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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on 3/2/2021**
Judgement delivered on 11/2/2021**WA No. 401 of 2020**

(Arising out of order dated 27.8.2020 passed by learned Single Judge in WPC No.1939/2020)

- Smt. Leela Bai Sharma, W/o Ghanshyam Prasad Sharma, aged about 62 years, R/o 726/18, Khaira Mohalla Masturi, Jairam Nagar, Masturi, District Bilaspur Chhattisgarh.

---- Appellant/Respondent No.6**Versus**

1. State of Chhattisgarh, through the Secretary, Department of Panchayat & Social Welfare, Mantralaya, Mahanadi Bhawan, Atal Nagar, Nava Raipur, District Raipur Chhattisgarh.
2. Collector Bilaspur, District Bilaspur, Chhattisgarh
3. Specified Officer cum Sub Divisional Officer (Revenue) Masturi, District Bilaspur, Chhattisgarh.
4. Tahsildar cum Returning Officer (Panchayat), Masturi, District Bilaspur Chhattisgarh.
5. Presiding Officers Booth Nos. 159, 160, 161, 162, 163, 164 And 165 of Gram Panchayat Jairam Nagar, Janpad Panchayat Masturi, District Bilaspur Chhattisgarh.
6. Smt. Girija Devi Agrawal, W/o Shri Kamal Kumar Agrawal, aged about 48 years, R/o Main Road, Jairam Nagar, Tehsil Masturi, District Bilaspur, Chhattisgarh
7. Smt. Bharti Pal, W/o Sukhnandan Bhargav.
8. Smt. Madhuri Sahu, W/o Narayan Prasad Sahu.
9. Smt. Seeta Mallick, W/o Dhanraj Mallick.

Respondents No.7 to 9 are R/o Jairam Nagar, Tahsil Masturi, District Bilaspur (CG)

---- Respondents

For Appellant : Mr. Harshwardhan Parganhia, Advocate
For Respondent No.1 to 5: Mr. Ashish Tiwari, Govt. Advocate
For Respondent No.6 : Mr. Shashank Thakur, Advocate

Hon'ble Shri PR Ramachandra Menon, CJ
Hon'ble Shri Parth Prateem Sahu, J

CAV Order

Per Parth Prateem Sahu, J

1. Sustainability of the order dated 27.8.2020 passed by the learned Single Judge in WPC No.1939/2020 by which the learned Single Judge has allowed writ petition and remitted back the case to the Election Tribunal i.e. respondent No.3 herein, for deciding the matter afresh after framing issues and after granting opportunity of hearing to the parties to lead evidence, is put to challenge in this writ appeal.
2. Facts of the case, in brief, are that election for the post of Sarpanch, Gram Panchayat Jairamnagar, Tahsil Masturi, District Bilaspur took place on 28.1.2020. Appellant along with private respondents herein contested the said election. After completion of counting of votes, result was declared in which respondent No.6 has been declared to be elected as she has secured total 1303 votes. Appellant secured second highest votes i.e. 1213. On 31.1.2020 appellant filed an objection before the Returning Officer with regard to irregularity in counting of votes and thereafter filed an election petition under Section 122 of the Chhattisgarh Panchayat Raj Adhiniyam, 1993 (for short 'the Adhiniyam, 1993') before the Sub Divisional Officer (R), Masturi i.e. respondent No.3, with a prayer for recounting of votes. Respondent No.6 filed reply to

election petition filed under Section 122 of the Adhiniyam, 1993 denying the pleadings made therein. Apart from reply, respondent No.6 also filed preliminary objection with regard to maintainability of election petition on the ground that election petition has not been filed in accordance with the provisions contained under the Chhattisgarh Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 (for short 'the Rules of 1995'). The Presiding Officers of different polling booths of Gram Panchayat Jairam Nagar had also submitted their reply to election petition and denied the pleadings made therein.

