IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE SANJAY DWIVEDI

ON THE 16th OF AUGUST, 2023

WRIT PETITION No.10450 of 2023

BETWEEN:-

PRADEEP KUMAR RAI, S/O. SHRI MALKHAN PRASAD RAI, AGED ABOUT NOT KNOWN, SARPANCH, GRAM PANCHAYAT PONDI MANGARH, TEHSIL JABERA, DISTRICT DAMOH (M.P.)

.....PETITIONER

(BY SHRI PRAKASH UPADHYAY & SHRI ADITYA JAISWAL - ADVOCATES)

AND

1. **THE RETURNING OFFICER, PANCHAYAT ELECTION 2022, TEHSIL JABERA, DISTRICT DAMOH (M.P.)**
2. **MANOJ RAI, S/O. NARMADA RAI, AGED ABOUT NOT KNOWN, CANDIDATE FOR SARPANCH, GRAM PANCHAYAT PONDI MANGARH, TEHSIL JABERA, DISTRICT DAMOH (M.P.)**
3. **NIKHAT JAHAN, W/. ILYAS KHAN, CANDIDATE FOR SARPANCH, GRAM PANCHAYAT PIPARIYA MEHRA, JANPAD PANCHAYAT AND TEHSIL LAKHNADON, DISTRICT SEONI (M.P.)**

.....RESPONDENTS

(BY SHRI VIPIN YADAV– ADVOCATE FOR RESPONDENT NO.2/CAVEATOR)

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Reserved on : 05.07.2023

Pronounced on : 16.08.2023

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This petition having been heard and reserved for orders, coming on for pronouncement this day, the Court pronounced the following:

ORDER

Pleadings are complete. With the consent of learned counsel for the parties, the matter is finally heard.

2. The petitioner has filed this petition under Article 226 of the Constitution of India, questioning the legality, validity and propriety of the order dated 22.02.2023 (Annexure P/11) passed by the Sub Divisional Officer, Tendukheda, District Damoh- Election Tribunal whereby the election petition filed by the respondent No.2 under Section 122 of Madhya Pradesh Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as the Adhiniyam, 1993) challenging the election of the petitioner to the post of Sarpanch of Gram Panchayat Pondi Mangarh, Tehsil Jabera, District Damoh has been partly allowed and the election tribunal has ordered for recounting of votes of polling booth no.211.

3. To resolve the controversy involved in the case, the facts of the case in nutshell are as follows:-

3.1 That, the election programme for Gram Panchayat for the year 2022-23 was notified. The petitioner along with respondent Nos. 2 and 3 contested the panchayat election for the post of Sarpanch for Gram Panchayat Pondi Mangarh, Tehsil Jabera, District Damoh. On 01.07.2022, the result was declared wherein the petitioner was declared to be a return candidate in the said election by securing two votes more than that of respondent No.2.

3.2 That, on 25.07.2022, respondent No.2 filed an election petition under Section 122 of Adhiniyam, 1993 claiming recounting of votes and declaring the election void. Several allegations about irregularities during the election process including the allegation of corrupt practice were also pleaded. On 21.09.2022, the matter was fixed

for framing the issues and the next date was fixed as 12.10.2022 but on the said date, issues were not framed and then again the case was fixed for recording the evidence. On 22.02.2023, election petition was partly allowed only on the ground that there is thin margin of two votes between the successful candidates and the election petitioner.

3.3 Petitioner filed writ petition being W.P. No.5465 of 2023 challenging the order passed by the Election Tribunal and the petition got disposed of vide order dated 15.03.2023 quashing the order dated 22.02.2023, remitting the matter to the Election Tribunal to pass a fresh order by assigning reasons.

3.4 That, on 27.03.2023, writ appeal being W.A. No.451 of 2023 was preferred assailing the order of the writ Court dated 15.03.2023 with limited prayer for grant of opportunity of hearing. The said writ appeal was dismissed vide order dated 19.04.2023 with an observation that no illegality has been committed by the writ Court.

3.5 That on 28.04.2023, impugned order was passed directing recounting of votes on 08.05.2023.

3.6 That, on 02.05.2023, the present writ petition has been filed and the writ Court vide order dated 08.05.2023 granted interim relief that recounting of votes may be conducted but the result of recounting shall not be declared without seeking leave of this Court and the said result shall be subjected to final outcome of the present petition.

