

HIGH COURT OF CHHATTISGARH, BILASPUR**WPC No.437 of 2016**

- Smt. Gouri Bai Patel W/o Shri Kanhaiya Patel, Aged About 40 Years R/o Village Barpali, Post Nawapara, Tahsil & District Raigarh (Chhattisgarh)

---- Petitioner**Versus**

1. State Of Chhattisgarh Through The Secretary, Panchayat & Welfare Department, Mahanadi Bhavan, New Raipur, District Raipur (Chhattisgarh)
2. The Collector Raigarh, District Raigarh (Chhattisgarh)
3. Sub Divisional Officer (Revenue)/ Specified Officer Panchayat, Raigarh, District Raigarh (Chhattisgarh)
4. Smt. Urmila Patel, W/o Shri Brijlal Patel, Aged About 42 Years Occupation House Wife/ Sarpanch Candidate, R/o Village Barpali, Post Nawapara, Tahsil & District Raigarh (Chhattisgarh)
5. Smt. Jagmati Patel, W/o Shri Babulal Patel, Aged About 42 Years Occupation House Wife/ Sarpanch Candidate, R/o Village Arasipali, Post Nawapara, Tahsil & District Raigarh (Chhattisgarh)
6. Smt. Tara Sidar, W/o Shri Jageshwar Sidar, Aged About 38 Years Occupation House Wife/ Sarpanch Candidate, R/o Village Mouhapali, Post Nawapara, Tahsil & District Raigarh (Chhattisgarh)
7. Smt. Dasmati Uranv, W/o Shri Lachhi Uranv, Aged About 27 Years Occupation House Wife/ Sarpanch Candidate, R/o Village Arasipali, Post Nawapara, Tahsil & District Raigarh (Chhattisgarh)
8. Smt. Belmati Chouhan, W/o Shri Kapoor Chouhan, Aged About 45 Years Occupation House Wife/ Sarpanch Candidate, R/o Village Mouhapali, Post Nawapara, Tahsil & District Raigarh (Chhattisgarh)
9. Smt. Sunita Patel, W/o Shri Deenanath Patel, Aged About 32 Years Occupation House Wife/ Sarpanch Candidate, R/o Village Barpali, Post Nawapara, Tahsil & District Raigarh (Chhattisgarh)
10. Presiding Officer, Polling Booth Center Village- Barpali, Post Nawapara, Tahsil & District Raigarh (Chhattisgarh)
11. Returning Cum Election Officer Gram Panchayat Village- Barpali, Post Nawapara, Tahsil & District Raigarh (Chhattisgarh)

---- Respondents

For Petitioner : Shri B. P. Sharma with Shri M. N. Thakur, Advocates
For Respondent/State : Shri D. R. Minz, Dy.GA
For Respondent No.4 : Shri Manoj Paranjpe, Advocate

Hon'ble Shri Justice Manindra Mohan Shrivastava

C A V Order

19/05/2017

By way of present writ petition under Article 226 of the Constitution of India, as originally filed, the petitioner sought to assail the correctness and validity of order dated 08-02-2016 passed by the Election Tribunal (Sub Divisional Officer (Revenue), by which, the petitioner's application for recalling order of ex parte proceedings against Presiding Officer and further prayer of summoning Returning Officer and Presiding Officer for evidence was rejected. By that time, final order was not passed and the proceedings remained pending. During the pendency of this writ petition, the Election Tribunal proceeded in the matter and passed final order on 15-02-2016 directing recount. This order was subsequently challenged by way of amendment.

2. Quintessential facts necessary for decision of the controversy involved in the petition are that the petitioner and the respondents No.4 to 9 contested election for the office of Sarpanch of Gram Panchayat Barpali. On 04-02-2015, voting had taken place and on that very day, votes were counted. As the petitioner and respondent No.4-Smt. Urmila Patel secured equal votes, the procedure under Rule 83 applicable in the case of equality of votes was followed and as a result of toss, the petitioner was declared elected. Urmila Patel thereafter filed election petition seeking recount. The Election Tribunal, however, without framing any issue or recording evidence and without there

being any trial, passed an order of recount, which was successfully challenged in writ petition filed by the petitioner i.e. WPC No.848/2015 which was allowed vide order dated 31-08-2015 on the consideration that without trial, recount was mechanically ordered. The case was remanded to the Tribunal to frame issues and allow the parties to lead evidence and thereafter, decide as to whether a case of recount is made out or not. After that, the parties led their evidence. At one point of time, during trial, the petitioner prayed for summoning as witness, the Returning Officer as well as Presiding Officer. That application was allowed by the Sub Divisional Officer/Election Tribunal, though with an observation that the Returning Officer and the Presiding Officer would be summoned for evidence after examination and cross-examination of the witness of the Election Petitioner and the Returned Candidate. The election petitioner-Urmila Patel examined herself, Keshav Lal, Kaushal Prasad as witnesses. The petitioner-Gauri Bai Patel examined Samay Lal Sidar as her sole witness. Thereafter, the Election Tribunal summoned the Presiding Officer for evidence. Though the Presiding Officer appeared on 13-01-2016, but an objection was made that the evidence of Presiding Officer be recorded along with the records only. On 22-01-2016, the application was rejected on the ground that the records relating to voting/counting are not available with the Presiding Officer. The election petition was fixed for recording evidence of Presiding Officer Shri Sant Ram on 29-01-2016. However, the Presiding Officer refused to take notice. He being a party respondent in the election petition, was proceeded ex parte and the case was directed to be listed for final arguments on 04-02-2016. On that date, the petitioner moved an application for summoning Returning Officer and Presiding Officer. That application was rejected by the first impugned order on 08-02-2016 which led to filing of the instant petition followed by challenge to the order of recount passed subsequently on 15-02-2016.

