding the respondents authorities to declare the result of said Pradeshik Nirvachan Kshetra Sankhya-25 (Baheri-8/3) (Inshort the Constituency) for the post of Zila Parishad Sadasya



on the basis of the polling held on 06.05.2016 by issuance of an appropriate writ(s), order(s) and / or direction(s) in the following facts and circumstances of the case.”

6. The petitioner, along with respondents no. 7 to 17, contested for the post of member of Darbhanga Zila Parishad from Pradeshik Nirvachan Kshetra Sankhya-25 (Baheri 8/3) for which election was held on 06.05.2016, as per the fixed schedule. The counting for the said constituency was started on 05.06.2016 and continued till 07.06.2016. However, with regard to Booths No. 257 and 258 in Baghauni Gram Panchayat, having a total of 707 and 601 voters respectively, it was detected that out of the 392 polled in Booth No. 257 and 425 in Booth No. 258, 320 ballot papers of Booth No. 257 and 394 ballot papers of Booth No. 258 had wrong printing of the name of the constituency and the name of the candidates. The same being detected after counting in the remaining 90 Booths had been completed and known, the local authorities communicated the factual position to the State Election Commission and after deliberation, the State Election Commission directed for re-poll on the said two Booths. However, by order dated 15.06.2016, there was a stay of declaration of the result of the fresh election on the said two Booths which was to be held on that day.

7. Learned counsel for the petitioner submitted that the State Election Commission has unnecessarily interfered in the matter



by directing for re-poll as this was a plain and simple case where such ballot papers which had the wrong constituency name as well as the name of the candidates, were to be rejected in terms of Rule 75 of the Bihar Panchayat Election Rules, 2006 (hereinafter referred to as the 'Rules'). Learned counsel submitted that specifically Rule 75(1)(h) deals with such a situation where there may be error with regard to the name of the candidate or candidates, serial number and symbol allotted to a candidate as recorded in Form 9. He submitted that once such ballot papers were detected which had such printing error, the only recourse under law for the Returning Officer was to reject such ballot papers and nothing further was required to be done. Learned counsel submitted that this not being done itself was improper and further, the matter being referred to the State Election Commission was not required. It was further submitted that the State Election Commission, in turn ordering for re-poll was totally beyond jurisdiction and impermissible in the particular facts and circumstances of the case. Learned counsel submitted that the decision for re-poll in two Booths out of 92 Booths, and that too, after the result of the remaining 90 Booths being known, the situation does not remain the same as it is during the election to the entire constituency and such a situation obviously does not create a level playing field for the contestants inasmuch as, after knowing the result



in the majority of the Booths, there is reasonable possibility that voting would not be as per the independent wishes of the electorate once the result for the remaining majority of Booth is known. Learned counsel submitted that though right to contest an election may not be fundamental and is statutory, but once the statute has conferred such right, a person claiming such right is entitled to get his due in terms of the requirement of the statute.

8. Learned counsel for the State Election Commission submitted that the decision taken at the level of the State Election Commission was based on the letter of the District Magistrate, Darbhanga dated 08.06.2016 as well as the letter of the Sub Divisional Officer, Sadar Darbhanga dated 07.06.2016, which disclosed that the petitioner had got 4012 valid votes and the respondent no. 7 had 3636 votes, excluding the votes polled at Booths No. 257 and 258 and since the difference between the candidates was 376 whereas 816 votes were not counted, the Commission in its wisdom, and as per its instructions/guidelines issued in this regard in terms of its plenary jurisdiction to supervise the election as mandated by the Constitution of India, the order for re-poll in said two Booths was both required and proper. It was submitted that since the votes which could not have been taken into account being 816 in number, and that too on account of the ballot