4. As per counsel for the petitioner, the election petition did not contain specific pleading and according to him, in paras 9 and 10 of the election petition, there was no specific pleading made. Shri Upadhyay has also submitted that evidence led by the respondent Nos.2 and 3 were contrary to pleading and in fact they were based on hearsay evidence and also on surmises. He has submitted that in the affidavit

filed along with the election petition, it is stated that whatever averments made therein are based upon personal knowledge of election petitioner. However, the number of improperly rejected votes for polling booth number 211 has been reduced from 18 votes to 10-15 votes in evidence. PW-1 (election petitioner) has admitted that he was not present in the polling booth and information with regard to rejection of 10-15 votes was conveyed to him by his counting agent. The counting agent Chandrashekhar Rai (PW-2) has also admitted that he was not present during the entire counting and no objection with respect to invalid rejection was made whereas procedure as contemplated under Rule 76 of Madhya Pradesh Panchayat Nirvachan Niyam, 1995 (hereinafter referred to as the Niyam, 1995) was complied with. According to Shri Upadhyay, for the first time objection was raised when counting was at the verge of completion and only 30 votes were remained to be counted but in cross-examination of writ petitioner, he has stated that he left the counting hall before completion of counting. The counting agent Chandrashekhar Rai in examination–in-chief itself has admitted that he has not actually seen the marking in the rejected ballot paper and as such, the allegation about invalid rejection was neither supported with credible evidence nor substantiated in evidence. He has therefore, submitted that the pleading was not as per rule and requirement, the averments regarding wrongful rejection of ballot, based upon personal knowledge is not sufficient to order for recount as such required pleadings are missing.

5. Counsel for the petitioner has also submitted that application for recounting is not filed as per rules and it was neither filed before the Presiding Officer nor before the Returning Officer. He has further submitted that Exhibit P/3-the application was filed after completion of procedure as contemplated under Rules 77(2) and 77(4)

of Niyam, 1995 and, therefore, it was liable to be rejected under Rule 80(5) of Niyam, 1995. He has further submitted that it is not alleged that Presiding Officer has not accepted the application Exhibit P/2 and no averment in this regard was made in Exhibit P/3. He has further submitted that Exhibit P/2 does not contain the date and as such, not trustworthy. He has also submitted that election petition was decided without framing the issues whereas it was fixed for framing the same on 21.09.2022. The ground with regard to corrupt practice was raised but no finding was given. He has further submitted that election tribunal arrived at a conclusion that most of the allegations made in the election petition were not effectively controverted by returning candidate and according to him, the respondent No.2 has led evidence contrary to the pleading and as such it was inadmissible. Though there was no pleading about inappropriate light arrangement and power failure but same was accepted. According to him, there were no grounds for recount of votes but election tribunal committed illegality in issuing such direction. In support of his contentions, he has placed reliance on judgments reported in **2011 SCC Online MP 2489- Narendra Patel Vs. Amarkant Tiwari and Others, I.L.R. (2019) M.P. 316 Devki Nandan Dubey Vs. Purshottam Sahu, (2001) 2 SCC 652-Makhan Lal Bangal Vs. Manas Bhunia and Others** and in a case reported in **2001(3) SCC 495-Preet Mohinder Singh Vs. Kirpal Singh.**

6. *Per contra*, Shri Vipin Yadav, counsel for the respondent/caveator submits that on 28.04.2023, recounting of votes has taken place in polling booth No.211 in which respondent No.2 secured two more votes and now petitioner secured total 601 votes whereas respondent No.2 secured 603 votes. He further submits that in view of the evidence adduced by the parties, it is clear that electricity got failed three to four times and it is sufficient for the Presiding Officer to order

recount of votes to remove the doubts. He further submits that once recounting is ordered and that has been done, the Court cannot shut its eyes on the result of recounting and according to him, in the recounting respondent No.2 has secured more votes than that of petitioner. He further submits that merely because issues were not framed, the trial of election petition cannot be vitiated especially under the circumstance when petitioner has not raised any objection before the Court below that issues shall be drawn first. He has relied upon a decision passed in **W.A. No.68/2016-Santosh Kumar Nishad Vs. State of Chhattisgarh**. He has also relied upon a decision passed in case of **Chandeshwar Saw Vs. Brijbhushan Prasad SLP (c) No.22715/2019.** He has further submitted that with regard to non framing of issues, an objection has already been raised in the earlier round of litigation and, therefore, that issue cannot be dealt with at this stage in the present petition.

7. I have heard the arguments advanced by learned counsel for the parties and perused the record.

8. The challenge of the petitioner is founded mainly on the ground that the order passed by the Election Tribunal which is impugned in this petition is not sustainable and is liable to be set-aside on the ground that the tribunal without there being sufficient pleading in the election petition could not pass the order of recounting of votes. The second contention to criticizes the order of tribunal is that the tribunal has committed a grave illegality while deciding the election petition even without framing the issues whereas the tribunal has already fixed a date in this regard.