3. During the course of proceedings before the Sub Divisional Officer (R), Masturi, District Bilaspur, it is recorded in the proceeding dated 5.8.2020 that the parties requested to pass the order on the basis of pleadings, documents and written submissions as they do not want to lead any evidence and accordingly, the respondent No.3 allowed the prayer of the parties and fixed the case for orders on 10.8.2020. The proceeding dated 5.8.2020 reads thus:-

“उभयपक्ष अधिवक्ता उपस्थित। उभय-पक्षकार अधिवक्ताओं ने निवेदन किया कि प्रकरण में सक्षय पेश नहीं करना चाहते। प्रकरण में प्रस्तुत दस्तावेज लिखित तर्क का अवलोकन कर आदेश परित किये जाने का निवेदन किये है। प्रकरण पूर्ववत अवलोकनार्थ/आदेशार्थ”

4. On the next date of hearing i.e. 10.8.2020, respondent No.3 passed the order of re-counting of votes, fixing the date as 13.8.2020. After re-counting of votes, it is recorded that appellant secured 1237 votes; respondent No.6 secured 1211

votes and 153 votes have been found to be invalid. The order dated 10.8.2020 was put to challenge by respondent No.6 before the High Court by filing writ petition *inter alia* on the ground that order of re-counting of votes has been passed in a mechanical and cryptic manner without complying with the provisions of the Rules of 1995. It has also been urged in the petition that total votes recorded earlier have been found to be reduced from 3282 to 3216.

5. Writ petition filed by respondent No.6 herein was opposed by the appellant.
6. The learned Single Judge after hearing the parties and taking note of the relevant provisions applicable to the facts of case, particularly Rule 11 of the Rules of 1995 and precedents on the issue, has allowed writ petition, set aside the order dated 10.8.2020 and remanded back the matter to the SDO (R), Masturi for fresh consideration after framing of issues and after affording opportunity of adducing evidence to the parties. It is this order which is subject matter of this appeal.
7. Mr. Harshwardhan Parganiya, learned counsel for appellant submits that both the parties had requested the Election Tribunal -cum- SDO (R), Masturi to decide election petition on the basis of pleadings and documents placed on record, hence respondent No.6 could not have been permitted to raise a submission that the Election Tribunal has not followed the procedure prescribed under the law before passing the order of re-counting of votes. He further submits that after

recounting of votes, appellant has secured 1237 votes, whereas respondent No.6 has secured 1211 votes. Thus, the appellant had secured more votes than the votes received by respondent No.6, who has been earlier declared as returned candidate. He submits that when after recounting of votes, appellant has been declared to have secured more votes than that of respondent No.6 and also declared to be elected, the learned Single Judge ought not to have disturbed the order passed by respondent No.3. He further contended that in the democracy the will of majority of voters must prevail, hence the order passed by the learned Single Judge requires to be interdicted. In support of his contention, learned counsel places his reliance on the judgment in cases of **Nedunuri Kameshwaramma vs. Sampati Subba Rao** reported in **AIR 1963 SC 884**; **Kunju Kesavan vs. M.M. Philip & ors** reported in **AIR 1964 SC 164**; **Sri Soneswar Borah vs. Sri Nagen Neog & ors** reported in **(1986) 1 Gauhati Law Reports 119**; **Kali Prasad Agarwalla (dead) by LRs & ors vs. M/s Bharat Coking Coal Limited & ors** reported in **1989 Supp (1) SCC 628**; **Parvatia vs. Padmini & ors** reported in **2005 (2) CGLJ 335**; order dated 28.1.2016 passed by Single Bench of this Court in **WPC No.1565/2015**; order dated 23.06.2016 passed by a Division Bench of this High Court in **Writ Appeal No.68/2016**.

8. Mr. Shashank Thakur, learned counsel representing respondent No.6 submits that after declaration of returned candidate, the procedure prescribed to challenge election of

returned candidate under the law is by way of filing an election petition, as prescribed under Section 122 of the Adhiniyam, 1993. The procedure of filing election petition and its manner of proceedings have been envisaged under the Rules of 1995. As per requirement of the Rules of 1995 the allegations are required to be specifically pleaded. The Election Tribunal is further required to frame issues based on the pleadings of respective parties and to proceed as per Rule 11 of the Rules of 1995. In the present case, the Election Tribunal has not framed any issue nor recorded any evidence and passed the order of re-counting of votes, which is contrary to the provisions of the Rules of 1995. Learned Single Judge taking into consideration the provisions of filing of election petition and essential requirements before passing order in it, has rightly arrived at a conclusion that the Election Tribunal has committed irregularity in passing the order of re-counting of votes. The order passed by the learned Single Judge is strictly in accordance with law which does not call for any interference. In support of his submissions, learned counsel places his reliance on the decisions in cases of **Makhanlal Vs. Manas Bhumia** reported in (2001) 2 SCC 652; **Parvati's case (supra)**; order dated 5.1.2017 passed by this Court in WPC No.2652/2016, **Ram Sai vs. State of CG & ors**; order dated 21.9.2016 passed in WPC No.1947/2016, **Smt. Bhupeshwari vs. State of CG & ors**; order dated 21.9.2016 passed in WPC No.422/2017, **Smt. Sabyarani vs. State & ors**; order dated 18.11.2016 passed in WPC No.2034/2016,

