HIGH COURT OF MADHYA PRADESH

WP No.7853/2016

(Aarya Maansingh Vs. State of M.P. & Others)

Indore, Dated : 1.11.2018

Shri Sameer Athawale, learned counsel for the petitioner.

Shri Rahul Sethi, learned counsel for the State.

Shri P.R. Bhatnagar, learned counsel for the respondent No.4.

Heard finally with consent.

1/ By this writ petition under Article 226 of the Constitution of India, the petitioner has challenged the order of the Sub Divisional Officer dated 18.11.2016 allowing the election petition of the respondent No.4 and declaring the respondent No.4 elected to the post of Sarpanch, Gram Panchayat Piplyasent, Janpad Panchayat Nalkheda.

2/ Short facts are that the petitioner as well as the respondent No.4 and other respondents had contested the election for the post of Sarpanch, Gram Panchayat Piplyasent, for which the polling had taken place on 22.2.2015. The petitioner and respondent No.4 had secured equal votes, therefore, by holding the toss the petitioner was declared Sarpanch on 26.2.2015. Aggrieved with the same, the respondent No.4 had filed the election petition under Section 122 of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (for short “the Panchayat Act) and the Sub Divisional Officer had initially ordered for the recount and the said order was set aside by this Court and thereafter the evidence was led and by the impugned order the election petition has been allowed.

3/ Having heard the learned counsel for the parties and on perusal of the impugned order, it is noticed that the impugned order dated 18.11.2016 suffers from the defect of complete non application of mind by the Sub Divisional Officer. In the initial part of the impugned order the statement of the witnesses have been reproduced as it is, without marshalling the evidence and thereafter the arguments have been noted and then the proceedings which were taken up, have been reiterated and in the final 5-6 lines the election petition has been allowed by mentioning that earlier in the election petition, on the direction of the SDO the recount of vote was done, in which respondent No.4 had received one vote more than the petitioner, therefore, it was held that again recounting was not necessary and on the basis of the earlier recount the respondent No.4 has been declared elected as Sarpanch.

4/ The record reflects that the SDO, earlier, vide order dated 31.8.2015 had directed for recounting of votes and the said order was subject matter of challenge before this court in WP No.7159/2015 at the instance of the present petitioner and this court vide order dated 1.2.2016 had set aside the order dated 31.8.2015. Since there was a typographical error in respect of date of the order in the final order in WP No.7159/2015, therefore, by the subsequent order dated 10.2.2016 in RP No.40/2016 the said typographical error was corrected.

5/ Once the order dated 31.8.2015 directing recount was set aside by this court, any recount which was done earlier on the basis of the order dated 31.8.2015 was of no consequence and the SDO committed grave error in

declaring the respondent No.4 elected by allowing the election petition on the basis of such a recount.

6/ The law relating to recounting of votes is very clear. Preservation of secrecy of ballot is sacrosanct. Recounting of votes can be ordered only if clear pleading exists in respect of illegality or irregularity done while counting and in such a case improper acceptance of invalid votes and rejection of valid votes must be pleaded and prima facie established. The recounting cannot be ordered in a routine manner effecting the secrecy of votes and purity of election and in this regard there can be no roving and fishing inquiry. It is also settled that mere narrow margin of votes between the returned candidate and the election petitioner, itself is not a ground for directing recount. The Division Bench of this Court in the matter of **Vidhyawati Lilhare Vs. Sub Divisional Officer and others reported in 2010(1) MPLJ 115** while considering the legal position in this regard has held as under:-

> "**10.** Before we advert to the factual matrix, we think it profitable to refer to certain citations in the field relating to recount of votes."
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> **11.** In Bhabhi (supra), a three-Judge Bench of the Apex Court laid down the following principles:-
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> > "15. Thus on a close and careful consideration of the various authorities of this Court from time to time it is manifest that the following conditions are imperative before a Court can grant inspection, or for that matter sample inspection, of the ballot papers :
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> > (1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;

> (2) That before inspection is allowed, the allocations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;
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> (3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;
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> (4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;
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> (5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and
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> (6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials.
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> If all these circumstances enter into the mind of the Judge and he is satisfied that these conditions are fulfilled in a given case, the exercise of the discretion would undoubtedly be proper."

12. In Ku. Shradha Devi Vs. Krishna Chandra Pant and others, AIR 1982 SC 1569, it has been held thus:

> "8. When a petition is for relief of scrutiny and recount on the allegation of miscount, the petitioner has to offer prima facie proof of errors in counting and if errors in counting are prima facie established, a recount can be ordered. If the allegation is of improper rejection of valid votes which is covered by the broad spectrum of scrutiny and recount because of miscount, petitioner must furnish prima facie proof of such error."