9. According to Shri Upadhyay, in absence of specific pleading with regard to irregularities committed during the course of the counting the votes; valid votes have been declared invalid and votes

which should have been counted in favour of election petitioner counted in favour of return candidate, order of recounting of votes cannot be passed. According to him, though paras-9 and 10 of election petition contained pleadings with regard to irregularities committed during counting of votes but those pleadings are insufficient and in absence of specific evidence adduced by the election petitioner to substantiate the averments made in the election petition, recounting could not have been ordered. As per learned counsel for the petitioner, from the election petition in the column of verification the election petitioner has stated that whatever averments made in the election petition are true to my personal knowledge, whereas election agent namely Chandrashekhar (PW-2) has admitted that he was not present during the entire counting and no objection with respect to invalid rejection was made while the returning candidate completed the procedure as per Rule 76 of Niyam 1995. According to Shri Upadhyay, it is clear that the pleadings made in the election petition are without any foundation and made only on the basis of hearsay evidence.

10. To deal with the contention with regard to requirement of framing of the issues although the Hon'ble Supreme Court in the case of Makhan Lal Bangal **(*surpa*)** has discussed the need of framing the issues and also the basis of object of framing the issue in the following manner:-

> "**19.** An election petition is like a civil trial. The stage of framing the issues is an important one inasmuch as on that day the scope of the trial is determined by laying the path on which the trial shall proceed excluding diversions and departures therefrom. The date fixed for settlement of issues is, therefore, a date fixed for hearing. The real dispute between the parties is determined, the area of conflict is narrowed and the concave mirror held by the court reflecting the pleadings of the parties pinpoints into issues, the disputes on which the two sides differ. The correct decision of civil lis largely depends on correct framing of issues, correctly determining the real points in controversy which need to be decided. The scheme of Order 14 of the

> Code of Civil Procedure dealing with settlement of issues shows that an issue arises when a material proposition of fact or law is affirmed by one party and denied by the other. Each material proposition affirmed by one party and denied by other should form the subject of a distinct issue. An obligation is cast on the court to read the plaint/petition and the written statement/counter, if any, and then determine with the assistance of the learned counsel for the parties, the material propositions of fact or of law on which the parties are at variance. The issues shall be framed and recorded on which the decision of the case shall depend. The parties and their counsel are bound to assist the court in the process of framing of issues. Duty of the counsel does not belittle the primary obligation cast on the court. It is for the Presiding Judge to exert himself so as to frame sufficiently expressive issues. An omission to frame proper issues may be a ground for remanding the case for retrial subject to prejudice having been shown to have resulted by the omission. The petition may be disposed of at the first hearing if it appears that the parties are not at issue on any material question of law or of fact and the court may at once pronounce the judgment. If the parties are at issue on some questions of law or of fact, the suit or petition shall be fixed for trial calling upon the parties to adduce evidence on issues of fact. The evidence shall be confined to issues and the pleadings. No evidence on controversies not covered by issues and the pleadings, shall normally be admitted, for each party leads evidence in support of issues the burden of proving which lies on him. The object of an issue is to tie down the evidence and arguments and decision to a particular question so that there may be no doubt on what the dispute is. The judgment, then proceeding issue-wise would be able to tell precisely how the dispute was decided."

11. However, according to Shri Yadav under the existing circumstances, it does not vitiate the order of election tribunal because the challenge of election of the return candidate was solely on the grounds of recounting of votes, an allegations that some valid votes were declared invalid and that the votes which should have been counted in favour of election petitioner have been counted in favour of return candidate and, therefore, it was in the knowledge of both the parties as to what was the issue involved in the election petition and accordingly both the parties have led evidence to that effect. Therefore, if issue is not framed, no prejudice would be caused to any of the parties. So far as the case of Santosh Kumar Nishad **(supra)** in which Shri Yadav has placed reliance is concerned, in the said case the

Division Bench has observed as under:-

> "**12.** The question that arises is that if the Election Tribunal fails to frame issue(s) is it always necessary to hold that the entire proceedings are non-est and have to be quashed. We do not think so. This will depend on the facts and circumstances of each case. If due to non framing of any issue(s) prejudice is caused to one of the parties inasmuch as the party cannot lead evidence or is denied an opportunity to lead evidence and the election petition is decided one way or the other on the basis of that point, then definitely the order will have to be set aside. Similarly, if the Election Tribunal decides the petition on a point which has not been argued before it because no issue was framed in that regard, then also the non-framing of an issue or issues will be fatal. However, there is an Exception to this. If parties fully knowing what is the dispute in hand enter into the witness box, examine witnesses, cross-examine witnesses of the other side and argue the matter on all the issue(s) which may arise in that petition, then they have waived their right to claim that the non-framing of issue(s) is such a defect that the final order should be quashed.
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> (emphasis supplied)
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> **14.** In 2011 (11) SCC 786 (Kalyan Singh Chouhan v. C.P. Joshi), the main dispute was whether one lady had cast her vote twice under two different names and whether the tendered votes cast in the election must be counted and whether six votes polled against the tendered votes must be rejected. In that case also the margin of victory was only one vote. A prayer was made to summon certain documents with regard to the tendered votes. This prayer was rejected on the ground that these facts were not pleaded and no issue had been framed in respect of those tendered votes. An appeal was filed before the Apex Court wherein the elected candidate urged that the election petition has to be adjudicated strictly adhering to the statutory provisions and the Court cannot permit a party to lead evidence unless an issue has been framed on the controversy and an issue cannot be framed unless there are actual pleadings in respect thereof. We are not concerned with the second part because there is no allegation in the present case that the pleadings are lacking material particulars. The only allegation is that no issue was framed. With regard to non-framing of issues, the Apex Court in the said judgment held as follows:-
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> > "25. The object of framing issues is to ascertain/shorten the area of dispute and pinpoint the points required to be determined by the court. The issues are framed so that no party at the trial is taken by surprise. It is the issues fixed and not the pleadings that guide the parties in the matter of adducing evidence.
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> 27. There may be an exceptional case wherein the parties proceed to trial fully knowing the rival case and lead all the evidence not only in support of their contentions but in refutation thereof by the other side. In such an eventuality, absence of an issue would not be fatal and it would not be permissible for a party to submit that there has been a mistrial and the proceedings stood vitiated."