3. Learned counsel for the petitioner vehemently argued that the Election Tribunal has committed serious jurisdictional illegality as well as irregularity in not examining the Returning Officer and the Presiding Officer, though earlier, prayer of the petitioner was accepted and the Tribunal had passed an order for examination of the two witnesses, after the witness of the parties are examined and cross-examined. The Tribunal was under a duty to summon the witness for just and fair trial of the election petition. As counting was done in the presence of the Presiding Officer and the records of counting prepared by them was placed before the Returning Officer, who notified results, their non-examination has resulted in serious prejudice to the petitioner in as much as they were crucial witnesses to depose regarding the manner, in which, counting had taken place. Learned counsel for the petitioner argued that the petitioner was returned candidate and in her reply, set up a defence that the counting had taken place in accordance with rules, there was no application in writing for recount either by the election petitioner or by her counting agent and that it was only after declaration of result that objections were raised, non-examination of the aforesaid witnesses seriously prejudiced the case of the petitioner. It is next contended that the power of Civil Court, as provided in the Civil Procedure Code, 1908, was vested in the Election Tribunal which includes the power under Section 32 to enforce attendance of witness. The Tribunal ought to have exercised that power of attendance of witness rather than hurriedly proceeding with the matter, without examining the Presiding Officer and the Returning Officer.

Learned counsel for petitioner has urged that though, there are specific provisions with regard to remedy of applying for recounting of votes immediately after counting, election petitioner or her agent never applied for recounting in writing, which only shows that there was no objection to manner of counting of

votes or acceptance or rejection of ballot papers to cast in favour or against the contesting parties including the petitioner and the election petitioner. The election petitioner only took a chance, when she found that the present petitioner was declared elected, on afterthought grounds and concocted pleadings. Next submission is that though this Court in earlier round of litigation had clearly directed framing of issues, though issues were framed, but that issues were quite general and vague in nature. Moreover, it is submitted that though an issue of limitation was raised and framed also, the Tribunal did not record any finding on that issue. Lastly, it is submitted that the pleadings of the election petitioner were highly vague and not specific and without any material particulars as to how and why valid votes cast in favour of election petitioner were rejected or invalid votes cast in favour of the petitioner were accepted. The evidence before the Tribunal was also not specific, except that some oral objections were taken. The Tribunal was swayed only by the fact that there was equality of votes, which by itself, without proof of irregularity in counting, could not be made a basis to direct recount. It was contended that for order of recount, election petitioner was required to discharge heavy burden, based on specific plea and clinching evidence which was not available on the records, therefore, secrecy of ballot papers was liable to be maintained and the election petition ought to be dismissed. In support of his submission, learned counsel for the petitioner placed reliance in the case of ***Makhan Lal Bangal vs. Manas Bhunia and Others***,¹ ***Chandrika Prasad Yadav vs. State of Bihar and others***², ***Chandradhoja Sahoo vs. State of Orissa and others***³ and ***Uday Singh vs. Himmat Singh and others***⁴.

4. Per Contra, learned counsel for the respondent-election petitioner

1 (2001) 2 SCC 652

2 (2004) 6 SCC 331

3 (2012) 13 SCC 419

4 1999 (1) JLJ 200

submitted that the election petition was duly tried after the order was passed by this Court in the first round of litigation, by framing appropriate issues and granting all the parties, an opportunity of leading oral as well as documentary evidence. The petitioner did not include the Returning Officer or Presiding Officer in the list of her witnesses and she had proposed to examine only one witness, to which, she was permitted. The petitioner having closed her evidence on 04-01-2016, could not claim, as of right, to summon Returning Officer or Presiding Officer without disclosing specific relevancy of their evidence with reference to stated pleadings of the writ petition. The petitioner somehow wanted to linger on the proceedings and with that view only, insisted examination of Returning Officer or Presiding Officer which is reflected from the order sheet that though Presiding Officer was present on 13-01-2016, the petitioner again sought adjournment without examination of Presiding Officer on the flimsy ground that the records were not available, whereas the records relating to election of the petitioner were available only with the Returning Officer and not with the Presiding Officer. Further submission is that the Presiding Officer was only a party and if it chooses not to appear, he could be proceeded ex parte which was rightly done by the Election Tribunal. The Presiding Officer or the Returning Officer were only parties and not parties witnesses, therefore, it was not obligatory for the Election Tribunal to summon any of them as witnesses in the election petition, particularly when the records were already produced before the Election Tribunal. Next submission is that even if the Presiding Officer was not called as witness, the petitioner is not entitled to any relief only on this ground because the petitioner failed to establish any prejudice caused to her on account of non-examination of Presiding Officer.