papers being for another Territorial Constituency No. 25 in the District of Banka and having nothing to do with the constituency for which the election in the present case was conducted and the difference between the first two candidates i.e., the petitioner and the respondent no. 6, being only 376, the only reasonable recourse was to hold a fresh election so that the participation and will of such 816 voters were not excluded from the said election process. Learned counsel further submitted that this was all the more necessary as the result could not have been declared without taking into consideration the will of the voters for Booths No. 257 and 258. Learned counsel submitted that in terms of Rule 75(1)(i) of the Rules, as this was not one of the grounds mentioned in sub Rules (a) to (h) of Rule 75(1) of the Rules, it was within the domain and discretion of the State Election Commission to give general or special direction, as has been issued in the present case. Learned counsel submitted that the petitioner has a statutory remedy available to him under Section 139(1)(d)(iv) of the Bihar Panchayat Raj Act, 2006 (hereinafter referred to as the 'Act'), which stipulates that any non-compliance with the provisions of the Act or of any Rules or orders made thereunder, the prescribed authority shall declare the election of the returned candidate to be void. He submitted that the invocation of power under Rule 75(1)(i) of the Rules was proper and justified,



especially in view of the proviso to Clause-19 of the guidelines issued for the 2016 election with regard to the manner of counting of the polled votes. Learned counsel also took a preliminary objection by submitting that once the election has been notified and has not reached finality by declaration of the result, interference by the Court is barred in terms of Article 243-O of the Constitution of India read with Section 138 of the Bihar Panchayat Raj Act, 2006. For such proposition, learned counsel relied upon a decision of the Hon'ble Supreme Court in the case of **Mohinder Singh Gill & Anr. vs. The Chief Election Commissioner, New Delhi & Ors.** reported as **AIR 1978 SC 851**, the provisions of Article 329 being *pari materia* to those of Article 243-O of the Constitution of India. He particularly drew the attention of the Court to paragraph 91 where it has been held relating to the bar to interfere during election by the Courts i.e., from the notification till the declaration of the result:

“91. Diffusion, even more elaborate discussion, tends to blur the precision of the conclusion in a judgment and so it is meet that we synopsise the formulations. Of course, the condensed statement we make is for convenience, not for exclusion of the relevance or attenuation of the binding impact of the detailed argumentation. For this limited purpose, we set down our holdings :

1(a) Article 329(b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result.

(b) Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate.



2(a) The Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This, responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances.

(b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection, with elections, the Commission, shall act in conformity with, not in violation of, such provisions but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be a required of it as fairplay-in-action in a most important area of the constitutional order, viz., elections. Fairness does import an obligation to see that no wrong-doer candidate benefits by his own wrong. To put the matter beyond doubt natural justice enlivens and applies to the specific case of order for total re-poll, although not in full panoply but inflexible practicability. Whether it has been complied with is left open for the Tribunal's adjudication.

3. The conspectus of provisions bearing on the subject of elections clearly expresses the rule that there is a' remedy for every wrong done during the election in progress although it is postponed to the post election stage and procedure as predicated in Article 329(b) and the 1951 Act. The Election, Tribunal has, under the various provisions of Act, large enough powers to give-relief to an injured candidates if he makes out a case and such processual amplitude of power extends to directions to the Election Commission or other appropriate agency to hold a poll, to bring up the ballots or do other thing necessary for fulfilment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the exiting law"

9. He further submitted, with regard to the authority and jurisdiction of the State Election Commission relating to the superintendence, direction and control during conduct of election, at paragraph no. 113, the following has been held:

"113. Article 324(1) vests in the Election Commission the superintendence, direction and control of the preparation of



