

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No. 382 of 2019

In

Civil Writ Jurisdiction Case No.21476 of 2018

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Brij Bhushan Prasad Son of Mathura Prasad Resident of Village and P.O. Dariyapur, P.S. Naubatpur, District-Patna.

... .. Appellant/s

Versus

1. The State Election Commission (Panchayat) Sone Bhawan Birchand Patel Path, Patna through the State Election Commissioner.
2. The Secretary, The State Election Commission (Panchayat), Sone Bhawan Birchand Patel Path, Patna.
3. The District Magistrate-cum-District Election Officer (Panchayat), Patna, District-Patna.
4. The Block Development Officer-cum- Returning Officer, Naubatpur Block, P.S. Naubatpur, District-Patna.
5. Chandeshwar Saw Son of Late Bakhauri Saw Resident of Village-Bichhedl, P.O. Arap, P.S. Naubatpur, District-Patna.
6. Ajibkhan Nat Son of Fonu Nat Resident of Village and P.O. Dariyapur, P.S. Naubatpur, District-Patna.
7. Akhilesh Kumar Son of Subhash Sah Resident of Village-Tarwan, P.O. Arap, P.S. Naubatpur, District-Patna.
8. Abhay Kumar Son of Mahesh Chandra Chakravarti Resident of Village-Tarwan, P.O. Arap, P.S. Naubatpur, District-Patna.
9. Arun Kumar Son of Satya Narayan Saw Resident of Village-Tarwan, P.O. Arap, P.S. Naubatpur, District-Patna.
10. Tapeswar Saw Son of Rameshwar Saw Resident of Village-Dariyapur, P.O. Chainpur Dariyapur, P.S. Naubatpur, District-Patna.
11. Devfal Saw Son of Rajendra Saw Resident of Village-Tarwan, P.O. Arap, P.S. Naubatpur, District-Patna.
12. Yogendra Pandit Son of Brij Nandan Pandit Resident of Village and P.O. Dariyapur, P.S. Naubatpur, District-Patna.
13. Virendra Saw Son of Surendra Saw Resident of Village-Tarwan, P.O. Arap, P.S. Naubatpur, District-Patna.
14. Shankar Saw Son of Ganga Saw Resident of Village and P.O. Dariyapur, P.S. Naubatpur, District-Patna.
15. Sharda Devi Wife of Bhagwan Mistri Resident of Village-Jagdishpur, P.O. Dariyapur, P.S. Naubatpur, District-Patna.
16. Sanjay Mistiri Son of Lalchandra Mistiri Resident of Village-Abgilla, P.O. Naubatpur, P.S. Naubatpur, District-Patna.

... .. Respondent/s

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with

Civil Writ Jurisdiction Case No. 9655 of 2019

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Brij Bhushan Prasad Son of Mathura Prasad Resident of Village and P.O. Dariyapur, P.s. Naubatpur, Distt. Patna.

... .. Petitioner/s

Versus

1. The State Election Commission (Panchayat) Sone Bhawan Birchand Patel Path, Patna through the State Election Commission
2. The Secretary The State Election Commission (Panchayat), Sone Bhawan Birchand Patel Path, Patna.
3. The District Magistrate-cum-District Election Officer (Panchyat) Patna, Distt.- Patna.
4. The Block Development Officer-cum-Returning Officer Naubatpur Block, P.s. Naubatpur, Distt. Patna.
5. Chandeshwar Saw Son of Late Bakhaury Saw Resident of Village - Bichhedl, P.o. Arap, P.s. Naubatpur, Distt. Patna.
6. Ajibkhan Nat Son of Fonu Nat Resident of Village Resident of Village and P.o. Dariyapur, P.s. Naubatpur, Distt. Patna.
7. Akhilesh Kumar Son of Subhash Sah Resident of Village Tarwan, P.o. Arap, P.s. Naubatpur, Distt. Patna.
8. Abhay Kumar Son of Mahesh Chandra Chakravarti Resident of Village - Tarwan, P.O. Arap, P.s. Naubatpur, Distt. Naubatpur, Patna.
9. Arun Kumar Son of Satya Narayan Saw Resident of Village - Tarwan, P.O. Arap, P.s. Naubatpur, Distt. Naubatpur, Patna.
10. Tapeswar Saw Son of Rameswar Saw Resident of Village - Dariyapur, P.o. Chainpur Dariyapur, P.s. Naubatpur, Distt. Patna.
11. Devfal Saw Son of Rajendra Saw Resident of Village - Tarwan, P.O. Arap, P.s. Naubatpur, Distt. Patna.
12. Yogendra Pandit Son of Brij Nandan Pandit Resident of Village - and P.o. Dariyapur, P.s. Naubatpur, Distt. Patna.
13. Virendra Saw Son of Surendra Saw Resident of Village - Tarwan, P.o. Arap, P.s. Naubatpur, Distt. Patna.
14. Shankar Saw Son of Ganga Saw Resident of Village - and P.o. Dariyapur, P.s. Naubatpur, Distt. Patna.
15. Sharda Devi Wife of Bhagwan Mistiri Resident of Village - - jagdishpur, P.o. Dariyapur, P.s. Naubatpur, Distt. Patna.
16. Sanjay Mistiri Son of Lalchandra Mistiri Resident of Village - Abgilla, P.O. Naubatpur, P.s. Naubatpur, Distt. Patna.