5. As far as framing of issue is concerned, it is argued that the issues as

framed by the Tribunal were duly enquired into and the petitioner never objected to framing of additional issues or for recast of the issues already framed on the ground that the issues were either not framed or not properly framed. The parties were alive to raise issues and led their respective evidence.

Further submission is that in the absence of there being any material to show that the election petition was not filed within the time stipulated under the law, the petitioner is not entitled to any relief on the ground that specific finding on the issue of limitation was not recorded.

Further submission of learned counsel for the respondent-election petitioner is that specific pleadings as to the manner, in which, the irregularity was committed during counting of votes was made in election petition, which was duly proved by clinching and reliable evidence of as many as three witnesses, which included election petitioner herself and her counting agents. Even though, no application in writing was made, evidence of oral request for recount is available, which was rightly relied upon by the Tribunal to hold that proper counting had not taken place and as the matter involves equality of votes, therefore, it was necessary to direct recount. In support of his submission, learned counsel for the respondent No.4 placed reliance in the case of **Chandrika Prasad Yadav** (supra) and **Arikala Narasa Reddy vs. Venkata Ram Reddy Reddygari and another**⁵.

6. One of the main ground taken in the petition is that once the election petitioner had agreed for drawl of lots and procedure for such lot was drawn, election petitioner could not pray for recount. This plea is liable to be rejected because the procedure required to be followed in case of equality of votes, is governed by the provisions contained in Rule 82 of the Chhattisgarh Panchayat

⁵ (2014) 5 SCC 312

Nirvachan Niyam, 1995 (In short "Rules of 1995"), which requires drawl of lots. It was obligatory on the part of the Returning Officer to follow mandatory procedure of drawl of lots, in case of equality of votes between the candidates and it is not dependent upon the consent of the candidates. Therefore, merely because the procedure prescribed under the rules was followed, having no requirement of consent or agreement of the candidate, election petition cannot be thrown on such ground.

7. Next submission of learned counsel for the petitioner is that non-examination of Presiding Officer has vitiated the entire election. According to him, the Election Tribunal was vested with the power to enforce attendance of the witness or party under Section 32 of the Civil Procedure Code, 1908. Earlier, according to him, the Presiding Officer was called for evidence but the records were not available, therefore, the case was adjourned and later on, when the Tribunal observed that the Presiding Officer was not possessed of records which are otherwise available with the Tribunal, it issued notices for appearance and evidence of Presiding Officer, the Presiding Officer ought to have appeared as his examination was extremely necessary to support the case of the petitioner/returned candidate that the counting had taken place in accordance with the prescribed rules in the presence of counting agents of the parties and no application for recount was made in writing at the stage prescribed under Rule 80 of the Rules of 1995 before the Officer, who counted and announced the votes secured by each candidate. To this argument, learned counsel for the respondent-election petitioner replied that the Presiding Officer was a merely a party and not witness and he was not included in the list of witnesses in the petition and lastly that the petitioner had failed to show that any prejudice was caused to him.

8. The powers of the Election Tribunal while trying election petition are provided under Chhattisgarh Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 (In short “the Election Petition Rules of 1995”).

Rule 11 of the Election Petition Rules of 1995 provides that subject to the provisions of these rules, every election petition shall be enquired into by the specified officer as nearly, as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits. It further provides that specified officer shall have the powers which are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters:-

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

Clause (f) authorizes and confers ample power on the specified officer to summon and examine suo moto, any person whose evidence, appears to him material. This is in addition to the powers to enforce attendance of the witnesses as provided in Clause (b) referred to hereinabove.

9. Section 32 of the Civil Procedure Code, 1908 provides that the Court can compel attendance of any person to whom summons has been issued under Section 30 and for that purpose, it may issue warrant of arrest, attach or sell his

property, impose a fine upon him {not exceeding five thousand rupees} and order him to furnish security for his appearance and in default commit him to civil prison.

Section 30 of the Civil Procedure Code, 1908 empowers the Civil Court to issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects mentioned therein. Section 30 & 32 of the Civil Procedure Code, 1908 are extracted hereinbelow:-

30. Power to order discovery and the like-Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,-

- (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;
- (b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;
- (c) order any fact to be proved by affidavit.

32. Penalty for default.-The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may-

- (a) issue a warrant for his arrest;
- (b) attach and sell his property;
- (c) impose a fine upon him not exceeding five hundred rupees;
- (d) order him to furnish security for his appearance and in default commit him to the civil prison.