13. In A. Younus Kanju Vs. R.S. Unni and others, AIR 1984 SC 960 the election petitioner failed to offer prima facie allegation and proof of errors in counting

of ballot papers. In that context, Their Lordships held as under:

> "The details necessary for obtaining a recount were not pleaded in the election petition nor was any cogent material placed before the Court which could bring the matter within the rule indicated by this Court to justify a direction for recount."

14. In P.K.K. Shamsudeen Vs. K.A.M. Mappiflai Mohindeen and others, AIR 1989 SC 640, it has been held as under:

> "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."

15. In Satyanarain Dudhani Vs. Aduay Kumar Singh, AIR 1993 SC 367, it has been stated as follows:

> "10. It is thus obvious that neither during the counting nor on the completion of the counting there was any valid ground available for the recount of the ballot papers. A cryptic application claiming recount was made by the petitioner-respondent before the

> Returning Officer. No details of any kind were given in the said application. Not even a single instance showing any irregularity or illegality in the counting was brought to the notice of the Returning Officer. We are of the view when there was no contemporaneous evidence to show any irregularity or illegality in the counting. Ordinarily, it would not be proper to order recount on the basis of bare allegations in the election petition. We have been taken through the pleadings in the election petition. We are satisfied that the grounds urged in the election petition do not justify for ordering recount and allowing inspection of the ballot papers. It is settled proposition of law that the secrecy of the ballot papers cannot be permitted to be tinkered lightly. An order of recount cannot be granted as a matter of course. The secrecy of the ballot papers has to be maintained and only when the High Court is satisfied on the basis of material facts pleaded in the petition and supported by the contemporaneous evidence that the recount can be ordered."

16. In Bahoran Lal Vs. Ganesh Prasad and others, AIR 1999 MP 7, it has been held as follows:

> "The law is settled as to when and under what circumstance the recount can be ordered. In the case of Ku. Shradha Devi vs. Krishna Chandra Pant, AIR 1982 SC 1569, the Supreme Court in Para 8 observed that when a petition is for relief of scrutiny and recount on the allegation of miscount, the petitioner has to offer prima facie proof of errors in counting and if errors in counting are prima facie established a recount can be ordered. If the allegation is of improper rejection of valid votes which is covered by the! broad spectrum of scrutiny and recount because of misconduct, petitioner must furnish prima facie proof of such error. If proof is furnished of some errors in respect of some ballot papers, scrutiny and recount cannot be limited to those ballot papers only. Reliance was placed on paragraph 940 of Halsbury's Law of England, 4th Edn., Vol. 15 and it was observed that : "This Court has in

> terms held that prima facie proof of error complained of must be given by the election petitioner and it must further be shown that the errors are of such magnitude that the result of the election so far as it affects the returned candidate is materially affected, then recount is directed."
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> Reliance was also placed in the case of Khilari v. The IVth Additional District Judge, Sonbhadra, AIR 1992 All 186 wherein the case of Beliram Bhalaik v. Jai Behari Lal Khachi, AIR 1975 SC 283 was noted where the Supreme Court said :
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> "............ .Although no castiron rule of universal application can be or has been laid down. Yet from a beadroll of the decisions of the Supreme Court, two broad guidelines are discernible that the Court would be justified in ordering a recount or permitting inspection of the ballot papers only where (i) all the material facts on which the allegations of irregularity or illegality in counting are founded are pleaded adequately in the election petition, and (ii) the Court/Tribunal 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."

17. In Vadivelu vs. Sundaram and others, (2000)8 SCC 355, a three-Judge bench of the Apex Court, after referring to the decisions rendered in the cases of Satyanarain Dudhani (supra), Jitendra Bahadur Singh vs. Shri Krishna Behari, (1969) 2 SCC 433; D.P. Sharma vs. Commr. and Returning Officer, 1984 Supp SCC 157; P.K.K. Shamsudeen (supra); Ram Sewak Yadav vs. Hussain Kamil Kidwai, AIR 1964 SC 1249; S. Raghbir Singh Gill vs. S. Gurcharan Singh Tohra, 1980 Supp SCC 53; R. Narayan vs. S. Semmalai, (1980)2 SCC 537; and M.R. Gopalkrishnan vs. Thachady Prabhakaran, 1995 Supp (2) SCC 101, expressed the view 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."

18. In Chandrika Yadav vs. State of Bihar, (2004) 6 SCC 331 = AIR 2004 SC 2036, the Apex Court has laid down the following norms:

> "20. It is well settled that an order of recounting of votes can be passed when the following conditions are fulfilled:
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> (i) A prima facie case;
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> (ii) Pleading of material facts stating irregularities in counting of votes;
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> (iii) A roving and fishing inquiry shall not be made while directing recounting of votes, and
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> (iv) An objection to the said effect has been taken recourse to.
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> 21. The requirement of maintaining the secrecy of ballot papers must also be kept in view before a recounting 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 recounting."