15. This view has been reiterated by the Apex Court in 2014 (5) SCC 312 (Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari & Another) as follows :

> "16. There may be an exceptional case where the parties proceed to trial fully knowing the rival case and lead all the evidence not only in support of their contentions but in refutation of the case set up by the other side. Only in such circumstances, absence of an issue may not be fatal and a party may not be permitted to submit that there has been a mistrial and the proceedings stood vitiated."

16. What we have to decide is whether the present case falls within the exception carved out by the Apex Court. As pointed out before, the dispute in the election petition was very short. Detailed allegation had been made challenging the correctness of the counting of the votes and specific allegations were made with regard to alleged wrong counting of votes of particular booths. These allegations were specific and were denied by the elected candidate. On these specific pleadings, evidence was led by the Election Petitioner and the Election Petitioner and his witnesses were cross-examined on these aspects of the matter by the elected candidate and thereafter the elected candidate also led evidence and he examined himself and other witnesses with regard to these very allegations and counter-allegations. Therefore, this clearly shows that the elected candidate was clearly aware of what was the dispute between the parties. In this case there was only one dispute and that was whether the votes have been properly counted or not and even with regard to that there was specific allegation and it was not a general plea of recounting. Since evidence has been led by both the parties on these specific pleadings knowing fully well what was the case set up by the election petitioner and what was the defence of the elected candidate. Therefore, it cannot be said that the non-framing of issue(s) has caused prejudice to the elected candidate. As such, in the facts of this case we hold that the non-framing of issue(s) is not fatal to the decision of the case and therefore we find no merit in the appeal which is accordingly dismissed."

12. After hearing the submissions of both the parties and examining the legal position as has been considered by the Courts and view expressed thereof, I am also of the opinion that in the present case

although the issue has not been framed by the election tribunal but both the parties were fully aware about the issue involved in the case because it was a solitary issue as to whether taking into account the pleadings and evidence led by parties, recount of votes can be ordered? Not only this, but during pendency of election petition the present petitioner travelled to the High Court and also filed writ appeal but never raised any objection with regard to non-framing of issue. Thus, in my opinion it was very much in the knowledge of the present petitioner as to what was the issue involved and as such parties led evidence and, therefore, not framing the issue does not prejudice the present petitioner. This Court *ergo* finds that the order of tribunal allowing the election petitioner cannot be set-aside only on this ground. The view of Division Bench of Chhatisgarh in the case of Santosh Kumar Nishad (***supra***), taking note of all the judgment of the Supreme Court on this issue is very clear that if no prejudice is caused to the parties for non-framing the issue then it would be fatal but here in this case and the existing facts and circumstances since no prejudice is caused to the parties, no objection ever raised though the parties appeared before the writ court and also in the writ appeal not raised any objection, thus I do not find any substance in the submission made by the counsel for the petitioner about non-framing the issue and set-aside the order passed by the election tribunal on this ground.

13. So far as the second issue with regard to specific pleading is concerned, the election petition contained pleading with regard to the irregularities committed during counting of votes in paragraphs 9 and 10 of the election petition. The election petitioner has very specifically mentioned that in polling centre No.211, some of the votes were valid and should have been counted in favour of election petitioner but they have been considered to be invalid votes and some of the votes which

should have been counted in favour of election petitioner have been counted in favour of return candidate. It is also pleaded in the said paragraph that at the time of counting, the supporters of return candidate were standing outside the polling centre where counting was being conducted and were creating pressure to declare the return candidate elected. It is also pleaded that at the time of counting of votes, there was dim light and on so many occasions there was a power cut. It is also pleaded that the agent of the election petitioner has made a request immediately to the Returning Officer for recount and submitted an application but that has been not been accepted and the Returning Officer refused to accept the same. In paragraph 10 also, it is very categorically pleaded that the request for recounting of votes was the right of the election petitioner but it has been refused and as such, the counting did on that occasion was said to be illegal and was not fair.