the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of the President and Vice-President held under the Constitution. Article 324(1) is thus couched in wide terms. Power in any democratic set up, as is the pattern of our polity, is to be exercised in accordance with law. That is why Arts. 327 and 328 provide for making of provisions with respect to all matters relating to or in connection with elections for the Union Legislatures and for the State Legislatures respectively. When appropriate laws are made under Art. 327 by Parliament as well as under Article 328 by the State Legislatures, the Commission has to act in conformity with those laws and the other legal provisions made thereunder. Even so, both Arts. 327 and 328 are "subject to the provisions" of the Constitution which include Article 324 and Article 329. Since the conduct of all elections to the various legislative bodies and to the offices of the President and the Vice-President is vested under Article 324(1) in the Election Commission, the framers of the Constitution took care to leaving scope for exercise of residuary power by the Commission, in its own right, as a creature of the Constitution, in the infinite variety of situations that may emerge from time to time in such a large democracy as ours. Every contingency could not be foreseen, or anticipated with precision. That is why there is no hedging in Article 324. The Commission may be required to cope with some situation which may not be provided for in the enacted laws and the rules. That seems to be the raison d'etre for the opening clause in Articles 327 and 328 which leaves the exercise of powers under Article 324 operative and effective when it is reasonably called for in a vacuous area. There is, however, no doubt whatsoever that the Election Commission will have to conform to the existing laws and rules in exercising its powers and performing its manifold duties for the conduct of free and fair elections. The Election Commission is a high-powered and independent body which is irremovable from office except in accordance with the provisions of the Constitution relating to the removal of Judges of the Supreme Court and is intended by the framers of the Constitution to be kept completely free from any pulls and pressures that may be brought through political influence in a democracy run on party system. Once the appointment is made by the President, the Election Commission remains insulated from extraneous influences and that cannot be achieved unless it has an amplitude of powers in the conduct of elections of course in accordance with the existing laws. But where these are absent, and yet a situation has to be tackled, the Chief Election Commissioner has not to fold his hands and pray to God for divine inspiration to enable him to exercise his functions and to perform his duties or to look to any external authority for the grant of powers to deal with the situation. He must lawfully exercise his power independently, in all



matters relating to the conduct of elections, and see that the election process is completed properly, in a free and fair manner. An express statutory grant of power or the imposition of a definite duty carries with it by implication, in the absence of a limitation, authority to employ all the means that are, usually employed and that are necessary to the exercise of the power or the performance of the duty.... That which is, clearly implied is as much a part of a law as that which is expressed. Sutherland Statutory Construction, 3rd Edition,, page 20.”

10. He also relied on the decision of the Hon’ble Supreme Court in the case of **Union of India v. Association for Democratic Reforms** reported as **A.I.R. 2002 S.C. 2112**, the relevant being at paragraph no. 56 and a recent decision of the Hon’ble Supreme Court in the case of **Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari** reported as **AIR 2014 SC 1290**, the relevant being at paragraphs no. 7 and 25. Learned counsel further referred to the decision of this Court in the case of **Heman Rai vs. State Election Commission (Panchayat)** reported as **2011(1) PLJR 570**, the relevant being at paragraphs no. 16 and 18, the case of **Sahdeo Yadav v. Election Commissioner** reported as **2004(1) PLJR 278**, particularly paragraphs no. 4, 31 and 32 which read as under:

“4. On 30-4-2001, the Election Commission had issued general guidelines mentioning, inter alia, that the votes cast on the basis of the ballot papers, which are not printed as Form 9, approved by the Returning Officer, should not be counted. The said guideline was issued by the Commission taking into consideration that the voting might have taken place with defective ballot papers, which could not be noticed by the Presiding Officer at the time of poll due to rush of work and due to their inexperience in conducting Panchayat election, which was being held after such a long time. A copy



of the said guideline has been annexed as Annexure 1 to the writ application and Annexure 6 to the memo of appeal.

31. Thus, in my considered view, during the process of election this Court should not have interfered with the decision taken by the Election Commission, which, as started above, was a step in the election and challenge to the same was barred by Article 243-O(b) of the Constitution and Section 140 of the Act. The Election Commission has not violated the direction given by this Court in the earlier order, on the other hand, its action is bona fide and was done for the sole purpose and with a view to achieve the goal of free and fair poll.

32. In the result, this appeal is allowed and the impugned order passed by the learned Single Judge is set aside and all consequential steps including the declaration of the result pursuant to the order of this Court are also quashed. The Election Commission is directed to proceed in accordance with its decision and hold a fresh poll immediately.”

