

IN THE HIGH COURT OF JUDICATURE AT PATNA
Election Petition No.2 of 2015

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Hulas Pandey, son of Late Kameshwar Pandey, resident of village/mohalla-
New Area, Ward No.-25, P.O.- Dalmiya Nagar, P.S.-Dehri-on-Sone,
District-Rohtas.

.... Petitioner/s

Versus

1. Radha Charan Sah, son of Shri Haribans Sah, resident of Mohalla-Babu
Bazar, P.O.- Ara, P.S.- Ara Town, District- Bhojpur
2. Raj Nath Ram, son of Shri Sariwan Ram, resident of village- Pahirol,
P.O.- Nawada Ara, P.S.- Ara Nawada, District-Bhojpur
3. Anil Kumar, son of Late Chatthu Choudhary, resident of village +
P.O.- Narayanpur, P.S.- Piro, District- Bhojpur.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Shri Prakash Srivastava

For the Respondent/s : Mr.

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**CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO**

ORAL ORDER

35 24-04-2017 1. I have already heard the learned senior counsel, Mr.

P.K.Verma on behalf of the respondent No.1 and the learned

counsel, Mr. S.K.Verma on behalf of the election petitioner on

I.A. No.8800 of 2016.

2. This interlocutory application No.8800 of 2016 has

been filed by the respondent No.1, Radha Charan Sah under Order

7 Rule 11 read with Order 6 Rule 16 of the Code of Civil

Procedure read with Section 81, 83 and 86 of the Representation

of People Act, 1951 praying for dismissal of the election petition.

Rejoinder has been filed on behalf of the petitioner to the aforesaid

interlocutory application.

3. The election petitioner, Hulas Pandey has filed this



election petition for declaration of election result of the respondent No.1, Radha Charan Sah from 06, Bhojpur-cum-Buxar Local Authority Constituency as void on the ground that the counting of votes of the said constituency was not properly conducted by the returning officer and thereby 413 valid votes of the petitioner was rejected despite objection raised by the counting agents of the petitioner. The petitioner therefore, prayed that after counting of valid votes, the petitioner be declared as returned candidate of the said constituency.

4. According to the petitioner, the returning officer in complete departure to clause 29(i) of the Conduct of Election Rules allowed the literate voters to cast their votes by declaring themselves as illiterate and blind and on account of the unauthorized action of the returning officer non-electors were allowed to cast their votes. The further case is that because of illegality and irregularity committed by the returning officer, who acted as per the dictates of the ruling party, so the election result of the constituency be declared as void.

5. The petitioner made statement of material fact to the effect that the total number of electors of 06, Bhojpur-cum-Buxar, Local Authority Constituency were 6,178. List was prepared for the purpose of voting by illiterate, blind and infirm voters for the



constituency. During course of polling, illegalities and irregularities were surfaced in the process of preparation of the separate voter list of illiterate, blind and infirm voters. This fact was categorically and substantively protested by the polling agent of the petitioner, but the same was never taken into consideration. The election agent namely Birendra Kumar Singh made complaint before the returning officer and the complaint has been annexed as Annexure 5. The returning officer in order to provide undue advantage prepared the separate voter list of illiterate, blind and infirm voters in order to provide benefits to Radha Charan Sah.

6. It is further stated that the counting of the votes of the constituency was started on 10.07.2015 and it was concluded on very that day itself. Altogether 6,058 voters voted in the constituency. The counting agents of the petitioner raised serious objection because the officials deployed for counting of votes were deliberately and intentionally used to reject the ballot papers of the petitioner and in the same transaction, they used to accept the invalid votes in favour of the returned candidates. The counting agent, Vaidyanath Upadhyay calculated that altogether 105 valid votes of the petitioner was rejected. The counting agent, Amod Kumar Roy calculated that 90 valid votes of the petitioner was rejected. The counting agent, Manoj Kumar Roy calculated



that 85 valid votes of the petitioner was rejected. Likewise, the counting agent, Vidul Pandey calculated that altogether 59 valid votes of the petitioner was rejected. The counting agent, Lav Kumar calculated that altogether 82 valid votes of the petitioner was rejected. Therefore, the total valid votes of the petitioner 413 votes were rejected which materially affected the election result of the petitioner. The petitioner lost the election by margin of only 233 votes. The 413 valid votes of the petitioner was rejected at the instance of ruling party. The returning officer directed the counting agent to reject the valid votes of the petitioner and surprisingly the objection raised in the counting hall by the counting agents were never noticed or responded in any positive manner.