... .. Respondent/s

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Appearance :

(In Letters Patent Appeal No. 382 of 2019)

Appearance :

For the Appellant/s : Mr. S. B. K. Manglam, Advocate
Mrs. Anita Kumari, Advocate



Mr. Ravi Ranjan, Advocate
Mr. Kislay Raj, Advocate
Mr. Awnish Kumar, Advocate
For the State : Mr. Manish Kumar, AC to AAG-6
For the Commission : Mr. Girish Pandey, Advocate

For the Respondent No.5: Mr. P.K. Shahi, Sr. Advocate
Mr. Jai Prakash Verma, Advocate

(In Civil Writ Jurisdiction Case No. 9655 of 2019)

For the Petitioner/s : Mr. S. B. K. Manglam, Advocate
Mrs. Anita Kumari, Advocate
Mr. Ravi Ranjan, Advocate
Mr. Kislay Raj, Advocate
Mr. Awnish Kumar, Advocate
For the State : Mr. Kumar Alok (Sc7)
For the Commission : Mr. Girish Pandey, Advocate
For the Respondent No.5: Mr. P.K. Shahi, Sr. Advocate
Mr. Jai Prakash Verma, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE JUSTICE SMT. ANJANA MISHRA
ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 27-08-2019

We have heard Shri Mangalam, learned counsel for the appellant Brij Bhushan Prasad, who is the elected Mukhiya and against whom the election petition came to be filed by the contesting respondent Chandeshwar Saw. The dispute centres around an order passed by the competent authority for recounting that became subject matter of challenge in C.W.J.C. No. 21476 of 2018. The said petition was partly allowed with certain directions given to the Election Tribunal and in the consequential action taken, the Election Tribunal came to pass an order which according to the appellant was in teeth of the judgment of the High Court and consequently, the appellant was



compelled to file C.W.J.C. No. 9655 of 2019 challenging the said action of the Tribunal.

The appeal, namely, L.P.A. No. 382 of 2019 has been filed by the appellant questioning the correctness of the judgement of the learned Single Judge in C.W.J.C. No. 21476 of 2018 on the ground that the learned Single Judge committed an error in upholding that part of the order of the Tribunal whereby a recount had been ordered.

We may point out at the very outset that in C.W.J.C. No. 21476 of 2018 upon the institution of the writ petition, an interim order was passed on 19.12.2018 that is extracted hereinunder:-

“Heard learned counsel for the petitioner, State, respondent no.5 and the State Election Commission.

Learned counsel for the petitioner submitted that if an Election Tribunal has formed an opinion that irregularities have been committed during the course of counting, to cross-check his tentative opinion, he can direct for recounting to obtain the correct result but unless and until such exercise is undertaken and he records a finding that any other candidate had received the majority of valid votes, law does not authorize him to set aside the election of the returned candidate. Since the learned Munsif has done this by his impugned judgment, the judgment under challenge is perverse and therefore, wholly unsustainable. He has also pointed out that vide impugned judgment and order dated 11.10.2018, recounting of votes has begun today and the process is going on.