14. Shri Upadhyay has also pointed out that in the verification column of election petition, the election petitioner has stated that the averments made in the election petition are as per his personal knowledge whereas his witness i.e counting agent has very categorically stated that the election petitioner was not present at the counting centre and, therefore, he submits that it was only a bald statement made on the basis of hearse evidence and, therefore, the pleading for recounting of votes is vague and recounting on the basis of the same cannot be ordered. The judgment on which Shri Upadhyay has placed reliance, i.e. Narendra Patel (**supra)**, in the said case, this Court has observed as under:-

> "**6.** I have heard learned counsel for the parties at length and perused the record. Even though this Court in the case of Kalka Prasad (supra) after following the judgment of the Supreme Court in the case of Makhan Lal Bangal (supra) has laid down the principle that an election petition should not be decided without framing of issues but the said

principle has to be evaluated in the light of further observation made in the case of Makhan Lal Bangal (supra) so also in the case of Shri Manni Lal (supra) wherein the question of prejudice and its effect on the final outcome has to be evaluated. Even though learned counsel for the petitioner had tried to emphasize that issues were not framed but he has not pointed out to this Court any prejudice that is caused to him due to the aforesaid procedure being followed. However, as the election petition is decided only on the question of improper counting of vote and direction issued is to order for recounting of the vote, the principles laid down by the Supreme Court in the cases of P.K.K. Shamsudeen v. K.A.M. Mappillai Mohindeen, (1989) 1 SCC 526 and Vadivelu v. Sundaram, (2000) 8 SCC 355 has to be applied and the recounting of vote ordered in the present case has to be evaluated in the back drop of the principles laid down in the cases of P.K.K. Shamsudeen (supra) and Vadivelu (supra). In the case of P.K.K. Shamsudeen (supra) the question is considered and principle is laid down in the following manner:—

> "12. In R. Narayanan v. Semmalai, 1980 SCR 571, the same principle has been reiterated. That was a case where the difference of votes between the candidates declared elected and his nearest rival, who filed an election petition wasonly 19 votes and which figure would have come down to 9 votes only if the postal ballots were included. Even so this Court after referring to a number of decisions and Halsbury's Laws of England and Fraser on Law of Parliamentary Elections and Election Petitions held that without 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.
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> 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.

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

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 of reference of the case of N. Gopal Reddy v. Bonala Krishnamurty, CA No. 3730(NCE) of 1986 reported in JT (1987) 1 SC 406 and hence it would be a travesty of justice and opposed to all democratic canons to allow the first respondent 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."

Similarly in the case of Vadivelu (supra) the following principle is laid down:—

"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."+

7. If the procedure followed in the present case is evaluated in the backdrop of the aforesaid requirement of law, it would be seen that in the election petition filed vide Annexure P/1 petitioner raised grounds with regard to improper counting by pointing out that in 3 polling booths namely booth No. 23, 24 & 26 various votes were declared valid or invalid without there being any proper reason for the same. Parties went to trial and evidence were also led on this count. Statements of witnesses indicate that witnesses without even referring to any documents or any other material with them regarding the particulars of the ward, number of votes cast and number of votes declared to be valid or invalid gave facts and figures in this regard. It is surprising as to how the witnesses could give exact number of votes cast, valid and invalid votes etc. without the help of any documents, such a statement based on help of any documents, such a statement based on memory that also by voters of a Panchayat election is unbelievable. Be that as it may, when the matter was considered by the election Tribunal, the order passed by the election tribunal indicates that after recording the pleadings of the parties and after taking note of allegations made in the election petition under Section 122. The Tribunal proceeded to take note of the statement of witnesses and finally in a very casual manner without application of mind or analysis of evidence finds illegality in the matter of counting and directed for recounting of the vote. If the findings by the Enquiry Officer in this regard is perused, it would be seen that in the order passed by him, the entire case of the parties are reproduced and thereafter in a very casual manner in less than two paras he has directed for recounting. He has accepted the version given by the witnesses of the respondent with regard to the number of votes declared valid or invalid but did not think it appropriate even for a moment to call for the ballot papers and verify the statement of witnesses. Once the statement were given, they could be verified through the ballot papers. It was not appropriate for the Election Tribunal to give credence to the oral statement of witnesses without there being any cogent material to hold that the witnesses were giving correct statement. More appropriate manner of dealing with the matter would have been to call for the ballot papers, other records, verify them as to whether statement given by the witnesses are correct and thereafter