7. The learned senior counsel, Mr. P.K.Verma appearing on behalf of the respondent No.1 submitted that from the averments made in the election petition itself, the election petition is liable to be dismissed under Order 7 Rule 11 read with Section 83 and 86 of the Representation of the People Act, 1951. According to the learned senior counsel, only two grounds have been raised by the petitioner for setting aside the election of the respondent No.1 and for declaring the election as void and after counting the valid votes of 06, Bhojpur-cum-Buxar, Local



Authority Constituency the petitioner be declared as returned candidate of the said constituency. The first ground is, despite objection raised by the counting agents of the petitioner, 413 valid votes of the petitioner were declared invalid and not counted in favour of the petitioner and the second ground is, there is irregularity in the list of illiterate and blind voters. The learned senior counsel submitted that the statements made in paragraph 8 to 10 and 15 of the election petition relates to the illegality and irregularity in the list of illiterate and blind voters and helpers provided to them. This ground is not a ground mentioned in Section 100 of the Representation of People Act, 1951 for declaring the election as void. Therefore, so far the question of illegality or irregularity in the preparation of list of illiterate and blind voters is not material at all.

8. So far the other ground i.e. 413 valid votes were declared invalid and not counted in favour of the petitioner is concerned, statements have been made in paragraph 13, 16 to 18 and 20 of the election petition and from perusal of these averments made in these paragraphs, it is clear that illegalities or irregularities or improper rejection of valid votes has been made with respect to 413 votes only but in the relief portion, the petitioner is claiming fresh counting of the valid votes of the



constituency. According to the learned senior counsel, there is no allegation whatsoever with respect to the valid votes and after counting the valid votes the result has been declared. When there is no allegation challenging the illegality or irregularity in the counting of valid votes, there is no question of granting the relief to the petitioner arises. Whatever allegation is made, it is with respect to 413 invalid votes. The learned senior counsel for the respondent relied upon various decision of the Supreme Court: (i) A.I.R. 1986 Supreme Court 1534 (ii) A.I.R.1987 Supreme Court 1926 (iii) A.I.R. 1987 Supreme Court 1577 (iv) A.I.R.1984 Supreme Court 309 (v) A.I.R.1976 Supreme Court 744.

9. The learned senior counsel on the basis of these decisions submitted that the secrecy of ballot papers should not be allowed to be violated by flimsy allegations. The allegation must be specific and supported by fact and if the court is satisfied regarding the truth of allegation then only the prayer for recounting can be made. Moreover, in the present case, recounting the valid votes have been prayed for.

10. On the other hand, the learned counsel, Mr. S.K.Verma for the petitioner submitted that at the time of deciding an application under Order 7 Rule 11 C.P.C. read with Section 82, 83 and 86 of the Representation of People Act, the court is



required to see only the allegation made in the election petition and not what is stated in the application or written statement filed by the respondent. The settled law is that if there is pleading of facts then the application should not be rejected at the threshold. The court is required to see that whether any triable issue has been raised by the petitioner or not. If the allegations made in the election petition are taken to be true then whether the relief can be granted or not should be the only consideration. The petitioner has clearly stated that 413 valid votes of the petitioner has been declared invalid which has materially affected the result of the election. Now therefore, if this allegation of the petitioner is accepted then there must be recounting of the votes i.e. valid votes which will include 413 votes declared invalid. For that purpose, the petitioner should be granted chance to prove the fact by adducing evidence. At this stage, the Court cannot reject the election petition by disbelieving the fact alleged by the petitioner. The learned counsel for the petitioner relied upon various decisions of the Supreme Court: (i) AIR 2016 Supreme Court 3282 (ii) AIR 2014 Supreme Court 2069 (iii) AIR 2007 Supreme Court 581 (iv) AIR 2015 Supreme Court 147 (v) AIR 2009 Supreme Court 2975 etc. On the basis of the aforesaid decisions, the learned counsel for the petitioner submitted that the application



filed by the respondent is liable to be rejected and the hearing of the election petition be expedited.