19. The aforesaid factual matrix is required to be scrutinized on the touchstone of the aforesaid enunciations of law. The vehement submission of Mrs. Verma is that it was obligatory on the part of the

> returning officer to entertain the application under Rule 80 and that having not been done, the prescribed authority has correctly directed for recount and the affirmation thereof by the learned single Judge is absolutely flawless. Filing of an application before the Returning Officer is all compliance of the procedure and the said compliance does not necessarily mean that the election petitioner earns the right to recount before the election tribunal. In fact, it is obligatory on the part of the election petitioner to prove that such an application was filed and not entertained and further which is more necessary is that there are prima facie irregularities in the counting. As has been held in catena of decisions, recount of votes can be ordered very rarely and on specific allegation in the pleadings in the election petition that illegality or irregularity was committed while counting and he who seeks recount should allege and prove that there was improper acceptance of invalid votes or rejection of valid votes. Purity of election cannot be tarnished on routine allegations without any pleadings of material fact stating irregularities in counting of votes. There cannot be a roving and fishing inquiry. That apart, as has been held by Their Lordships, narrow margin of votes between the returned candidate and the election petitioner by itself cannot be ground for direction for recounting."

7/ Having regard to the aforesaid legal position, it is clear that firstly the recount itself could not have been directed in a mechanical manner and secondly even otherwise the order of recount dated 31.8.2015 was set aside by this Court, therefore, the SDO by the impugned order could not have allowed the election petition on the basis of such a recount, which was done in pursuance to the erroneous order dated 31.8.2015.

8/ The impugned order also reveals that an argument was advanced by counsel for the petitioner before the SDO that the security amount in terms of Rule 7 of M.P. Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 (for short "Rules of 1995") was not

deposited before the specified authority but it was deposited in the Bank which is a non compliance of the mandatory provision but this argument has not been examined by the SDO while passing the impugned order. This Court in the matter of **Ganeshi Bai Vs. State of M.P. and others reported in 2016(4) MPLJ 456** has held that the deposit of the security amount through Challan in the Bank with the prescribed authority is not a compliance of Rule 7 of 1995 Rules. Hence the SDO could not have proceeded to decide the election petition on merit when there was an objection in respect of non compliance of the mandatory provision relating to Rule 7.

9/ Counsel for the petitioner has also referred to Annexure P/2 and has raised an issue that there was non compliance of Rule 3(2) inasmuch as the copy enclosed with the election petition was not attested by the election petitioner. The record reflects that an application dated 2.5.2016 was filed by the petitioner under Order 14 Rule 5 of the CPC for framing the issue *inter alia* in respect of the non attestation of the copy of the election petition and the said application was rejected by the SDO vide order dated 12.5.2016, against which WP No.5576/2016 was filed by the petitioner, which was dismissed by order dated 22.8.2016 taking note of the fact that the matter was already fixed before the SDO for final arguments but giving liberty to the petitioner to argue on the proposed issue at the time of final hearing and further liberty to raise these issues in the writ petition challenging the order of the Election Tribunal, if the occasion so arises.

10/ This Court in the matter of **Baijulal Verma Vs. Additional Collector, Chhindwara and others reported in 2009(4) MPLJ 548** in a case where the copies of the election

petition served upon the respondent did not bear the signature of the petitioner were not verified and did not bear attestation as required by Rule 3(2), has affirmed the order of the Election Tribunal dismissing the Election Petition on the ground of non compliance of the provisions of Rule 3(2) by further making it clear that the issue of defect of non compliance of the Rules can be taken up by the Election Tribunal at any stage and it is not incumbent upon the authority to do so only at the threshold. The Division Bench of this Court in the matter of **Babulal Kaluram Kirar and another Vs. State of M.P. and others reported in 1985 MPLJ 411** has held that in case of non compliance of provisions of Rule 3, 4 or 7 the prescribed authority has to dismiss the petition for such non compliance and that there is nothing in Rule 8 to suggest that the jurisdiction to dismiss the petition can be exercised only when the objection is raised by the respondent. Considering the scope of Rule 8, the Division Bench has held as under:-

> "11. In Rule 8, the expression used is -'the prescribed authority shall dismiss the petition'. This clearly means that duty is cast on the Tribunal to dismiss the petition on the non compliance of the provisions enumerated in Rule 8. It is an important provision. The Tribunal has no option, but to dismiss the petition, on being satisfied about non compliance-the non compliance may come to its knowledge-in any manner. From the language of Rule 7 it appears that as a petition being presented, the Tribunal should verify before taking its cognizance and proceeding with the trial, whether security amount is deposited along with it or not. The proviso to Rule 8 of the Election Rules cannot be read to mean that the Tribunal has the jurisdiction to dismiss for non compliance of the provisions mentioned in the parent provision of Rule 8 only when an objection is raised by the