Learned counsel for the State admits that recounting



has begun and has yet not concluded.

Considering the submissions made on behalf of the parties, let notices be issued to respondents no.6 to 16 by ordinary process as well as registered cover with A/D, for which requisites etc must be filed by 5th of January, 2019, failing which the application shall stand dismissed without further reference to a Bench.

In the meantime, even if recounting, which is in process, is completed, the concerned authorities shall not declare the result.

Mr. Ajay Kumar, learned counsel for the State shall communicate the order to the authorities concerned in this regard forthwith.

List this matter under the heading “For Admission” after the notices are served upon the respondents.”

The writ petition was partly allowed on 6th of March, 2019, the judgment whereof is on record and is impugned in L.P.A. No. 382 of 2019.

The order passed by the Tribunal on 11th April, 2019 came to be challenged in C.W.J.C. No. 9655 of 2019 in which an interim order was passed by the learned Single Judge on 18th June, 2019, i.e., extracted hereinunder:-

‘This writ application has been preferred challenging the order dated 11.04.2019 passed by the learned Civil Judge, Junior Division-cum-Election Tribunal, Danapur in Election Case No. 08 of 2016 by which the learned Election Tribunal has been pleased to transmit the envelop containing the result of recounting for declaration of result to the District Magistrate, Patna.

Mr. S.B.K. Mangalam, learned counsel



representing the petitioner has taken this Court through judgment dated 06.03.2019 passed by this Court in C.W.J.C. No. 21476 of 2018. In the said writ application the petitioner had challenged the order dated 11.10.2018 passed by the learned Election Tribunal. By the said order the learned Tribunal had set aside the election of the petitioner and after setting aside the election directed the respondent no. 3 for recounting of votes and declaration of the result.

After hearing learned counsel for the parties in the said case, this Court took a view that the direction of the learned Tribunal holding the election of the returned candidate null and void and then direction saying that the District Magistrate, Patna-cum-District Election Officer, Patna shall declare the final result and shall issue a certificate cannot sustain.

This Court had saved the order of learned Tribunal, so far as the same relates to recounting of votes by the District Magistrate but had set aside that part of the impugned judgment by which the Tribunal had directed the District Magistrate to declare the result after recounting and to issue certificate accordingly in favour of the returned candidate.

The result of recounting was kept in a sealed envelope with the Registrar General of this Court which was ordered to be produced before the learned Election Tribunal on 14th March, 2019 for further action.

Learned counsel for the petitioner has placed before this Court the impugned order dated 11.04.2019 passed by the learned Election Tribunal. A perusal of which would show that the Tribunal referred to Rule 81 of the Bihar Panchayat Election Rules, 2006 which provides that the Returning Officer or the officer authorized shall declare that the candidate elected as Mukhiya on the basis of the number of valid votes secured by the candidate. He



has further referred to the Form No. 22 in which Returning Officer shall grant an election certificate and under Rule 81 District Election Officer shall make publication in the district gazette about the duly elected candidates in Form 23. In the concluding part the learned Election Tribunal has recorded as under :-

“In the light of ‘sprite’ of direction of Honourable Patna High Court and law discussed above let the report sent to District election officers-cum-District Magistrate, Patna for declaration of result accordance with report which is kept in sealed envelop with intimation to this Tribunal and also directed to taking further action accordingly.....”

The word ‘sprite’ seems to have been wrongly typed in place of the word ‘spirit’, thus, this Court read the entire sentence taking the correct word in consideration.

Learned counsel submits that this is a case where learned Election Tribunal has disobeyed the order of this Court willfully and negligently and hence it may be a case of committing a contempt. It is submitted that the learned Election Tribunal was required to proceed in terms under Section 140 of the Bihar Panchayat Raj Act, 2006 (hereinafter referred to as ‘the Act, 2006’). It is further submitted that in terms of the judgment of this Court once it was held that the District Magistrate could not have declared the result and in this case under Section 140 of the Act of 2006 it was the Election Tribunal which was competent to declare the result, there was no reason for the Tribunal to refer Rule 81 of the Bihar Panchayat Election Rules which would not be applicable in the facts and circumstances of the present case where the matter is being adjudicated under Section 140 of the Act of 2006 by an Election Tribunal.