Dharam Singh v. Vijay Rathiya; order dated 21.9.2015 passed in WPC No.699/2015 Narendra Kumar Kewat Vs. State; order dated 23.6.2016 passed in WA No.68/2016, Santosh Kumar Nishad vs. State;

9. We have heard learned counsel for the parties and perused the record.
10. Before proceeding further, we find it appropriate to have a glance at the relevant provisions of the Adhiniyam, 1993 and the Rules of 1995 applicable to the case. Section 122 of the Adhiniyam, 1993 reads thus:-

“122.Election petition. - (1) An election under this Act shall be called in question only by a petition presented in the prescribed manner:-

- (i) in case of Panchayat to the Sub-Divisional Officer (Revenue);
- (ii) in case of Janpad Panchayat to the Collector; and
- (iii) in case of Zila Panchayat to [Director, Panchayat] and not otherwise.

Procedure is prescribed under the Rules of 1995. Rule 5 of the Rules of 1996 is extracted below;-

“5.Contents of the petition.-- An election petition shall-
 (a) contain a concise statement of all material facts on which the petitioner relies;
 (b) set forth with sufficient particulars, the grounds on which the election is called in question;
 (c) be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (V of 1908), for the verifications of pleadings.

11. Procedure before the specified officer and his powers.- (1) 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 :

Provided that it shall have only be necessary for the specified officer to make a memorandum of the substance of the evidence of any witness examined by him.

(2) The 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 motu* any person whose evidence, appears to him to be material.

12. Parties to produce their witnesses.-xxxxxxxxxx

16.Application of the Indian Evidence Act, 1872.-xxxxxxxxxx

20. Answering of criminating questions and certificate of indemnity.-xxxxxxxxxx”

11. From the above provisions of law it is clear that how an election petition is to be presented, its contents and the manner of proceeding to be drawn by the Election Tribunal.
12. In view of the finding recorded by the learned Single Judge and the submissions made by learned counsel for respondent No.6, we put a specific question to the learned counsel for appellant as to whether any issue has been framed by the Election Tribunal and any evidence of the parties was recorded, to which learned counsel answered in negative. Learned counsel fairly submits that both the parties have agreed not to lead any evidence and requested the SDO (R), Masturi to pass orders on the basis of pleadings and documents brought on record by the parties. The Election Tribunal considering the materials available before it, has

passed the order of re-counting of votes. Perusal of the order sheets recorded by the Election Tribunal reveals that after filing of reply and preliminary objections, it is recorded that both the parties have requested for passing of the order on the basis of pleadings and documents available on record and only on that basis, the Election Tribunal has passed the order of re-counting of votes. It is settled law that re-counting of votes not to be made only on asking by any of the candidate to the election and secrecy of ballot papers is required to be maintained. The Hon'ble Supreme Court in the case of **M. Chinnaswamy Vs. K.C. Palaniswamy & ors** reported in **(2004) 6 SCC 341** has referred to the circumstances under which an order of recount of votes can be passed by an Election Tribunal, which are thus:-

“15....It is trite that an order of recounting of votes can be passed when the following ingredients are satisfied: (1) If there is a *prima facie* case; (2) material facts therefor are pleaded; (3) the court shall not direct recounting by way of roving or fishing inquiry; and (4) such an objection had been taken recourse to.”

13. In case of **Chandrika Prasad Yadav Vs. State of Bihar & ors** reported in **(2004) 6 SCC 331** the Hon'ble Supreme Court while dealing with the extent of jurisdiction of Election Tribunal to direct re-counting of votes has held thus;-

“17.The learned Munsif in his order dated 20.10.2001 failed to analyse the evidences adduced by the parties. He also did not state as to what materials were brought on record to show that there

had been illegal reception of votes in favour of the opposite party. Reference to Ex. 4/12 only shows certain interpolation but whether the same had materially affected the result or not had not been taken into consideration.

