

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (C) No.743 of 2016

Uttam Patle, aged about 42 years, S/o Late Sadhram Patle, By
Caste Satnami, R/o Post Khaija, Tahsil and Thana Baloda,
Distt.Janjgir Champa

----Petitioner

Versus

1. Ashok Kumar Kurre S/o Guharam Kurre, By Caste Satnami,
2. Ramnarayan S/o Kanhiya, by Caste Satnami
Both R/o Village Khaija (Navapara), Tahsil and Thana Baloda,
Distt.Janjgir Champa
3. Peethaseen Adhikari Shri Jawaharlal Tande, Head Master,
Govt. Girls Middle School, Navagarh, Tahsil Navagarh, Distt.
Janjgir Champa
4. Sub Divisional Officer (R) cum Prescribed Authority, Janjgir,
Distt.Janjgir Champa

---- Respondents

For Petitioner : Mr.Parag Kotecha, Advocate
For Respondent No.1 : Mr.F.S.Khare, Advocate
For Respondent No.5 : Mr.Arun Sao, Dy.A.G.

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

14/09/2017

1. This writ petition is directed against the order dated
24.2.2016 (Annexure P/3) passed by the Specified Officer/Sub
Divisional Officer (R), Janjgir by which the election petition
filed by the petitioner has been dismissed by the Specified
Officer/Sub Divisional Officer finding no merit.

2. Election for the post of Panch of Ward No.10 of Gram Panchayat Khaija was held on 1.2.2015 and result was declared on 8.2.2015. The petitioner filed the election petition under Section 122 of the Chhattisgarh Panchayat Raj Adhiniyam, 1993 (hereinafter called as "Act of 1993") read with the Chhattisgarh Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 (hereinafter called as "Rules of 1995") calling in question the election of respondent No.1 and praying that recounting was made as he has secured more votes than respondent No.1. The Specified Officer by its impugned order dismissed the election petition finding that the petitioner has failed to make out prima-facie case for grant of recounting.
3. Return has been filed on behalf of respondent No.1 opposing the writ petition and supporting the impugned order stating inter-alia that learned Specified Officer is justified in dismissing the election petition.
4. Mr.Parag Kotecha, learned counsel appearing for the petitioner, would submit that the Election Tribunal has committed illegality in rejecting the election petition as the petitioner and his witness Shyamlal both have proved that the petitioner has secured 65 votes in his favour, whereas respondent No.1 has secured 53 votes and therefore, he ought to have been declared elected candidate and recounting could have been made. He would further submit that Ex.P/2 has been ignored by the Specified Officer which

clearly indicates that the petitioner has secured 65 votes i.e. 12 votes than respondent No.1. Therefore, the impugned order deserves to be set aside. He would rely upon the judgment of the Supreme Court in the matter of **Sohan Lal Vs. Babu Gandhi and others**¹ and judgment of this Court in the matter of **Asim Saha Vs. Collector, Kanker and others**².

5. Mr.F.S. Khare, learned counsel appearing for respondent No.1, would support the impugned order and submit that order passed by the Election Tribunal is strictly in accordance with law and no interference is called for.
6. I have heard learned counsel appearing for the parties, considered their rival submissions made hereinabove and also gone through the record with utmost circumspection.
7. Election for the post of Panch of Gram Panchayat Khaija was conducted in accordance with the Act of 1993 and Rule of 1995 made thereunder. Rule 80 of the Rules of 1995 provides for recount of votes, which states as under:-

“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 all or any of the votes already counted, stating the grounds on which he demands such recount.

¹ 2003(1) M.P.H.T. 292 (SC)

² 2001 (1) M.P.H.T. 6 (CG)

(2) On such an application being made, the Returning Officer or such other officer authorised by him shall decide the matter and may allow the application in whole or in part or may reject it in toto if it appears to him to be frivolous or unreasonable.

(3) Every decision of the Returning Officer or such other officer authorised by him, under sub-rule (2) shall be in writing and contain the reasons therefor.

(4) If the Returning Officer or such other officer authorised by him, decides under sub-rule (2) to allow an application either in whole or in part, he shall-

(a) count the ballot papers again in accordance with his decision;

(b) amend the result sheet to the extent necessary after such recount; and

(c) announce the amendment so made by him.

(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 election agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by sub-rule (1).

6. The counted ballot papers shall be bundled and kept in the manner mentioned in sub-rule (3) of Rule 77.

7. Result sheets in Forms 16, 17, 18 and 19 for Panch, Sarpanch, member of Janpad Panchayat

and member of Zila Panchayat respectively, prepared by such other officers as are authorised by the Returning Officer, shall be submitted by them, in separate envelopes to the Returning Officer for compilation and tabulation of votes polled by each candidate.