Mr. Kumar Alok, learned counsel representing the State submits that prima-facie he is of the view that so far as law is concerned, the Tribunal should have proceeded under Section 140 of the Act, 2006 only to decide the lis and it was the Tribunal which was competent to declare the result and not the District Magistrate, Patna.

Learned counsel for the Bihar State Election Authority is also present and supports the submission advanced on behalf of the State.

Mr. Ashutosh Kumar Singh, learned Advocate who is present in Court submits that he will enter appearance on behalf of respondent no. 16 by filing Vakalatnama tomorrow.

In the given facts and circumstance, let there be a notice to the private respondent nos. 5 to 15 through both by ordinary process as well as by registered cover with A/D for which requisite etc. must be filed within one week, failing which this application shall stand rejected against the concerned respondents without further reference to a Bench.

Having noticed the submission made on behalf of the petitioner and the stand of the State and Bihar State Election Authority, this Court prima-facie convinced that the Election Tribunal has proceeded to pass the impugned order in complete ignorance of the order passed by this Court and instead of proceeding further in accordance with law sending of the envelop to the District Magistrate, Patna for declaration of result is neither in accordance with law nor in terms of the direction of this Court.

This being the position the Court being prima-facie convinced that there has been an attempt to circumvent the order of this Court, directs that till further order there will be an interim stay on operation of all subsequent action taken pursuant to the impugned order passed by the Election Tribunal.



List this case on 5th August, 2019 within top five cases.'

This appeal questioning the correctness of the judgment dated 06.03.2019 was entertained and an interim order had been passed therein on 24th July, 2019 which is extracted hereinunder:-

“Heard Shri S. B. K. Manglam, learned counsel for the appellant, Shri Amit Shrivastava, learned counsel for the State Election Commission and Shri Jai Prakash Verma, learned counsel for the Respondent No.5 Chandeshwar Saw.

This appeal arises out of a dispute raised in an Election Petition filed by the respondent no.5 assailing the election of the appellant for the office of Mukhiya, Gram Panchayat Dariyapur, Patna. The challenge raised was based on several allegations of irregularities, the primary challenge being that the votes cast in favour of the respondent no.5 had been wrongly declared to be invalid, whereas invalid votes had been counted in favour of the appellant for which oral evidence was led. The main allegation in the Election Petition was that the ink mark of the rubber stamp was imprinting a very weak impression of Swastika and, therefore, the votes were treated to be invalid which, according to the respondents, were valid votes and could not have been discarded.

We find that no inspection of the ballot papers appears to have been carried out and the Election Tribunal in spite of the contradictions in the oral testimony of the witnesses, proceeded to believe the same. The Tribunal came to the conclusion that recounting was therefore, necessary and, accordingly,



allowed the Election Petition. The tribunal, strangely enough without recounting having taken place, also annulled the elections of the appellant.

The challenge was raised to the same before the learned Single Judge in the writ petition giving rise to the present appeal and the learned Single Judge also approved of the said finding recorded by the Election Tribunal on the basis that the plaint allegations are categorical and, therefore, the Court does not find any reason to take a different view on the issue of recounting.

The learned Single Judge has, however, set aside the order passed by the Election Tribunal whereby the election of the appellant had been declared as null and void on the ground that while issuing a direction for recounting of votes, the Tribunal could not have simultaneously declared the election to be void.

The judgement of the learned Single Judge was delivered on 6th of March, 2019. From the order sheet, we find that the arguments had been heard on 15th February, 2019 and the matter was fixed for delivery of judgement on the date on which it was pronounced. There was an interim order dated 19th December, 2018 whereby it was directed that even if recounting is processed and completed, the concerned authority shall not declare the result. Accordingly, the ballots was kept in a sealed cover and was placed in the custody of the Registrar General of this Court during the hearing of the petition.

Upon the final direction having been issued by the learned Single Judge, the sealed envelope was returned to the learned counsel for the State Election Commission to be produced before the Tribunal on 14th of March, 2019 for further action. The direction



was to dispose of the matter within one month.

A supplementary affidavit has been filed on record stating the facts relating to the conduct of a learned Munsif and also the action taken with regard to the recounting of votes.