The power of the Election Tribunal revealed by conjoint reading of Section 30 & 32 of Civil Procedure Code, 1908 read with Rule 11 of the Election Petition Rules of 1995 leaves no doubt that these powers stated in aforesaid provisions are applicable to the Election Tribunal and merely because the person happened to be one of the respondent, it cannot be said that the Tribunal had no power to enforce/compel attendance of such person, if in the opinion of the Tribunal, his examination was necessary.

10. In the present case, though the petitioner had not cited Presiding Officer or Returning Officer as witness, it shows that he had moved an application for summoning them as witnesses and the Tribunal accepted the prayer and issued notice to the Presiding Officer to appear as witness but on the objection of the petitioner that the records were not available, the case was adjourned. Later on, the Tribunal recorded a finding that as the presiding Officer was not possessed with the relevant records, insistence to his examination along with records only was not proper and the prayer was rejected. Later on, the Presiding Officer was summoned to appear as witness, but on the next date of hearing, he did not appear and in the order sheet, it has been recorded that he refused to take notice. The Tribunal could have invoked its power to enforce his attendance by taking proper measures as provided under Section 30 of Civil Procedure Code, 1908 read with Section 11 of the Election Petition Rules, 1995, but the Tribunal only proceeded ex parte. That was not enough, because the petitioner's prayer made earlier for examination of Presiding Officer was allowed by the Tribunal. This was material irregularity committed by the Tribunal in holding trial of the Election Petition and it caused serious prejudice to the petitioner because petitioner was returned candidate. He intended to examine the Presiding Officer in his defence against the allegations of the Election Petitioner that the counting was not properly made by the Presiding Officer.

Learned counsel for the petitioner has raised one more ground that though an issue of limitation was framed by the Tribunal, but did not decide the same. This contention is clearly substantiated from reading of the impugned order that the Tribunal had not decided this issue at all. However, in the absence of there being any material on record that the election petition was barred by limitation as provided under Section 122 of the Chhattisgarh Panchayat Raj Adhiniyam, 1993, no further examination on this count is

necessary.

11. The dates, on which, election was held and the fact that immediately after voting, votes were counted on 04-02-2015 is not in dispute. A perusal of the election petition filed by the respondent No.4 reveals that prayer for recount was made on the pleadings that out of 43 votes declared invalid, there were several votes which were clearly cast in favour of the election petitioner, but those votes were wrongly rejected, which was objected to by the Counting Agent Bal Kharosh, Keshav Lal and Kaushal Prasad, but the objections were not paid any heed to and the results of counting were declared by the Presiding Officer. The other pleading made is that the proper proceeding of election and counting of election was not followed. Further pleadings are that the election petitioner as well as returned candidate secured equal number of votes. It was also pleaded that the oral request for recount made by the Counting Agents namely Bal Kharosh, Keshav Lal and Kaushal Prasad was rejected and immediately thereafter, an application in writing was submitted before the Presiding Officer, which was refused and thereafter on 05-12-2015, an application for recount was submitted before the Returning Officer, Raigarh on the assurance of recount, signatures of election petitioner were obtained on certain papers. On 07-02-2015, the procedure of result of election by way of toss was adopted and on that basis, the petitioner was declared elected, though in the presence of the election petitioner, the proceedings of toss were not conducted nor consent of the election petitioner was taken in adopting such course.

The pleadings as contained in the election petition seeking recount completely lacked specific pleadings and except saying that out of 43 rejected ballot papers, some of the ballot papers were cast in favour of the election petitioner and that oral prayer was made for recount, no other substantial

pleading was made in the election petition.

12. At this stage, it would be apposite to refer to the procedure of recount which has prescribed in the Rules of 1995, regulating the manner of recount and the stage, at which, objection and application for recount is required to be made by a aggrieved party.

13. Rule 75 of the Rules of 1995 provides for scrutiny and opening of ballot boxes. There is no specific pleading much less any evidence to show that the ballot boxes were found to be tampered with or their seal was broken or they were opened in the absence of the Counting Agents of the election petitioner. Rule 76 of the Rules of 1995 provides for scrutiny and rejection of ballot papers. The grounds, on which, the ballot paper is liable to be rejected have been exhaustively enumerated in clauses (a to h) of sub section(1) of Section 76. There was no pleading much less specific evidence that any vote cast in favour of the returned candidate was invalid for any of the reasons enumerated in Rule 76. The Election petitioner's case has been that some of the rejected votes included those cast in favour of the election petitioner, were valid and ought to be counted, but there is no specific pleading as to why those votes said to be valid, were rejected. It is relevant to note that both in the election petition as well as in the evidence of the election petitioner, no specific material to this effect has come. While pleadings are blissfully vague in that regard, the witnesses of election petitioner namely Urmila Patel, Keshav Lal and Kaushal Prasad have not stated very specifically in this regard. According to evidence of Urmila Patel, election petitioner herself was not present at the time of counting. According to her, she had appointed three counting agents namely Bal Kharosh, Keshav and Kaushal Prasad. That means, whatever has been stated by her with regard to counting is based on information supplied by her counting agents. This has