proceed in the matter. Election Tribunal did not proceed in the said manner. Instead merely on the basis of the oral statement held that in various polling booths the number of ballot papers has not been properly counted and that is why they have been declared valid or invalid and proceed to order for recounting. However, while doing so, the Election Tribunal did not even think it appropriate to refer to the defence of the petitioner or its witnesses. Therefore, I am of the considered view that the finding recorded by the Election Tribunal is a perverse finding, shows non application of mind. Recounting of votes in a duly conducted election is directed in the manner done which is not in accordance to law. It is a case where the principles laid down by the Supreme Court in the cases referred to herein above is violated. Even though there is some force in the contention advanced by Shri Adhikari that non framing of issues has not caused any prejudice but the manner in which the Election Tribunal has decided the issue, warrants consideration by this Court. The Election Tribunal was proceeding to decide the fate of elected candidate and if the election Tribunal found that the election stood vitiated which would have the result of unseating an elected candidate, the Election Tribunal should have been more analytical and should have analyse the matter more critically particularly about truthfulness of the allegation and should have recorded its satisfaction about the irregularity in the counting of votes in more careful manner. Finding of the Election Tribunal is totally perverse and cannot be accepted by this Court. Finding recorded by the Election Tribunal does not show application of mind and in a casual manner which runs contrary to the principles laid down by the Supreme Court in the case of P.K.K. Shamsudeen (supra) and Vadivelu (supra) so also by this Court in the cases relied upon by the learned counsel for the petitioner."

15. Further, in case of Devki Nandan (**supra**), the Court has observed as under:-

"**8.** Before dealing with rival contentions advanced at the Bar, it is profitable to summarize and catalog the circumstance under which recount could be ordered. The Apex Court way back in Bhabhi v. Sheo Govind, (1976) 1 SCC 687 opined that the election petition must contain the adequate statement of all the material facts on which the allegations of irregularity and illegality in counting are founded. On the basis of evidence adduced, such illegality must be established. The Court trying the petition must be satisfied that making of such an order of recount is imperatively necessary to decide the dispute and to do complete justice between the parties. The Apex Court in Ram Autar Singh Bhadauria v. Ram Gopal Singh, (1976) 1 SCC 43 followed the said principle. In Chanda Singh v. Choudhary Shiv Ram Verma, (1975) 4 SCC 393, the Apex Court held that the democracy runs on the smooth wheels of periodic and pure elections. A certain amount of stability in the electoral process is essential. Recount of ballot cannot be interfered too frequently

and on flippant accounts. The secrecy of the ballot is sacrosanct in democratic process. In Beliram Bhalaik v. Jain Beharilal Kachi, (1975) 4 SCC 417, the Apex Court held that a whimsical and bald statement of the candidate that he is not satisfied with the counting will not tantamount to a statement of the "grounds" within the meaning of relevant rules. A Division Bench of this Court in Ganesh Ram Gayari v. Bagdiram, (2013) 2 MP LJ 447 followed the said principle. In Hanumant Singh v. State of M.P., (2012) 3 MP LJ 191, this Court considered the judgment of the Supreme Court reported in 1993 Supp (2) SCC 82 : AIR 1993 SC 367, Shri Satyananrain Dudhani v. Uday Kumar Singh and opined that secrecy of ballot cannot be lightly tinkered. In a democratic set up, secrecy of ballot is of utmost importance and in absence of very specific pleadings of material facts and particulars supported by contemporaneous evidence, neither election can be quashed nor recount can be ordered. This Court considered the judgment of Mahender Pratap v. Kishan Pal, (2003) 1 SCC 390 in which it was held that the onus of proof on the basis of proper pleading is on the election petitioner. It is further held that the degree of proof is of very high standard for the purpose of annulling an election or for issuing direction for recounting."

16. In a case reported in **2000 (8) SCC 355- Vadivelu Vs. Sundaram & Ors**, the Supreme Court has observed as under:-

"**8.** In Satyanarain Dudhani v. Uday Kumar Singh [1993 Supp (2) SCC 82] it was held that the secrecy of the ballot papers cannot be permitted to be tinkered lightly and an order of re-count cannot be granted as a matter of course. 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 re-count can be ordered. When there was no contemporaneous evidence to show any irregularity or illegality in the counting, ordinarily, it would not be proper to order re-count on the basis of bare allegations in the election petition.

9. In Jitendra Bahadur Singh v. Shri Kirshna Behari [(1969) 2 SCC 433 : AIR 1970 SC 276] the election petitioner, who claimed to be a counting agent filed election petition alleging that there was irregularity and illegality in the counting of votes. The learned Single Judge, who was trying the election petition permitted the petitioner to inspect the packets of the ballot papers containing the accepted as well as the rejected votes of the candidates. This Court, while allowing the appeal, held that the basic requirements to be satisfied before the Election Tribunal can permit the inspection of ballot papers are that (1) the petition for setting aside the election must contain an adequate statement of material facts on which the petitioner relies in support of his case, and (2) the Tribunal must be prima facie satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of ballot papers is necessary. The material facts required to be stated are

those facts, which can be considered as materials supporting the allegations made. In other words, they must be such facts as to afford a basis for the allegations made in the petition.