8. The Returning Officer on receipt of result sheets under sub-rule (7) shall enter or cause to be entered the total number of votes polled by each candidate contesting for a seat of Sarpanch, member of Janpad Panchayat or member of Zila Panchayat at each polling station of the constituency concerned in subsequent part or parts of Forms 17, 18 and 19 respectively and complete and sign the result sheet.”

8. The question whether the election petitioner after declaration of result of the election can make an application for recounting of votes to the Election Tribunal directly without making an application before the Returning Officer, came up for consideration before the Supreme Court in the matter of **Ram Rati (Smt) vs. Saroj Devi and others**³, in which it was held by the Supreme Court that it is essential that an application in writing for recounting giving reasons in support thereof must be made before the Returning Officer and in absence of such application, the court or tribunal is not empowered to direct recounting even after adduction of evidence and consideration of alleged irregularities in the counting. It was held as under:-

“8.....In the light of the mandatory language of Rule 76 of the Rules, it is incumbent upon a

³ (1997) 6 SCC 66

candidate or an agent, if the candidate was not present, to make an application in writing and give reasons in support thereof, while seeking recounting. If it is not done, then the tribunal or the court is not empowered to direct recounting even after adduction of evidence and consideration of the alleged irregularities in the counting. The essential condition-precedent is that an application in writing should be made and the Returning Officer should pass an order with reasons in support thereof either to recall the order or otherwise, in writing. The fact that the officer had not passed any order in writing would indicate that the respondent had not made any application.....”

9. Later on, in the matter of **Sohan Lal** (supra), the decision rendered in **Ram Rati's** case (supra) was revisited by the Supreme Court and it has been held that in election petition after declaration of the result, the court or tribunal can direct for recounting of the votes and making an application in writing before the Returning Officer is not necessary and it has been held that the ratio laid-down in **Ram Rati** case (supra) is not correct. It was held as under:-

“14. In view of Section 122 and the Rules, we are unable to agree with the ratio laid down in Ram Rati case. It is not correct to hold that, in an election petition, after the declaration of the result, the court or tribunal cannot direct re-counting of votes unless the party has first applied in writing for re-counting of votes. There is no prohibition in the Act or under the Rules prohibiting the court or tribunal to direct a re-counting of the votes. Even otherwise, a party may not know that the re-counting is necessary till after the result is declared. At this stage, it would not be possible for him to apply for re-recounting to the Returning Officer. His only remedy would be to file an election petition under Section 122. In such a case, the court or the tribunal is bound to consider the plea and where a case is made out, it may direct re-count depending upon the evidence led by the parties. In the present case, there was obvious error in declaring the result. We, therefore, hold that the ratio laid down in Ram Rati case is not correct.”

10. Subsequently, in the matter of **Chandrika Prasad Yadav vs. State of Bihar and others**⁴, the Supreme Court has laid down the condition to be fulfilled before an order of recounting of votes can be passed. It was held as under:-

“20. It is well settled that an order 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.”

11. The Supreme Court in the matter of **R. Narayanan vs. S. Semmalai and others**⁵ has considered the question as to when recount can be directed by the Election Tribunal and held as under:-

“26. Finally, the entire case law on the subject regarding the circumstances under which re-count could be ordered was fully summarised and catalogued by this Court in the case of Bhabhi v. Sheo Govind⁶ to which one of us (Fazal Ali, J.) was a party and which may be extracted thus:-

The Court would be justified in ordering a recount 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 or 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

⁴ (2004) 6 SCC 331

⁵ (1980) 2 SCC 537

⁶ 1975 Supp SCR 202

(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."

12. The Supreme Court in the matter of **P.K.K. Shamsudeen vs. K.A.M. Mappillai Mohindeen and others**⁷ laid down the principles of law as to when the recount of votes should be permitted and held as under:-

"11. In Ram Sewak Yadav v. Hussain Kamil Kidwai & Ors.⁸, this Court has set out the circumstances when an order for inspection of ballot papers can be ordered in the following terms:

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 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. Semmalai⁹, the same principle has been reiterated. That was a case

⁷ (1989) 1 SCC 526

⁸ AIR 1964 SC 1249

⁹ (1980) 2 SCC 537

where the difference of votes between the candidates declared elected and his nearest rival, who filed an election petition was only 19 votes and which figure would have come down to 9 PG NO 957 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 their 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 high sight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election petitioner on the threshold before an order for recount of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or court should not order the recount of votes."

13. The Supreme Court in the matter of **Udey Chand vs. Surat Singh and another**¹⁰ has held that before an Election Tribunal can permit scrutiny of ballot papers and

¹⁰ (2009) 10 SCC 170

order re-count, the following two basic requirements must be satisfied:-

(i) the election petition seeking re-count of the ballot papers must contain an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded, and (ii) on the basis of evidence adduced in support of the allegations, the Tribunal must be prima facie satisfied that in order to decide the dispute and to do complete and effectual justice between the parties, making of such an order is imperatively necessary, are satisfied.”