The Tribunal has proceeded to pass the order on 11th of April, 2019 with a direction to the District Magistrate to declare the results. The appellant also appears to have filed an application in relation to certain records having been either forged or evidence tampered for which a Miscellaneous case under Section 340 Cr. P.C. has also been registered. This order dated 11th April, 2019 has again been assailed by the appellant in CWJC No.9655 of 2019 where the following orders have been passed by a learned Single Judge on 18th of June, 2019:-

This writ application has been preferred challenging the order dated 11.04.2019 passed by the learned Civil Judge, Junior Division-cum-Election Tribunal, Danapur in Election Case No. 08 of 2016 by which the learned Election Tribunal has been pleased to transmit the envelop containing the result of recounting for declaration of result to the District Magistrate, Patna.

Mr. S.B.K. Mangalam, learned counsel representing the petitioner has taken this Court through judgment dated 06.03.2019 passed by this Court in C.W.J.C. No. 21476 of 2018. In the said writ application the petitioner had challenged the order dated 11.10.2018 passed by the learned Election Tribunal. By the said order the learned Tribunal had set aside the election of the petitioner and after setting aside the election directed the respondent no. 3 for recounting of votes and declaration of the result.

After hearing learned counsel for the parties in the said case, this Court took a view that the direction of the learned Tribunal holding the election of the returned candidate null and



void and then direction saying that the District Magistrate, Patna-cum-District Election Officer, Patna shall declare the final result and shall issue a certificate cannot sustain.

This Court had saved the order of learned Tribunal, so far as the same relates to recounting of votes by the District Magistrate but had set aside that part of the impugned judgment by which the Tribunal had directed the District Magistrate to declare the result after recounting and to issue certificate accordingly in favour of the returned candidate.

The result of recounting was kept in a sealed envelope with the Registrar General of this Court which was ordered to be produced before the learned Election Tribunal on 14th March, 2019 for further action.

Learned counsel for the petitioner has placed before this Court the impugned order dated 11.04.2019 passed by the learned Election Tribunal. A perusal of which would show that the Tribunal referred to Rule 81 of the Bihar Panchayat Election Rules, 2006 which provides that the Returning Officer or the officer authorized shall declare that the candidate elected as Mukhiya on the basis of the number of valid votes secured by the candidate. He has further referred to the Form No. 22 in which Returning Officer shall grant an election certificate and under Rule 81 District Election Officer shall make publication in the district gazette about the duly elected candidates in Form 23. In the concluding part the learned Election Tribunal has recorded as under :-

“In the light of ‘sprite’ of direction of Honourable Patna High Court and law discussed above let the report sent to District election officers-cum-District Magistrate, Patna for declaration of result accordance with report which is kept in sealed envelop with intimation to this Tribunal and also directed to taking further action accordingly.....”

The word ‘sprite’ seems to have been wrongly typed in place of the word ‘spirit’, thus,



this Court read the entire sentence taking the correct word in consideration.

Learned counsel submits that this is a case where learned Election Tribunal has disobeyed the order of this Court willfully and negligently and hence it may be a case of committing a contempt. It is submitted that the learned Election Tribunal was required to proceed in terms under Section 140 of the Bihar Panchayat Raj Act, 2006 (hereinafter referred to as 'the Act, 2006'). It is further submitted that in terms of the judgment of this Court once it was held that the District Magistrate could not have declared the result and in this case under Section 140 of the Act of 2006 it was the Election Tribunal which was competent to declare the result, there was no reason for the Tribunal to refer Rule 81 of the Bihar Panchayat Election Rules which would not be applicable in the facts and circumstances of the present case where the matter is being adjudicated under Section 140 of the Act of 2006 by an Election Tribunal.

Mr. Kumar Alok, learned counsel representing the State submits that prima-facie he is of the view that so far as law is concerned, the Tribunal should have proceeded under Section 140 of the Act, 2006 only to decide the lis and it was the Tribunal which was competent to declare the result and not the District Magistrate, Patna.

Learned counsel for the Bihar State Election Authority is also present and supports the submission advanced on behalf of the State.

Mr. Ashutosh Kumar Singh, learned Advocate who is present in Court submits that he



will enter appearance on behalf of respondent no. 16 by filing *Vakalatnama* tomorrow.