10. In D.P. Sharma v. Commr. and Returning Officer [1984 Supp SCC 157] allegations were made in the election petition that there was discrepancy between the total number of ballot papers issued and ballot papers taken out and counted from the ballot boxes. This Court held that the discrepancies alleged in the statements prepared under Rules 45 and 56 of the Conduct of Election Rules, 1967 do not make out a case for directing a re-count of votes especially when the discrepancy is marginal and insignificant. In para 4 of the said judgment, it was held that in order to obtain re-count of votes, a proper foundation is required to be laid by the election petitioner indicating the precise material on the basis of which it could be urged by him with some substance that there has been either improper reception of invalid votes in favour of the elected candidate or improper rejection of valid votes in favour of the defeated candidate or wrong counting of votes in favour of the elected candidate, which had in reality been cast in favour of the defeated candidate.

11.P.K.K. Shamsudeen v. K.A.M. Mappillai Mohindeen [(1989) 1 SCC 526] is a case where the petitioner contested the election for the post of President of a Panchayat in Tamil Nadu. In the election, the 1st respondent was declared elected and the petitioner challenged the election on the ground that while counting, the Returning Officer had wrongly treated some valid votes cast in favour of the petitioner as invalid votes and certain invalid votes were treated as valid votes which were cast in favour of the 1st respondent and that the Returning Officer had not permitted the petitioner's agents to have scrutiny of the ballot papers at the time of counting. The Tribunal after recording the evidence of all candidates and the Assistant Returning Officer ordered re-count of votes. On re-counting of votes, it was found that there was no difference in the number of votes secured by the petitioner but insofar as the 1st respondent was concerned he had secured only 528 votes as against 649 votes he was originally held to have secured. 121 votes cast in his favour had been found to be invalid votes. Based on the figures of the re-count, the election petitioner was declared duly elected as he had secured 28 votes more than the 1st respondent on re-count. This order was challenged by the 1st respondent in civil revision petition before the High Court. The learned Single Judge allowed the revision petition and held that the Tribunal had erred in ordering a re-count of the votes when the petitioner had not made out a prima facie case for an order of re-count of votes cast. This order was challenged before this Court. This Court held in para 13 of the said judgment as under: (SCC p. 531)

> “13. Thus the settled position of law is that the justification for an order for examination of ballot papers and re-count of votes is not to be derived from hindsight and by the result of the re-count of votes. On the contrary, the justification for an order of re-count of

> votes should be provided by the material placed by an election petitioner on the threshold before an order for re-count 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 re-counting 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 re-count of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or court should not order the recount of votes."

12. In Ram Sewak Yadav v. Hussain Kamil Kidwai [AIR 1964 SC 1249 : (1964) 6 SCR 238] this Court held that an order for inspection of ballot papers can be granted under the following circumstances:

> "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."

* * *

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."

17. On the other hand, Shri Yadav has placed reliance upon a judgment reported in **(2002) 3 MPLJ 415- Raqib Mohammad Vs. District Collector and Specified Officer Raisen and others** wherein the Division Bench has observed as under:-

"**6.** Catena of cases decided by Apex Court Vadivelu v. Sundaram, (2000) 8 SCC 355, Jitendra Bahadur v. Krishna Bihari, (1969) 2 SCC 433 : AIR 1970 SC 276 and P.K.K. Shamsuddin v. K.A.M.M. Mohindin, (1989) 1 SCC 526 : AIR 1989 SC 640 hold that preservation of security of the ballot is a sacrosanct principle which cannot be lightly or hastily disregarded unless there is a prima facie genuine need for the same. But whether case for recount is made out, facts of the case are of great significance. Jinesh Singhai has pleaded, proved and established case for recount. Justification in his plea has been found by the Collector and learned single Judge. After all, in a case of this nature, it is necessary to see what has actually happened and what exact number of votes each of the candidates to the contest has polled. In the facts of this case, Apex Court decision in Mahendra Pal v. Ram Dass Malanger, (2000) 1 SCC 261 aptly applies. The Apex Court said:

> "In the present case, it is not disputed, as indeed it cannot be, that in Form 20-A, Ex. P-2, it is recorded that the total number of votes found in the ballot boxes of 82 polling stations pertaining to this constituency were 35, 310 whereas a perusal of the statement of 'roundwise detailed result counting', certified copy whereof is Ex. P3, records that the total number of valid and rejected votes counted for the purpose of declaring the result were 35,318. A difference of 8 votes had been projected in Annexure P-2 and Annexure P. 3. The margin of difference between the votes polled by the election petitioner and the returning candidate, in the present case, was only 3 votes. Unless a satisfactory explanation was furnished during the trial about the discrepancy, there would be need to inspect the ballot papers to clarify doubts regarding the excess counting

> of 8 votes, allegedly in favour of the returned candidate. This was also necessary to dispel doubts about the allegations of irregularity in counting. Had the Returning Officer, instead of rejecting the application for recount made a test check, soon after the declaration of result, he could have silenced the scepticism and removed all doubts but since that was not done, the learned Designated Judge ought to have considered the matter in its correct perspective."