11. As stated above, the prayer of the petitioner in the election petition is to recount the valid votes and this prayer has been made on the ground that the valid 413 votes in favour of the petitioner was rejected improperly by the returning officer. It may be mentioned here that at paragraph 13, 16 to 18 and 20 of the election petition, the allegation is made that 413 valid votes were casted in favour of the petitioner as reported by the counting agents of the petitioner. The petitioner has given details that different counting agents of the petitioner informed him about the rejection of valid votes. Except this bald statement, there is no other specification. It is the rule that during the course of counting, the candidates along with their election agents are permitted to remain present at the central table where the returning officer sits and returning officer has the only power to declare a ballot paper as invalid. Now therefore, when the ballot paper is declared as invalid in the central table by the returning officer, no counting agents of any contesting candidates is expected to be present at the central table. No other counting officers in other table has power to declare ballot paper as invalid. Then how the counting agents of the petitioner, who were seating in different tables, learnt that 413



votes were rejected by the election officer. The contesting candidates are expected to know this fact about rejection of the ballot papers as invalid by the returning officer in the central table. Here, the petitioner is not saying that in his presence, the ballot papers were declared invalid nor his election agent is saying. The petitioner is deriving this knowledge from the counting agents who were sitting in different tables. Further, the petitioner nowhere states that he protested the rejection of valid ballot papers casted in his favour. The petitioner never objected before the returning officer nor any complaint was filed nor any prayer was made before the returning officer for recounting the votes.

12. Now let us consider the decisions relied upon by the petitioner:

- (i) **AIR 2009 Supreme Court 2975(Uttamrao Shivdas Jankar v. Ranjitsinh Vijaysinh Mohite-Patil.):** It appears that the case before the Supreme Court was against the final judgment passed in the election petition and the Supreme Court has described the power of the High Court and held that while dealing with election petition, the High Court acts as a court of original jurisdiction and the election petition is a civil trial and the jurisdiction in such a trial, *stricto sensu* cannot be



said to be appellate in nature. So far this proposition laid down by the Supreme Court is concerned, there is no dispute about this position of law.

(ii) **AIR 2007 Supreme Court 581(Virender Nath Gautam v. Satpal Singh and Ors.):** In this decision, the Hon'ble Supreme Court has described the distinction between "material facts" and "particulars". "Material facts" are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. "Particulars" on the other hand, are details in support of material facts pleaded by the party. The Supreme Court found that the High Court in the judgment did not deal with the material facts pleaded by the election petitioner in that case and therefore, on that ground also, the Supreme Court set aside the judgment of the High Court. The fact of that case is entirely different than the present case.

(iii) **AIR 2015 Supreme Court 147(Ashraf Kokkur v. K.V. Abdul Khader etc.):** This decision relates to disqualification for holding office of profit under State Govt. as Chairperson of Kerala State Wakf Board. This



decision also do not relate to application under Order 7 Rule 11 C.P.C.

- (iv) **1994(2) Supreme Court Cases 392(Mohan Rawale v. Damodar Tatyaba & Ors.):** This decision relates to issue of corrupt practice described in Section 123 of the Representation of People Act. The Supreme Court in this decision held that the High Court was right in its view that a reasonable cause of action is said to mean a cause of action with some chances of success when only the allegations in the pleading are considered. But so long as the claim discloses some cause of action or raises some questions fit to be decided by a Judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. It appears that in that case, the election was challenged on the ground of corrupt practice. From perusal of the above facts, it appears that the facts are entirely different. However, the scope of Order 7 Rule 11 has been dealt with by the Supreme Court and so far this law laid down by the Supreme Court is concerned, there is no dispute. The question is whether this law fits in the present case or not.

- (v) **AIR 2014 Supreme Court 2069(Kisan Shankar**



Kathore v. Arun Dattatray Sawant and others): In

this case, the Hon'ble Supreme Court was dealing with rejection of nomination papers on the ground that affidavit suffers from non-disclosure of important information or information furnished is incorrect. The Supreme Court held that it may not be possible for the returning officer at that time to conduct a detailed examination. Summary enquiry may not suffice. At the same time, it would not be possible for the returning officer to reject the nomination for want of verification about the allegation made by the objector. In such a case, when ultimately it is proved that it was a case of non-disclosure and either the affidavit was false or it did not contain complete information leading to suppression, it can be held at that stage that the nomination was improperly accepted. In the present case at our hand, the facts are different entirely.

- (vi) **AIR 2016 Supreme Court 3282(R.K.Roja v. U.S.Rayudu and another).** The Supreme Court has held that once an application is filed under Order 7 Rule 11 of the C.P.C., the court has to dispose of the same before proceeding with the trial. There is no point or sense in



proceeding with the trial of the case, in case the election petition is only to be rejected at the threshold. Therefore, the defendant is entitled to file the application for rejection before filing his written statement. In case, the application is rejected, the defendant is entitled to file his written statement thereafter. It appears that in that case, it was directed by the court that the application under Order 7 Rule 11 to be considered at the time of final hearing. The Supreme Court said that it should be disposed of first.