In the given facts and circumstance, let there be a notice to the private respondent nos. 5 to 15 through both by ordinary process as well as by registered cover with A/D for which requisite etc. must be filed within one week, failing which this application shall stand rejected against the concerned respondents without further reference to a Bench.

Having noticed the submission made on behalf of the petitioner and the stand of the State and Bihar State Election Authority, this Court prima-facie convinced that the Election Tribunal has proceeded to pass the impugned order in complete ignorance of the order passed by this Court and instead of proceeding further in accordance with law sending of the envelop to the District Magistrate, Patna for declaration of result is neither in accordance with law nor in terms of the direction of this Court.

This being the position the Court being prima-facie convinced that there has been an attempt to circumvent the order of this Court, directs that till further order there will be an interim stay on operation of all subsequent action taken pursuant to the impugned order passed by the Election Tribunal.

List this case on 5th August, 2019 within top five cases.”

In the background aforesaid, *prima facie*, we find that the law relating to recounting of ballots as propounded by the



Apex Court in the leading case of **Bhabhi Vs. Sheo Gobind and others**, reported in **(1976) 1 SCC 687** does not appear to have been appreciated by the Tribunal or even by the learned Single Judge in the impugned judgement in its correct perspective and, therefore, we are *prima facie* of the opinion that an order of recounting cannot be made unless the specified allegations come out with such strength or proof so as to constitute *prima facie* material that the results would be materially affected in the event the recounting is ordered. In the instant case, a weak impression of the ink was one of the major contentions and we find that the learned Munsif who proceeded with the Election Petition did not even take care to get the ballot papers inspected.

We, therefore, find that the appellant's right to continue as Mukhiya by virtue of the impugned order passed by the Tribunal has been *prima facie* breached and consequently, this Court is of the opinion that even though an interim order has been passed by the learned Single Judge dated 18th June, 2019 in the second round of litigation, it would be appropriate to direct that the said interim order will continue to operate till modified by any



final decision. The respondents are further restrained from interfering with the functioning of the appellant in the discharge of his duties as Mukhiya of Dariyapur Panchayat, District- Patna.

Since the contesting respondent has put in appearance, let a counter affidavit be filed by the contesting respondent no.5 as well as by the Election Commission and the State of Bihar within three weeks.

List on 26.08.2019. ”

Learned counsel appearing for the respective parties including the learned counsel for the State of Bihar have agreed upon for the disposal of this appeal along with C.W.J.C. No. 9655 of 2019 and it is in this background that we have proceeded to hear the appeal as well as the said writ petition finally in which affidavits have been exchanged between the parties.

From a perusal of the orders extracted hereinabove, the moot question that has to be determined by this Court is as to whether the Tribunal had proceeded in accordance with law to order a recount of the votes on the allegations made. Without reiterating the facts and even the position of law which stands extracted in our order dated 24th July, 2019, we find that the



learned counsel for the respondent election-petitioner could not successfully convince us to take a different view from what was expressed by us in the interim order quoted hereinabove. Keeping in view the law laid down by the Apex Court in the case of **Bhabhi Vs. Sheo Gobind and others, reported in (1976) 1 SCC 687**, we find that the order of recount as upheld by the learned Single Judge in the impugned judgment, therefore, is unsustainable as it is not in conformity with law. The Tribunal without even inspecting the ballots or forming a *prima facie* opinion on the basis of such material that was necessary to be gone into, proceeded to pass an order of recount that cannot be sustained in law. The learned Single Judge, therefore, could not have upheld the same.

From the narration of facts hereinabove, it appears that even after the judgment dated 6th March, 2019, the Tribunal appears to have acted in ample haste and in our opinion, any action in proceeding to pass the order on 11th April, 1999 was in the nature of an overreach so as to virtually circumvent the orders passed by this Court. This fact has been noticed by the learned Single Judge while passing the interim order dated 18th June, 2019 extracted hereinabove in C.W.J.C. No. 9655 of 2019 with which we find ourselves in full



agreement with.

The Tribunal, therefore, not only committed an error, but the action of the Tribunal can be clearly described as one to be malice in law. The Tribunal, therefore, ought not to have proceeded for issuing any direction for declaration of results without even complying with the observations made in the judgment dated 6th of March, 2019. This manner of dealing with the matter by the Tribunal, therefore, cannot be appreciated in the background of the case, more particularly, in the light of the arguments that have been advanced on the legal issue about the procedure to be adopted by a Tribunal before ordering a recount.