11. He also relied on the decision in the case of **Devendar Yadav v. State of Bihar** reported as **2005(1) PLJR 26**, the relevant being at paragraphs no. 10 and 11.

“10. Mr. Mahto lastly submits that the learned Munsif on its own finding ought not to have directed for holding fresh election at the entire booths but should have directed for holding of repoll only at booth Nos. 14 and 17. I find substance in the submission of Mr. Mahto. The learned Munsif had found that violence had taken place at booths Nos. 14 and 17 and the poll held at those booths were not free and fair and in that view of the matter, I am not of the opinion that the learned Munsif erred in directing for holding the election on all the booths afresh.

11. Accordingly, I find and hold that the learned Munsif rightly set aside the election of the returned candidate but erred in directing for holding fresh election for the office of the Mukhiya of Dehuri Gram Panchayat in the district of Gaya on all the booths. Hence I direct the State Election Commission to hold the election for the office of the Mukhiya of Dehuri Gram Panchayat at booth Nos. 14 and 17 and thereafter declare the result of the election.”

12. Learned counsel for the State has opposed the writ



petition and has adopted the arguments advanced on behalf of the State Election Commission.

13. Mr. S.B.K. Mangalam, learned counsel for the respondent no. 7 has also opposed the writ petition and adopted the arguments of learned counsel for the State Election Commission. However, he reiterated that if genuine voters have exercised their franchise on Booths No. 257 and 258, their votes cannot go unconsidered and since the ballot papers itself were incorrect, the only way to gather their will, according to the State Election Commission, was by directing re-poll on the said Booths. At this juncture, he made an alternative argument and submitted that if at all, it is considered proper, then he is prepared for fresh poll to the entire constituency, agreeing that re-poll in only two Booths may cause prejudice to parties contesting the election in view of results of the other Booths being known.

14. Learned counsel for the petitioner, by way of reply, submitted that the preliminary objection regarding the maintainability of the present writ application, by learned counsel for the State Election Commission is misconceived. He submitted that all the decisions relied upon by the learned counsel for the State Election Commission in this regard starting from **Mohinder Singh Gill** (supra) do not stipulate a blanket/complete bar on exercise of



jurisdiction by the High Court under Article 226 of the Constitution of India and moreover, in such cases, after the result was declared, the parties had moved the High Court under its writ jurisdiction, and the Courts had observed that there being a statutory remedy of filing an election petition, such exercise of power under Article 226 of the Constitution by the High Court was not to be exercised. Learned counsel submitted that even in the recent case of **Bibha Devi vs. State Election Commission (Panchayat)** reported as **2017(1) PLJR 226**, a Division Bench of this Court, though had observed that the exercise of jurisdiction under Article 226 of the Constitution of India is barred in view of Article 243-O read with Section 138 of the Act, but the said decision also was in the background of the fact that after declaration of the result of the election, the contesting candidate had challenged the same before the High Court under Article 226 of the Constitution of India attributing illegality in the manner of counting of votes. He submitted that in the present case, if the re-poll is held for the two Booths, the petitioner shall be precluded from having any remedy under any law, including the Act and the Rules, since the grounds for declaring an election to be void as specified in Section 139 of the Act do not contemplate such a situation. He submitted that in the case of **Bhavnagar University v. Palitana Sugar Mill (P) Ltd.** reported as **(2003)2 SCC 111**, it has



been held at paragraphs no. 40 and 59 that when a statutory authority is required to do a thing in a particular manner, the same must be done in that manner or not at all and the State and other authorities while acting under the said Act are only creature of statute and must act within the four corners thereof. He further submitted that at paragraph no. 59, it has clearly been held that a decision, as is well known, is an authority for which it is decided and not what can logically be deducted therefrom. It was further held that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. Similarly, he referred to the decision of the Hon'ble Supreme Court in the case of **Bharat Petroleum Corporation Ltd. v. N. R. Valramani** reported as **A.I.R. 2004 S.C. 4778**, where at paragraph no. 9 it has been held that the Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the factual situation of the decision on which reliance is placed. It was further held that observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. He further submitted that at paragraph no. 12, the words of Lord Denning in the matter of applying precedents having become *locus classicus* have been quoted as:

“ Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the



temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.”

“Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.”

15. As far as the case of **Sahdeo Yadav** (supra) is concerned, learned counsel submitted that the foundational fact was that on the day of polling itself, on those particular Booths it was detected that wrong symbol has been shown for the candidates and objection was raised at that time itself and counting was not held for any of the Booths and in that background, the said order was passed. Similarly, he submitted that paragraph no. 21 of the said judgment has also referred to and clarified the law laid down by the Hon'ble Supreme Court in the case of **Mohinder Singh Gill** (supra), where it has been held that there are certain controversies, which may not attract the wrath of Article 329(b) of the Constitution of India, namely, if the Election Commission acts in breach of law or its action is arbitrary or *mala fide* or the Election Commission has passed an order, which instead of accomplishing and completing the process of election, may have the effect of thwarting the course of election. In both the situations, the Court may interfere inspite of ban created by Article 329(b) of the Constitution.



16. Learned counsel submitted that in the case of **Devendar Yadav** (supra), due to irregularities found only in two Booths, the order for re-poll by the Election Tribunal was not found proper by the High Court and it was directed that re-poll be conducted only in the specific Booths where there was allegation of irregularities and direction to do so was issued to the State Election Commission.

17. Learned counsel submitted that in the present case, clearly an unjust situation has arisen where the electorate of the said two Booths are aware of the result of the remaining 90 Booths, and therefore there cannot be any reasonable expectation of there being free and fair polling with regard to the electorate exercising their franchise as would have been done if they were unaware of how the electorate had voted in the remaining majority Booths.

18. Having considered the rival contentions, the Court, in the facts and circumstances of the present case, is unable to uphold the decision taken by the State Election Commission, for reasons discussed hereinbelow.

19. The admitted position is that voting was held on 06.05.2016 peacefully, without any demur or complaint from any quarter whatsoever. This aspect, being admitted, is most vital and



cannot be lost sight of. It is an equally admitted position that the serial number and symbols of the candidates were not changed, despite the so called incorrect ballot papers pertaining to another constituency having been used for casting of votes by the 714 voters at Booths No. 257 and 258. In this background, the clear, logical and obvious presumption would be that the electorate had exercised their franchise in favour of the candidate of their choice, unmindful of the incorrect name of the constituency being printed and even that of the candidates and had clearly gone by the symbols. Thus, there was no complaint, either with regard to there being any discrepancy in the ballot paper or there being any complaint of any untoward incident of which cognizance was required to be taken. Such being the admitted position, the authorities, more importantly, the State Election Commission had to move forward. The Court need not reiterate the legal position that the provisions of the Constitution of India have to be given primacy over all other written or laid down laws and in the present case, though undoubtedly, Article 243-O creates a bar to interference by Courts in electoral matters, but the same also stipulates that the election shall be called in question in such manner as is provided for by or under any law made by the Legislature of a State. In the present case, the Legislature has enacted the Act and thus, after the constitutional provision, it is the



provisions of the Act which are to be implemented strictly. Thereafter, come the Rules which have been framed under the Act and operate in areas where it supplements the provisions of the Act. Once the same is done, if there is any grey area or a situation which has not been taken care of either under the Act or the Rules, the State Election Commission under its plenary power shall have jurisdiction in terms of Section 138 of the Act. Further, Rule 75(1)(i) also gives power to the State Election Commission to prescribe by a general or special direction other grounds which may not be specified in sub Rules (a) to (h) of Rule 75(1) of the Rules for rejection of any ballot papers contained in the ballot box. Such being the position, only if the ballot papers of Booths No. 257 and 258, which were found to be pertaining to another constituency could not be categorized in any of the conditions mentioned in sub Rules (a) to (h) of Rule 75(1) of the Rules, the role of the State Election Commission would begin and it would have jurisdiction to prescribe general or special direction in the present matter also. In the instant case, it is the admitted position that the ballot papers were of another constituency and were wrong to the extent that the name of the constituency and the candidates was different. However, the serial number as well as the symbols allotted to the persons was the same. Once such mistake or error came to the notice of the