19. The learned Munsif despite having opined that an order for inspection of ballot papers cannot be granted to support vague pleas and not supported by material facts but failed to point out as to which averments made by the appellant could be accepted as disclosing material facts, on the basis whereof an order for recounting could be passed. The said order dated 20.10.2001 being not supported by any cogent or valid reasons could not have been sustained.”

14. From the aforementioned rulings of the Hon'ble Supreme Court, what is mandatory for passing an order of re-counting of votes is that there should be specific pleading of material facts stating irregularities in counting of votes and further the said pleadings are required to be proved by placing cogent and acceptable piece of evidence before the Election Tribunal. In case at hand, no issue has been framed for consideration and making the party to prove the same. Further, the Election Tribunal has not recorded evidence of any of the parties and only on the basis of oral submission made by them to decide election petition on the basis of pleadings, decided the election petition and directed for re-counting of votes. Direction for recounting of votes in an election cannot be made on the basis of consent given by the parties. The order of recount can only be passed when a case of recount is

made out by the election petitioner on the basis of pleadings and evidence brought on record before the Election Tribunal and not merely on the basis of consent of the parties.

15. Another submission made by learned counsel for the appellant that after passing of the order of re-counting of votes by the Election Tribunal, recounting has been done in which appellant has secured highest votes and accordingly, she was declared to be returned candidate. In this situation, the learned Single Judge ought not to have allowed the writ petition. We are not convinced with the submission made by learned counsel for appellant for more than one reason. Under the Election Laws when once the result of election on the post like Sarpanch, Gram Panchayat is declared and one of the contesting candidates is declared to be elected, as in the case at hand, then the election petition is required to be tried strictly in accordance with the Election Laws and the Rules of 1995. Requirement under the Rules of 1995 and the Election Laws is that election petitioner should not only make specific pleading with regard to material facts stating irregularities in counting of votes, but also required to prove the same in accordance with law so as to get an order of recount of votes from the Election Tribunal. In case at hand, the said proceedings and proof are missing. In case of **P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen & ors** reported in **(1989) 1 SCC 526** considering the identical situation wherein pursuant to an order of recount of votes, recounting was done and election petitioner therein has been

declared to have secured more votes than the returned candidate, Hon'ble Supreme Court has observed thus:-

“15.Mr. Padamanabhan also contended that the purpose and object of the election law is to ensure that only that person should represent the constituency who is chosen by the majority of the electors and that is the essence of democratic process, and this position has been observed by a Bench of this Court in their order reference of the case of N. Gopal Reddy v. Bonala Krishnamurty (1987) 2 SCC 58 and hence it would be a travesty of justice and opposed to all democratic canons to allow respondent 1 to continue to hold the post of the President of the Panchayat when the recount disclosed that he had secured 28 votes less than the petitioner. We are unable to sustain this contention because as we have stated earlier an order of recount of votes must stand or fall on the nature of the averments made and the evidence adduced before the order of recount is made and not from the results emanating from the recount of votes.”

16. The Hon'ble Supreme Court in case of **M.Chinnaswamy (supra)** has held that “....even if on recount it was found that returned candidate had not secured majority of votes, the result could not have been disturbed unless prima facie case

of high degree of probability existed for recount of votes..”. In case at hand, no such occasion arises as no issue has been framed and the parties to election petition have not led any evidence before the Election Tribunal.

17. For the foregoing discussions and in the light of rulings of the Hon'ble Supreme Court on the issue involved in this case, we do not find any infirmity in the order passed by the learned Single Judge. Writ appeal being *sans merit* is liable to be dismissed and it is hereby dismissed.
18. The learned counsel for appellant submitted that looking to the nature of challenge raised by election petitioner/appellant herein, the Election Tribunal be directed to expeditiously conclude the proceedings pending before it, to which learned counsel for respondent No.6 herein has no objection.
19. Taking into consideration the nature of dispute, proceedings as also the provisions of the Adiniam, 1993 and the Rules of 1995, we find it appropriate to direct the Election Tribunal i.e. respondent No.3 herein, to decide the election petition at the earliest, preferably within a period of six months from the date of receipt of copy of this order.

Sd/-
(P.R. Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

roshan/-