13. The learned counsel for the respondent relied upon AIR 2002 Patna 125 and AIR 2001 Jharkhand 25. From perusal of these decisions also, I find that the facts are entirely different.

14. Now let us see the decisions relied upon by the respondent:

- (i) **AIR 1987 Supreme Court 1577(Dhartipakar Madan Lal Agarwal v. Shri. Rajiv Gandhi):** The Hon'ble Supreme Court in this case has held that on a combined reading of Section 81, 83, 86 and 87 of the Act, it is apparent that those paras of an election petition which do not disclose any cause of action are liable to be struck off under Order 6 Rule 16 C.P.C. as the court is empowered



at any stage of the proceedings to strike out or delete pleadings which is unnecessary. It is the duty of the court to examine the plaint and it need not wait till the defendant files written statement and point out the defects. If the court on examination of the plaint or the election petition finds that it does not disclose cause of action it would be justified in striking out the pleadings.

- (ii) **AIR 1987 Supreme 1926 (Samar Singh v. Kedar Nath and others):** The Hon'ble Supreme Court has held that if an election petition does not disclose cause of action, it can be dismissed summarily at the threshold of the proceeding under Order 7 Rule 11 C.P.C. If an election petition can be summarily rejected at the threshold of the proceeding, the same can also be rejected at any stage of subsequent proceeding. If after framing of issues basic defect in the election petition persists, it is always open to the contesting respondent to insist that the petition be rejected under Order 7 Rule 11 C.P.C..
- (iii) **AIR 1986 Supreme Court 1534=1986(4) Supreme Court Cases 78(Bhagwati Prasad Dixit 'Ghorewala' v. Rajeev Gandhi):** In this case, the Supreme Court held that the vexatious allegation in election petition that



returned candidate disqualified under Article 102(1)(a) being an M.P. and drawing salary and allowances as such at the time of election is untenable raising no cause of action and therefore, liable to be struck off. In this decision, the Hon'ble Supreme Court further held that in election petitions, pleadings have to be précised specific and unambiguous and if the election petition does not disclose a cause of action, it is liable to be rejected in limine.

- (iv) **AIR 1984 Supreme Court 309(Charan Lal Sahu v. Giani Zail Singh and another):** This decision relates to the election of President and Vice President.

15. From the above discussion of the decisions, it is now clear that the election petition can be rejected under Order 7 Rule 11 C.P.C., if there is no cause of action disclosed in the election petition and that the allegations are vexatious and untenable. It is also clear that the allegation must be specific and supported by facts. So far recount of ballot paper is concerned, the settled law is that the secrecy of ballot papers should not be allowed to be violated by flimsy allegations. The court must be satisfied regarding the truth of allegation for recount. In the present case, as discussed above, it appears that the petitioner



derived the information of rejection of 413 votes from his counting agents who are not expected to be present in the central table where the election officer rejected 413 votes. Although the petitioner was present with election agents in the central table, the petitioner did not get the knowledge about the rejection. The petitioner did not file any application or complaint as required under Rule 63 of the Conduct of Election Rule 1961. It is not the case of the petitioner that he was not present at the central table. Therefore, the allegation made by the petitioner is full of ambiguity and it appears that the allegations are flimsy allegation for the sake of this election petition. It is settled law that the court is required to maintain the secrecy of ballot papers and cannot ordinarily direct recounting unless there is specific allegation supported by facts. In the present case, except the statement that such counting agents informed rejection of this much of votes and such counting agents reported rejection of this amount of valid votes, there is no specification regarding in which round of counting the said rejection of ballot papers were detected. It appears that the statements are cryptic in nature. Not even a single incident is shown or pleaded that the same was brought to the notice of returning officer.

16. It is settled law that the recounting of votes cannot



be directed as a matter of course. It should not be permitted lightly. Here, in the present case, it appears that the election petition has been drafted skillfully so as to bring the case under Section 100 of the Representation of People Act. Therefore, the demand of the defeated candidate for recount of vote has to be considered keeping in view the secrecy of ballot and, therefore, unless the election petitioner is able not only to plead and disclose the material facts but also to substantiate the same by means of reliable evidence, no court could be justified in directing the recount.