already been admitted by her in her evidence. The other witness namely Keshav Lal in his affidavit has deposed that out of 43 votes declared invalid, he had raised oral objection that the votes which were being treated as invalid, number of votes are proper and liable to be counted in favour of Urmila Patel, but the objection was rejected. He, however, has admitted that they did not apply for recounting in writing at the stage when the Presiding Officer declared number of votes found to have been cast in favour of the candidates in the election. He stated that the votes were counted hurriedly. He had also stated that immediately after counting, application for recount was made before the Presiding Officer. In his cross-examination, this witness admits that he was counting agent of Booth No.12 and for Booth No.11 & 13, there were other counting agents. He states that though in Booth No.12, Urmila Patel secured 117 votes, but there is no specific evidence as to how many votes according to him, liable to be counted in favour of Urmila Patel, were rejected much less specific evidence as to how that rejected votes were liable to be counted in favour of election petitioner. He admits that no application in writing was made to the Presiding Officer. He also admits that he had also seen rejected ballot papers, but he is not in a position to give any specific evidence on these votes. He further admits that the Presiding Officer had shown the rejected votes to all the counting agents. He also admits that 20 rejected votes were shown at that time, to him and other counting agents, but no specific objection in writing was submitted that some of the votes are valid, yet not counted. He admits that the signatures of Gauri Bai and this witness were taken by the Presiding Officer. He further admits that the Returning Officer in the presence of Gauri Bai and his witness, had drawn the toss, which was found in favour of Gauri Bai. He further admits that in the counting papers, his signatures were also taken by the Returning Officer in the Tahsil office and was also controverted with his affidavit

to elicit with regard to this fact, he had stated that he has no knowledge. Importantly, he admits that when he came to know that Gauri Bai had won elections, he submitted an application for recount before the Returning Officer. It is also relevant to note that the discrepancy in the evidence of this witness and the election petitioner -Urmila Patel, as to who were counting agents. According to Urmila Patel, Kaushal, Bal Kharosh and Sant Ram were counting agents and according to this witness, Keshav Lal, Kaushal and Sant Ram were counting agents.

14. The other witness namely Kasual Prasad in his affidavit has stated that when 43 votes were declared invalid, he and other agents have raised oral objections that some of the votes were liable to be counted in favour of Urmila Patel, but he has not given any specific evidence with regard to those votes much less stated reason for their rejection. Affidavit of this witness-Kaushal Prasad compared with the affidavit of Keshav Lal shows that the affidavits are stereotype. In his further cross-examination, this witness says that he was counting agent in booth No.13. He admits that all the ballot papers were shown to the agents and then kept in the accounts of the respective candidates. He admits that instead of valid votes, no objections were raised and that objections with regard to rejected votes were made orally and no application was made in writing. He pleaded ignorance of the procedure applicable at the time of counting or the right to apply for recount. He admits that he was present throughout counting. He also admits that even after completion of counting of votes, he had not submitted any objection in writing nor raised any complaint before any higher authorities

15. Conjoint reading of the pleadings and evidence of the election petitioner, reveals firstly that the pleadings to support case of recount are not specific with

reference to provisions contained in Rule 76 of Rules of 1995. Since, according to the case of the election petitioner, counting agents in three booths were present, out of which, only two namely Kaushal, Keshav Lal were examined, but Bal Kharosh was not examined, there had to be categorical pleadings as to how many number of votes said to have been cast in favour of the election petitioner were rejected at the time of counting and for what reasons. This essential requirement of pleading lacks in the election petition itself. All that has been said is that votes were being counted hurriedly and that some of the votes which ought to be declared valid, were declared invalid. The purpose of keeping counting agent is to ensure that the counting is done in the presence of the counting agents of all the candidates and if any particular vote is declared invalid, which is said to have been cast in favour of a particular candidate, his agent immediately notes and raises specific objection that to in writing as required under the Rules. Absence of specific pleading only shows that till the filing of the election petition, no specific case was available with the election petitioner and on vague pleadings, the prayer for recount was made, because there was equality of votes and the election petitioner, after counting was done and results of counting were announcing under the Rules 77 of the Rules of 1995, they wanted to take chance by somehow securing recount of votes.

16. At this juncture, it is profitable to refer the provisions contained in Rule 80 of the Rules of 1995 which provides for right of recount as also the stage, at which and the manner, in which, prayer for recount is to be made. The relevant para of the Rule 80 is extracted hereinbelow:

80. Recount of votes.- (1) After an announcement has been made by the Returning Officer or such other Officer authorised by him, of the total number of votes polled by each candidate under sub-rule(2) of rule 77, a candidate or, in his absence, his election agent or his counting agent may apply in writing to the Returning Officer or such Officer authorised by him, for a recount of call or any of the votes already counted, stating the grounds on which he demands such

recount.”