Returning Officer, at the time of counting, after the ballot papers were taken out from the ballot box, the same would be a situation covered under Rule 75(1) (h) of the Rules. The natural corollary then would be that such ballot papers had to be rejected. In the present case, it was not such a situation where the entire ballot papers had been found to be wrongly printed which prevented the voters in voting for the candidate of their choice. Having reached such conclusion, any exercise of authority or power by the State Election Commission for directing of another course of action and by ordering re-poll in those two particular Booths only is clearly unwarranted and without jurisdiction. The State Election Commission could not have issued any general or special direction for any situation which stood covered under Rule 75(1)(h) of the Rules and the results were required to be declared. Here, the Court would advert to another angle in the whole issue, that is, whether the re-poll in the two booths out of 92 Booths and that too after the results of the remaining 90 Booths having been known, was just, fair, reasonable, appropriate and proper. The Court has no hesitation to hold that such a situation would clearly prejudice the candidates and there would be no level playing field as far as the exercise of votes by the voters of only two Booths are concerned, once they are aware of the results of the remaining 90 Booths. Had it been a



situation where the results of none of the Booths was known to the public at large, the Court, considering the overall implication may have refrained from interfering in the decision of the State Election Commission to go for a re-poll only for the said two Booths. This is also a common practice where re-polls are held for particular Booths but the same is done before counting for any of the Booths begin. Such is not the position in the present case. The Court is aware that as per the statute, a remedy lies by challenging the result of any election by filing an Election Petition but in this particular case, the grounds under which such election can be interfered with or declared to be void are enumerated in Section 139 of the Act, which clearly does not cover the situation at hand. On the other hand, if the election was concluded and results declared on the basis of votes already polled by simply rejecting the votes in question, it was well covered under Section 139 of the Act, and the result could be challenged and the election declared to be void, as it would come under the category of improper rejection of any vote. However, in the present case, if the election result is declared on the basis of the votes polled in the re-poll to those two Booths, the original votes polled and those ballot papers become redundant and cannot be a ground for maintaining an Election Petition. Thus, for such cause of action, the petitioner would otherwise be left with no forum to



agitate. Law does not contemplate such a situation where a person is left without a forum or remedy and only for such exigency, the Constitution of India has provided Article 226 and where judicial interference may be required.

20. The preliminary objection of learned counsel for the State Election Commission that once the process of election has started and till the declaration of result, there is a bar to interference by the High Court under Article 226 of the Constitution is noticed only for the sake of rejecting the same. In this context, the Court would refer to paragraph no. 21 of **Sahdeo Yadav** (supra), where the law laid down by the Hon'ble Supreme Court in the case of **Mohinder Singh Gill** (supra) has been explained, which leaves no doubt that the Court may interfere where the Election Commission acts in breach of law or its action is arbitrary or *mala fide* or the Election Commission has passed an order, which instead of accomplishing and completing the process of election, may have the effect of thwarting the course of election. The Court finds it appropriate to reproduce paragraph no. 21 from **Sahdeo Yadav** (supra):

“21. In Mohinder Singh's case (supra), the apex Court held that Article 329(b) of the Constitution is itself a complete bar on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result. The sole remedy to the aggrieved party, if he wants to challenge any election, is an election petition and this excludes all remedies



including the remedy provided under Article 226 of the Constitution, as a result of the non-obstante clause. In other words, it was held that if the challenge amounts to calling the election in question, then Article 329(b) will operate. However the Apex Court held that there are certain controversies, which may not attract the wrath of Article 329(b) namely, if the Election Commission acts in breach of law or its action is arbitrary or mala fide or the Election Commission has passed an order, which instead of accomplishing and completing the process of election, may have the effect of thwarting the course of election. In both the situations, the Court may interfere inspite of ban crated by Article 329(b) of the Constitution.”