17. Rule 63(2) of Conduct of Election Rules, 1961 provides that after such announcement has been made, a candidate or in his absence, his election agent or any of his counting agents may apply in writing to the returning officer to recount the votes either wholly or in part stating the grounds on which he demands such recount. In view of this rule, the petitioner should have availed this opportunity before the returning officer itself. No such application in writing was filed by the petitioner. Rule 59A (2) of the election rule empowers the returning officer to reject the ballot papers on the grounds mentioned there in the provision. In the election petition, nowhere the petitioner specified as to on what ground the returning officer rejected the ballot papers, 413 in



number, and on the ground on which the ballot papers were rejected is not the ground or valid ground for rejection. Mere allegation has been made without specification. At sub-rule (3) it is provided that before rejecting any ballot paper, the returning officer shall allow each counting agent present a reasonable opportunity to inspect the ballot paper. It is not the case of the petitioner that any inspection was done by any of the election agent prior to rejection of the ballot paper. If no inspection was made by them, how they counted the ballot papers which were rejected. Moreover, this rule provides inspection by one counting agent but the petitioner has given the names of many counting agents who informed him separately giving separate number of ballot papers. None of them inspected the ballot paper prior to rejection. In other words, if they inspected, then in which table. It is not the case that they all inspected at one time before the returning officer. It is not the case of the petitioner also that for sometime one counting agent inspected who noted particular number of ballot paper rejected by returning officer and then another counting agent of the petitioner inspected for sometime who noted further number and so on and so forth. Now, it becomes clear that wherefrom and how different counting agents of the petitioner informed the petitioner about rejection of



particular valid votes casted in favour of the petitioner, there is no clarification at all.

18. The petitioner will adduce evidence in support of the allegation only and not beyond that. Now therefore, even if the allegation is accepted to be true regarding information given by the counting agents then also it is only mere flimsy allegation without there being any specification and the source of the knowledge the allegations are full of ambiguity and the court cannot say that the counting agents deposed as pleaded in the election petition, there should be recounting of votes. In my opinion, therefore, there is no specific pleading as to how the different agents got the knowledge of rejection of particular number of ballot papers which were casted in favour of the petitioner. The grounds pleaded are flimsy in nature and the allegations have been made for the purpose of maintaining the election petition. Further, without giving any details of any kind regarding incident showing illegality or irregularity committed in particular table in particular round of counting in presence of particular counting agents and whether any inspection was done or not before the returning officer by any of the counting agents named in the election petition and without giving any explanation as to how the petitioner did not get the knowledge himself who



was present in central table where the ballot papers were being rejected by the returning officer. Cryptic, ambiguous and vexatious allegations have been made in the election petition. Therefore, there is absence of adequate statement of material facts. No written application for recounting was filed as provided under Rule 63. No explanation has been given as to why at the spot no any written application was filed by the candidate. Mere allegations have been made in the election petition. Now therefore, keeping in view the secrecy of ballot papers on flimsy, ambiguous and mere allegation, the court must not enable the petitioner to indulge in a roving enquiry for setting aside the election result. In other words, if one will come to court and say that such number of my valid votes have been rejected so recount it, the court will not allow recounting unless court is satisfied that there is satisfactory materials.

19. It is also settled principles of law that inspection and recount of ballot papers can be ordered when the election petition contains adequate statement of material fact on which the petitioner relies and the court after applying its mind is satisfied that it is necessary in the interest of justice. In the present case, as stated above, there is no adequate statement of material facts and the statements made are not sufficient enough to direct for



inspection and recount for ballot papers which is not a rule but is exception.

20. It is also settled principles of law that where the details necessary for obtaining a recount order were not pleaded in the election petition, the court cannot direct for recount in a routine manner.

21. So far the allegation regarding irregularity in the list of illiterate and blind voters and helpers provided to them and published under the election rules by the returning officer is concerned, it is not a ground for declaring the result of the election as void. In other words, this ground is not covered under Section 100 of the Representation of People Act. Therefore, those allegations do not disclose cause of action, as such, are not necessary and liable to be struck out.

22. From perusal of different paragraphs of the election petition itself, as stated above, no ground for recounting is made out and, therefore, if the election petition is allowed to continue, it will amount to abuse of the process of the court and it will amount to enabling the petitioner to indulge in a roving enquiry.

23. Thus, in view of my above discussion, I find that this election petition is liable to be dismissed in limine under Order 7 Rule 11 C.P.C. read with Section 83 and 86 of the



Representation of People Act, 1951. Accordingly, the I.A.
No.8800 of 2016 filed by the respondent No.1 is hereby allowed
and the election petition is dismissed.

(Mungeshwar Sahoo, J)

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