(2) ----- xxx ---- xxx -----

(3) ---- xxx ---- xxx -----

(4) ---- xxx ---- xxx -----

(5) ---- xxx ---- xxx -----

(6) ---- xxx ---- xxx -----

(7) ---- xxx ---- xxx -----

(8) ---- xxx ---- xxx -----

The aforesaid provisions clearly show that as soon as announcement is made by the Returning Officer or the Officer authorised by him in the present case, the Presiding Officer, who had counted the votes, a candidate or his election agent or counting agent is required to apply that to in writing for recount of all or any of the votes already counted. Moreover, the application must clearly state all the grounds, on which, he demands such recount. Such salutary provision is made to ensure that a candidate may not seek recount on afterthought grounds. The aforesaid provision refers to announcement of the total number of votes held by each candidate under Rule 77(2) of the Rules of 1995. Thus, as soon as the votes are counted, entries are made in the result sheet in prescribed proforma and announcement of total number of votes held by each candidate is made, at that stage, an application for recount is to be made in writing by one, who was actually present and in whose presence, the votes were counted, after showing ballot papers. Evidence of the election petitioner shows that at the time of counting, ballot papers were shown to all the candidates or their counting agents of the election petitioner. If there was any specified reason to doubt the decision of the Presiding Officer to reject the allegedly valid votes cast in favour of the election petitioner, nothing prevented the said counting agent to apply in writing stating all the grounds, on which, he

demands recount. Abundance of evidence led by the election petitioner herself shows that her election/counting agents did not file any objection in writing, which alone could have disclosed the specific grounds, on which, recount was sought in respect of all or some of the votes.

Sub rule(5) of Rule 80 of the Rules of 1995 referred to above, also extracted hereinbelow:-

80. Recount of votes.-

(1) ---- xx ----

(2) --- xxx ---

(3) --- xxx ---

(4) --- xxx ---

(5) After the total number of votes polled by each candidate has been announced under sub-rule(2) of rule 77 or sub-rule(4), the Returning Officer or such other officer authorised by him shall complete and sign the result sheet and no application for a recount shall be entertained thereafter:

Provided that no step under this sub-rule shall be taken on the completion of the counting until the candidates and the election agents present at the completion thereof have been a reasonable opportunity to exercise the right conferred by sub-rule(1).

(6) --- xxx ----

(7) --- xxx ----

(8) --- xxx ----

Once result sheets are signed, application for recount cannot be entertained. Learned counsel for the respondent urged to convince this Court that merely because application for recount was not made at the stage, as required under the Rules, enquiry by the Election Tribunal is not ousted and election petition seeking recount on valid grounds would still be maintainable, placing reliance on the decision of the Supreme Court in the case of **Sohan Lal vs. Babu Gandhi and others**⁶. There is no quarrel with the settled legal

⁶ (2003) 1 SCC 108

position, in view of the decision in the case of **Sohan Lal** (supra) that even though, there was no application for recount made, after the announcement was made, election petition seeking recount would still be maintainable. But then, non filing of application in writing at an appropriate stage after counting and failure to explain as to why such application could not be moved, would be a circumstance weighing against the prayer for recount.

17. In the case **Chandrika Prasad Yadav** (supra), this aspect was considered by the Supreme Court, as below:-

25. "Rule 79 as noticed hereinbefore enables a candidate to file an appropriate application for re-counting of votes. Rule 79 unlike rules framed by other States does not say that such an application would not be maintainable after declaration of the votes polled by the parties or prior thereto. Such an application, therefore, can be filed at any point of time. The very fact that sub-rule (3) of Rule 79 provides for amendment of the result relating to the votes polled by the respective candidates and as such amended result is required to be announced in the prescribed form under sub-rule (2) of Rule 79, the same itself is a pointer to the fact that even after announcement of result an application for re-counting would be maintainable. It may be true that only because such an application had not been filed before the Returning Officer by itself may not preclude the Election Tribunal to go into the question of requirement of issuing a direction for re-counting but there cannot be any doubt whatsoever that Rule 79 serves a salutary purpose. Counting of ballot papers in terms of the rules takes place in presence of the candidate or his counting agent. When an agent or a counting agent or the candidate himself notices improper acceptance or rejection of the ballot papers, he may bring the same to the notice of the prescribed authority. As noticed hereinbefore, in a given case, an application for re-counting either before announcement of the result or thereafter, would be maintainable. Once an application is filed by an agent or a counting agent or the candidate himself pointing out the irregularities committed by the officers appointed for counting the ballot papers, immediate redressal of grievances would be possible. As indicated hereinbefore, while filing such an application the basis for making a request for re-counting of votes is required to be disclosed. The Returning Officer is statutorily enjoined with a duty to entertain such an application, make an inquiry and pass an appropriate order in terms of sub-rule (2) of Rule 79 either accepting in whole or in part such requests or rejecting the same wherefor he is required to assign sufficient or cogent reasons. In the event such an application is allowed either in whole or in part, he is statutorily empowered to amend the results also."