Shri Manglam, learned counsel for the appellant, however, insisted that the matter should not be remitted even if the appeal is allowed and the order dated 11th April, 2019 is quashed. His submission is that the election petition itself was not maintainable keeping in view the nature of the pleadings on record which do not make out any case for either a recount or even for trying the allegations levelled in the election petition. Pointing out to the framing of Issue No. 1 by the Tribunal and the answer given to it on the strength of the findings arrived at, he contends that election petition has been found to be



maintainable on the ground that there was a case made out for recount. This, he submits was a converse procedure to record a finding, inasmuch as, once there was evidence on record to the effect that no application for recount had been filed, which is evident from the deposition of the Returning Officer, then in that event Issue No. 1 has been wrongly decided. He further submits that the incident relating to the transfer of the records from the strong room to the Court under the private custody of the sons of the election petitioner was also an additional ground apart from the fact that the Court itself had entertained a Miscellaneous Application for undertaking proceedings under Section 340 Cr.P.C. His submission is that an intentional false plea, therefore, clearly disentitled the election petitioner to maintain the election petition and for which reliance has been placed by the learned counsel on the judgment in the case of **Mahender Pratap Vs Krishan Pal & Ors. reported in (2003) 1 SCC 390.**

The contention, therefore, in short is that, this Court itself should hold that the election petition was not maintainable and consequently, there is no occasion for remitting the matter back to the Tribunal concerned.

Responding to the aforesaid submissions,



Shri P.K. Shahi, learned Senior Counsel appearing for the election petitioner submits that even assuming for the sake of argument that the Tribunal committed error in proceeding to order a recount without recording appropriate findings, even though not admitting the same, yet the matter has to go back to the Tribunal, inasmuch as, the issue of maintainability was not the main issue, and it was the issue of recount which formed the basis of the entire litigation. In order to determine as to whether a recount would be permissible or not on the basis of the evidence adduced will be a matter of enquiry by the Tribunal itself and not by this Court in the exercise of jurisdiction under Article 226 of the Constitution of India. He, therefore, submits that the matter will have to be looked into keeping in view the evidence on record and also the pleadings which do indicate that there was sufficient material in order to attempt a recount on the allegations made.

Learned counsel for the State of Bihar has also advanced his submissions contending that the law as laid down by the Apex Court in the case of **Bhabhi Vs. Sheo Gobind and others** (supra) deserves to be followed.

Having heard learned counsel for the parties and having perused the records and in view of what has been



recorded by us hereinabove, we find that the order of recount cannot be sustained as the Tribunal acted in hot haste and the action of the Tribunal even in subsequently passing an order dated 11th April, 2019 clearly indicates that it is not an order which can either be sustained in law or can be described to be in conformity with the legal principles as laid down in the case of **Bhabhi Vs. Sheo Gobind and others** (supra).

The manner in which the proceedings have been conducted by the Presiding Officer, therefore, cannot be appreciated and in this background and having perused the material on record, we find that upon the matter being remitted, the said Presiding Officer who has passed the orders impugned, should not act as the Presiding Officer to decide the present dispute.

Accordingly, the present appeal (L.P.A. No. 382 of 2019) is allowed. The impugned judgment dated of the learned Single Judge dated 6th of March, 2019 is set aside.

The order of recount passed by the Tribunal dated 11.10.2018 is also quashed. The order passed by the Tribunal on 11th April, 2019, therefore, also cannot be sustained and is accordingly set aside. C.W.J.C. No. 9655 of 2019 is also accordingly allowed.



The matter shall now stand remitted to the Tribunal with a direction to the learned District Judge, Patna, to nominate the said election petition to an officer of the rank empowered to try the election petition other than the officer who had dealt with the matter earlier.

With the aforesaid directions, the appeal (L.P.A. No. 382 of 2019) and the writ petition (C.W.J.C. No. 9655 of 2019) are accordingly allowed.

(Amreshwar Pratap Sahi, CJ)

(Anjana Mishra, J)

Saif/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	06.09.2019
Transmission Date	