21. In the present case, the State Election Commission has, in fact, acted as a spanner in accomplishing and completing the process of the election by ordering for re-poll and by not allowing the results to be declared on the basis of the votes polled at Booths No. 257 and 258 to be counted, in accordance with law, especially in terms of Rule 75(1) of the Rules. Further, the Court is in agreement with the submissions made by learned counsel for the petitioner that the underlying principle of the Constitution of India, which has to be applied to every legislated law in the field of exercise of authority by institutions which may be creatures of either the Constitution or the statute, is that the cause of justice has to be promoted and something which appears to be arbitrary and unreasonable needs to be negated. In the present case, at the cost of repetition, both on the ground of the decision of the State Election Commission being beyond jurisdiction and unwarranted and also in view of the fact that re-poll for the Booths No. 257 and 258 would necessarily and obviously prejudice



the petitioner when the electors of only such two Booths, being aware of the result of the other 90 Booths and also the difference between the first two candidates, would thus, be in a position to materially affect the ultimate result which cannot, in any way, be said to be a level playing field.

22. The contention of learned counsel for the State Election Commission, of the petitioner having a remedy under Section 139(1)(d)(iv) of the Act does not appear to be correct for the reason that it contemplates a situation where the election can be declared to be void if there is non-compliance with the provisions of the Act, Rules or orders made thereunder. The present is a case whereupon re-election being held, the same would have been in compliance of the orders issued by the State Election Commission and not otherwise. The said Section contemplates that it should be non compliance of the provision of the Act, Rules or orders made thereunder and not in the contrary, when steps are taken in compliance of the order of the State Election Commission. Also, the contention with regard to the action being taken in terms of the guidelines issued by the State Election Commission, suffice to say that any instructions or guidelines cannot be contrary to the provisions of the Act and the Rules and when the Rules directly provide and take care of the situation, which is the subject-matter of



the present writ application, such direction clearly has to be held to be *ultra vires* and impermissible. Moreover, as has already been explained by learned counsel for the petitioner, the said proviso to Clause-19 of the guidelines is only with reference to a situation where there is more than 95% polling, which obviously is not the fact in the present case.

23. For the reasons aforesaid, the direction to hold re-poll at Booths No. 257 and 258 of Pradeshik Nirvachan Kshetra Sankhaya-25 (Baheri 8/3), is set aside. Consequently, re-poll actually held is also set aside. The State Election Commission shall proceed by counting the votes polled at Booths No. 257 and 258 on 06.05.2016 and after rejecting the invalid/incorrect/wrongly printed ballot papers, shall declare the result. The exercise be completed within two weeks from the date of production of a copy of this order before the respondent no. 6.

24. During the course of hearing the matter, on earlier occasions, the Court had embarked upon an exercise, that is, of requesting Mr. Amit Shrivastava, learned counsel to go through such ballots which were polled in the election held on 06.05.2016 on Booths No. 257 and 258 and give report after counting the number of ballot relating to the symbols allotted to the candidates. Upon going through the report submitted by Mr. Amit Shrivastava, learned



counsel, in a sealed envelope, the Court is further convinced that the view taken and order passed will not result in injustice, particularly in the background when there has been no complaint of any kind from any quarter with regard to there being any discrepancy or error in the ballot papers, enabling the Court to safely presume that the voters had exercised their franchise in favour of their person of choice on the basis of the symbols. The order has been dictated in open Court and thus, it is recorded that no other points or submissions were advanced.

25. Since such procedure was adopted by way of a unique experiment, with a view to further the cause of justice, let the sealed cover, in which the report has been kept, form part of the records. The original ballot papers, form etc., either called for or available with the learned counsel for the State Election Commission, be returned.

26. The writ petition stands allowed in the aforementioned terms.

(Ahsanuddin Amanullah, J.)

P. Kumar

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