In yet another decision in the case of **Baldeo Singh Mann vs. Surjit Singh Dhiman**⁷, the aforesaid observations in the case of **Chandrika Prasad Yadav** (supra) were again referred to while dealing with the election petition for

7 (2009) 1 SCC 633

recount.

Application of strict rules of specific pleading in election petition has been emphasized time and again by the Supreme Court and this Court in plethora of decisions.

That, ordinarily, the secrecy of ballot papers is not to be breached unless a case is made out on pleadings and evidence, has been succinctly stated and restated. As early as in the case of **Bhabhi vs. Shiv Govind**⁸, strict rules of pleadings, evidence and making out a case for recount was stated which was later on re-stated in a subsequent decision in the case of **R. Narayan vs. S. Samangali and others**,⁹ wherein it was held, as under:

26. “Finally, the entire case law on the subject regarding the circumstances under which re-count could be ordered was fully summarized and catalogue by this Court in the case of *Bhabhi v. Sheo Govind*” to which one of us (Fazal Ali, J.) was a party and which may be extracted thus:(SCC p. 693, para 13)

“The court would be justified in ordering re-count of the ballot papers only where:

- (1) The election petition contains an adequate statement of all the material facts on which the allegations of irregularity of illegality in counting are founded;
- (2) On the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting; and
- (3) The court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties.”

18. In the case of **P. K. K. Shamsudeen vs. K.A.M. Mappillai Mohindeen and Others**,¹⁰ the principle was prepounded by the Supreme Court, as below:-

11. “In *Ram Sewak Yadav v. Hussain Kamil Kidwai*, AIR 1964 SC 1249, this Court has set out the circumstances when an order for inspection of ballot papers can be ordered in the following terms: (SCR pp. 244-45)

“An order for inspection may not be granted as a matter of course: having regard to the insistence upon the secrecy of the ballot papers, the court would be justified in granting an order for inspection provided two

8 (1975) SCR Supp. 202

9 (1980) 2 SCC 537

10 (1989) 1 SCC 526

conditions are fulfilled:

(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and

(ii) The Tribunal is prima facie satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary.”

But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection.”

12. In *R. Narayanan v. S. Semmalai*, (1980) 2 SCC 537, the same principle has been reiterated. That was a case where the difference of votes between the candidate declared elected and his nearest rival, who filed an election petition was only 19 votes and which figure would have come down to 9 votes only if the postal ballots were included. Even so this Court after referring to a number of decisions and *Halsbury's Laws of England* and Fraser on *Law of Parliamentary Elections and Election Petitions* held that without there being an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting of votes are founded and such averments being backed by acceptable evidence and the court trying the petition being prima facie satisfied that an order for recount of votes is imperatively necessary to decide the dispute and do complete justice between the parties, an order of recount of votes cannot be passed.

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 hindsight 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.

14. Viewed in the light of these well enunciated principles, we find that the petitioner has neither made such averments in the petition nor adduced evidence of such a compulsive nature as could have made the Tribunal reach a prima facie satisfaction that there was adequate justification for the secrecy of ballot being breached in the petitioner's case. Factors urged before us by Mr Padamanabhan such as that Respondent 1 had accepted the correctness of the recount, and that he had conceded his defeat and wanted a re-election to be held cannot constitute justifying materials in law for the initial order of recount of votes made by the Tribunal.”

19. In the case of **Chandrika Prasad Yadav** (supra), it was held, as under:-

20. “It is well settled that an order of re-counting of votes can be passed when the following conditions are fulfilled:

- (i) a prima facie case;
- (ii) pleading of material facts stating irregularities in counting of votes;
- (iii) a roving and fishing inquiry shall not be made while directing re-counting of votes; and
- (iv) an objection to the said effect has been taken recourse to.

21. The requirement of maintaining the secrecy of ballot papers must also be kept in view before a re-counting can be directed. Narrow margin of votes between the returned candidate and the election petitioner by itself would not be sufficient for issuing a direction for re-counting.

23. It was further held that for the said purpose the Tribunal must arrive at a finding that the errors are of such magnitude which would materially affect the result of the election. As regards standard of proof, this Court held: (SCC p. 359, para 44)

“44. The requirement of laying foundation in the pleadings must also be considered having regard to the fact that the onus to prove the allegations was on the election petitioner. The degree of proof for issuing a direction of re-counting of votes must be of a very high standard and is required to be discharged. (See *Mahender Pratap v. Krishan Pal*, (2003) 1 SCC 390)”
(See also *Mukand Ltd. v. Mukand Staff & Officers Assn.* (2004) 10 SCC 460)

20. In a recent decision in the case of **Arikala Narasa Reddy** (supra), the strict rule of pleading in fulfillment of statutory requirement of high degree of proof required and the conditions which were required to be satisfied before the recount could be ordered, by applying the principle that secrecy of ballot papers is to be preserved, was again emphatically stated thus:-