> respondent. To hold that the Tribunal can dismiss for non compliance only when objection is raised by respondent, would mean adding something which is not there in the Rule and taking out the jurisdiction of the Tribunal. The proviso is nothing but expresso verbis incorporation of the *audi alteram partem* rule of natural justice. To uphold the argument of the learned counsel for respondent Nos.3 and 4 would tantamount to holding that a petition though suffering from the non compliance of the rules referred to in the parent Rule 8 of the Election Rules can never be dismissed when no one appears to oppose the petition and it is proceeding ex parte. Further, the question of waiver also does not arise in view of the fact that we have held the provision as mandatory and a compulsion on the petitioner based on public policy."

11/ In this regard in the matter of **Rakesh S/o Narayanlalji Vs. Returning Officer Panchayat Nirvachan and others reported in 2012(4) MPLJ 458** it has been reiterated that if the requisite copies of the election petition are not filed and they are not signed in accordance with Rule 3, the election petition is liable to be dismissed.

12/ Another issue has been raised by the petitioner before this Court that the election petition was not presented by the respondent No.4 himself or the person authorized by him as required by Rule 3(1) of the Rules of 1995. This aspect of the matter is also required to be gone into by the SDO. This Court in the matter of **Guddi Vs. Prescribed Authority-Cum-Sub Divisional Officer, Niwadi and others reported in 2017(1) MPLJ 650** has already held that the requirement of presentation of the petition as per the prescribed procedure is mandatory and the consequence of non compliance thereof is the dismissal of the election petition. Counsel for the

respondent No.4 has placed reliance upon the Division Bench judgment of this Court in the matter of **Shakuntalabai Vs. Nathulal and another reported in 2011(3) MPLJ 119**, but in that case there was nothing on record to establish that signed and attested copy of the election petition was not sent to the appellant along with the notice but in the present case since the issue itself has not been examined by the SDO, therefore, no benefit of the said judgment can be granted to the petitioner. This Court in the matter of **Geeta Devi Yadav Vs. Smt. Archna and another reported in 2008(2) JLJ 34** has reiterated that if the election petition is not presented by the petitioner himself and the person who presented the petition was not authorized by the petitioner, then the presentation is not legal in terms of requirement of Rule 3(1).

13/ The aforesaid aspects ought to have been examined by the SDO while deciding the election petition, which the SDO has failed to do. On the contrary the SDO has passed the final order declaring the respondent No.4 elected on the basis of the recount, which was already set aside by this Court in the earlier round of litigation.

14/ Hence, the impugned order dated 18.11.2016 cannot be sustained and is hereby set aside. The SDO is directed to decide the election petition afresh in accordance with law after taking into account the observations made above.

15/ Petition is accordingly allowed.

C.C. as per rules.

(Prakash Shrivastava)
Judge

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HIGH COURT OF MADHYA PRADESH

1	**Case No.**	WP No.7853/2016
2	**Parties Name**	Aarya Maansingh Vs. State of M.P. & Others
3	**Date of Judgment**	1.11.2018
4	**Bench constituted of**	Hon'ble Shri Justice Prakash Shrivastava
5	**Judgment delivered by**	Hon'ble Shri Justice Prakash Shrivastava
6	**Whether approved for reporting**	**Yes**
7	**Name of counsels for parties.**	Shri Sameer Athawale, learned counsel for the petitioner. Shri Rahul Sethi, learned counsel for the State. Shri P.R. Bhatnagar, learned counsel for the respondent No.4.
8	**Law laid down (1)**	Preservation of secrecy of ballot is sacrosanct and recounting of votes can be ordered only if clear pleading exists in respect of illegality or irregularity done while counting and in such a case improper acceptance of invalid votes and rejection of valid votes must be pleaded and prima facie established. The recounting cannot be ordered in a routine manner effecting the secrecy of votes and purity of election and in this regard there can be no roving and fishing inquiry.
	Significant paragraph numbers	**6**
	(2)	The requirement of deposit of security amount in terms of Rule 7 of M.P. Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 is mandatory in nature.
	Significant paragraph numbers	**8**
	(3)	The consequence of non compliance of the provisions contained in Rule 3, 4 & 7 is the dismissal of petition as required by Rule 8.
	Significant paragraph numbers	**10**

	(4)	The requirement of presentation of petition by the petitioner himself or the person authorized by the petitioner in terms of Rule 3(1) of the Rules of 1995 is mandatory and the consequence of non compliance thereof is dismissal of the election petition.
	Significant paragraph numbers	**12**

(PRAKASH SHRIVASTAVA)

J u d g e