14. The Supreme Court in the matter of **Kattinokkula Murarli Krishna vs. Veeramalla Koteswara Rao and others**¹¹ has held in no uncertain terms that in election process, the secrecy of ballot is sacrosanct and inviolable except where strong prima facie circumstances to suspect the purity, propriety and legality in the counting of votes are made out. It was held as under:-

“15. Before examining the merits of the issues raised on behalf of the parties, it would be appropriate to bear in mind the salutary principle laid down in the Election Law that since an order for inspection and re-count of the ballot papers affects the secrecy of ballot, such an order cannot be made as a matter of course. Undoubtedly, in the entire election process, the secrecy of ballot is sacrosanct and inviolable except where strong prima facie circumstances to suspect the purity, propriety and legality in the counting of votes are made out. The importance of maintenance of secrecy of ballots and the circumstances under which that secrecy can be breached, has been considered by this Court in several cases.

16. It would be trite to state that before an Election Tribunal can permit scrutiny of ballot papers and order re-count, two basic requirements viz. (i) the election petition seeking re-count of the ballot papers must contain an adequate statement of all

¹¹ (2010) 1 SCC 466

the material facts on which the allegations of irregularity or illegality in counting are founded, and (ii) on the basis of evidence adduced in support of the allegations, the Tribunal must be, prima facie, satisfied that in order to decide the dispute and to do complete and effectual justice between the parties, making of such an order is imperatively necessary, are satisfied. Broadly stated, material facts are primary or basic facts which have to be pleaded by the election petitioner to prove his cause of action and by the defendant to prove his defence. But, as to what could be said to be material facts would depend upon the facts of each case and no rule of universal application can be laid down."

15. Their Lordships also considered the decision of the Supreme Court rendered in the matter of **Vadivelu vs. Sundaram and others**¹² and held as under:-

"16. The result of the analysis of the above cases would show that this Court has consistently taken the view that re-count of votes could be ordered very rarely and on specific allegation in the pleadings in the election petition that illegality or irregularity was committed while counting. The petitioner who seeks re-count should allege and prove that there was improper acceptance of invalid votes or improper rejection of valid votes. If only the Court is satisfied about the truthfulness of the above allegation, it can order re-count of votes. Secrecy of ballot has always been considered sacrosanct in a democratic process of election and it cannot be disturbed lightly by bare allegations of illegality or irregularity in counting. But if it is proved that purity of elections has been tarnished and it has materially affected the result of the election whereby the defeated candidate is seriously prejudiced, the Court can resort to re-count of votes under such circumstances to do justice between the parties."

16. Very recently, in the matter of **Arikala Narasa Reddy vs. Venkata Ram Reddy Reddygari and another**¹³, the Supreme Court has reiterated the conditions necessary for

¹² (2000) 8 SCC 355

¹³ (2014) 5 SCC 312

making an order of recounting and further held that the secrecy of ballot is to be treated sacrosanct and indispensable adjunct of free and fair election. It was held as under:-

“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 minimize 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 candidate 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.

14. Before the court permits the re-counting, the following conditions must be satisfied:

- (i) The court must be satisfied that a prima facie case is established;
- (ii) The material facts and full particulars have been pleaded stating the irregularities in counting of votes;
- (iii) A roving and fishing inquiry should not be directed by way of an order to re-count the votes;

- (iv) An opportunity should be given to file objection; and
- (v) Secrecy of the ballot should be guarded.

17. In the light of proposition of law laid down by the Supreme Court in the afore-stated judgments (supra), if the facts of the present case are examined, it is quite vivid that learned Specified Officer has reached to the conclusion that the petitioner has failed to make out prima-facie case in his favour for directing recount. It has also been held that the petitioner and his witness Shyamlal both have clearly stated that no counting slip in Form 16 was issued to the petitioner. Likewise, document Ex.P/2 has not been relied upon by the Specified Officer as it is not counting slip as per Rules of 1995 and it is not in prescribed form. Moreover the petitioner has neither produced counting slip in Form 16 before the Election Tribunal nor Presiding Officer was summoned before the Specified Officer to prove the fact that the petitioner had secured 65 votes in the said election. The Specified Officer reached a finding that it is the case of no evidence for directing recount, which is finding of fact based on evidence available on record.
18. In view of the aforesaid discussion, I do not find any force in the submissions made by Mr.Kotecha. The writ petition is accordingly dismissed. No cost(s).

Sd/-

(Sanjay K.Agrawal)
Judge

B/-