13. “It is a settled legal proposition that the statutory requirements relating to election law have to be strictly adhered to for the reason that an election dispute is a statutory proceeding unknown to the common law and thus, the doctrine of equity, etc. does not apply in such dispute. All the technicalities prescribed/mandated in election law have been provided to safeguard the purity of the election process and the courts have a duty to enforce the same with all rigours and not to minimise their operation. A right to be elected is neither a fundamental right nor a common law right, though it may be very fundamental to a democratic set-up of governance. Therefore, answer to every question raised in election dispute is to be solved within the four corners of the statute. The result announced by the Returning Officer leads to formation of a Government which requires the stability and continuity as an essential feature in election process and therefore, the counting of ballots is not to be interfered with frequently. More so, secrecy of ballot which is sacrosanct gets exposed if re-counting of votes is made easy. The court has to be more careful when the margin between the contesting candidates is very narrow. “Looking for numerical good fortune or windfall of chance discovery of illegal rejection or

reception of ballots must be avoided, as it may tend to a dangerous disorientation which invades the democratic order by providing scope for reopening of declared results". However, a genuine apprehension of miscount or illegality and other compulsions of justice may require the recourse to a drastic step.

15. This Court has consistently held that the court cannot go beyond the pleadings of the parties. The parties have to take proper pleadings and establish by adducing evidence that by a particular irregularity/illegality, the result of the election has been "materially affected". There can be no dispute to the settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". Thus, a decision of the case should not be based on grounds outside the pleadings of the parties. In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering re-counting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for declaring the election to be void. The order of re-counting can be passed only if the petitioner sets out his case with precision supported by averments of material facts. (Vide *Ram Sewak Yadav v. Hussain Kamil Kidwai*, AIR 1964 SC 1249, *Bhabhi v. Sheo Govind*, (1976) 1 SCC 687 and *M. Chinnasamy v. K.C. Palanisamy*, (2004) 6 SCC 341.)"

17. The secrecy of a ballot is to be preserved in view of the statutory provision contained in Section 94 of the Act. Secrecy of ballot has always been treated as sacrosanct and indispensable adjunct of free and fair election. Such principle of secrecy is based on public policy aimed to ensure that voter may vote without fear or favour and is free from any apprehension of its disclosure against his will. In *S. Raghubir Singh Gill v. S. Gurcharan Singh Tohra*, AIR 1980 SC 1362, a Constitution Bench (*sic* two-Judge Bench) of this Court considered the aspect of secrecy of vote and held that such policy is for the benefit of the voters to enable them to cast their vote freely. However, where a benefit, even though based on public policy, is granted to a person, it is open for that person and no one else to waive of such benefit. The very concept of privilege inheres a right to waive it. (See also *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1 and *People's Union for Civil Liberties v. Union of India*, (2013 10 SCC 1)"

21. The aforesaid analysis of the legal position in the matter of trial of election petition seeking recount applied to the evidence, pleadings and governing rules discussed hereinabove leads to irresistible conclusion that the Tribunal, even though, no case for recount was made out as per the required standards degree and pleadings of proof, order of recount, presumably swayed by the fact on the

ground that there was equality of votes, was passed.

22. In the case of ***M. Chinnasamy vs. K. C. Palanisamy and others***¹¹, it was held, as under:

23. “Despite the fact that in relation to the allegations made under Categories 1, 2, 3 and 5, similar general and vague allegations had been made, the High Court proceeded to accept the evidences of the said witnesses.”

Necessity of maintaining secrecy of ballot papers should be kept in view before recounting is directed. A direction for recounting shall not be issued only because margin of votes between the returned candidate and the election petition is narrow.

23. The same principle was stated in the case of ***Chandrika Prasad Yadav, (supra)***, as under:

21. “The requirement of maintaining the secrecy of ballot papers must also be kept in view before a re-counting can be directed. Narrow margin of votes between the returned candidate and the election petitioner by itself would not be sufficient for issuing a direction for re-counting.”

A recent authoritative judicial pronouncement of the Supreme Court in the case of ***Arikala Narasa Reddy (supra)***, is that the counting should be confined only to the number of ballot papers, against which, illegality or irregularity is alleged in pleading. Therefore, the election petition is required to contain specific pleading with material facts to make out a case for recount of only specific votes and there cannot be an order of recount general in nature on pleadings like counting was made hurriedly and some valid votes were declared invalid, particularly, in a case where counting was done in the presence of the candidate or his agent and no application for recount was made in writing at the stage contemplated under the Rules and such failure is not satisfactorily explained.

11 (2004) 6 SCC 341

24. In the result, the petition has to be allowed and is accordingly allowed. The impugned order of recount passed by the Tribunal is set aside and the election petition is dismissed.

**Sd/-
(Manindra Mohan Shrivastava)
Judge**