Therefore, there is clear case for recount, rightly so found by Collector and learned single Judge.
No other point was urged."

18. Further reliance is placed upon a case reported in **2008 (4) MPLJ 375-Rajesh Kumar Banshkar Vs. Malti Parmar and others** wherein the Court has observed as under:-

> "**16.** On recounting having been made pursuant to the order of Election Tribunal, respondent No. 1 is found to have secured five votes in excess of the votes polled by the elected candidate i.e. the present petitioner.
>
> **17.** Hon'ble Supreme Court of India in the case of T.A. Ahammed Kabeer v. A.A. Azeez, (2003) 5 SCC 650 : AIR 2003 SC 2271 has clearly held that once the recounting is allowed, its effect cannot be ignored. I may profitably refer to paragraphs 28 and 29 which run as under:—
>
> > "28. It is true that a recount is not be ordered merely for the asking or merely because the Court is inclined to hold a recount. In order to protect the secrecy of ballots the Court would permit a recount only upon a clear case in that regard having been made out. To permit or not to permit a recount is a question involving jurisdiction of the Court. Once a recount has been allowed the Court cannot shut its eyes on the result of recount on the ground that the result of recount as found is at variance with the pleadings. Once the Court has permitted recount within the well-settled parameters of exercising jurisdiction in this regard. It is the result of the recount which has to be given effect to.
> >
> > 29. So also, once the Court exercises its jurisdiction to enter into the question of improper reception, refusal or rejection of any vote, or the reception of a vote which is void by reference to the election result of the returned candidate under section 100(1)(d)(iii), as also as to the result of the election of any other candidate by reference to section 97 of the Act and enters into scrutiny of the votes polled, followed by recount, consistently with its findings on the validity or invalidity of

> the votes, it cannot refuse to give effect to the result of its findings as to the validity or invalidity of the votes for the purpose of finding out true result of recount though the actual finding as to validity or otherwise of the votes by reference to number may be at variance with the pleadings. In short, the pleadings and proof in the matter of recount have relevance for the purpose of determining the question of jurisdiction to permit or not to permit recount. Once the jurisdiction to order recount is found to have been rightly exercised, thereafter it is the truth as revealed by the result of recounting that has to be given effect to."

19. Similarly, in case of **T.A. Ahammed Kabeer Vs. A.A. Azeez and others** reported in **(2003) 5 SCC 650**, the Supreme Court has observed as under:-

> "**28.** It is true that a re-count is not to be ordered merely for the asking or merely because the court is inclined to hold a re-count. In order to protect the secrecy of ballots the court would permit a re-count only upon a clear case in that regard having been made out. To permit or not to permit a re-count is a question involving jurisdiction of the court. Once a re-count has been allowed the court cannot shut its eyes on the result of re-count on the ground that the result of re-count as found is at variance with the pleadings. Once the court has permitted re-count within the well-settled parameters of exercising jurisdiction in this regard, it is the result of the re-count which has to be given effect to.
>
> **29.** So also, once the court exercises its jurisdiction to enter into the question of improper reception, refusal or rejection of any vote, or the reception of any vote which is void by reference to the election result of the returned candidate under Section 100(1)(d)(iii), as also as to the result of the election of any other candidate by reference to Section 97 of the Act and enters into scrutiny of the votes polled, followed by re-count, consistently with its findings on the validity or invalidity of the votes, it cannot refuse to give effect to the result of its findings as to the validity or invalidity of the votes for the purpose of finding out the true result of re-count though the actual finding as to validity or otherwise of the votes by reference to number may be at variance with the pleadings. In short, the pleadings and proof in the matter of re-count have relevance for the purpose of determining the question of jurisdiction to permit or not to permit re-count. Once the jurisdiction to order re-count is found to have been rightly exercised, thereafter it is the truth as revealed by the result of re-counting that has to be given effect to."

20. In the judgment passed in **Civil Appeal No.780 of 2020** arising out of SLP (C) No.22715/2019- **Chandeshwar Saw Vs. Brij Bhushan Prasad & ors,** the Supreme Court has observed as under:-

> "3. Briefly stated, the election for the post of Mukhia, Artyapur Gram Panchayat No. 8 under Naubatpur Block was held on 6.5.2016, in which the appellant and respondent No. 1 alongwith 11 others had contested as candidates and after counting of votes on 4.6.2016, the respondent No.1 was declared elected. During the counting, however, the appellant had noticed that number of valid votes cast in his favour were being rejected, while even invalid votes in favour of respondent No.1 were being accepted and counted. The respondent No.1 was declared elected by a margin of 154 votes. In this backdrop, the appellant filed an election case before the Election Tribunal, seeking recounting of votes, setting aside election of respondent no.1 and declaring him (appellant) elected. The appellant specifically alleged about the irregularities committed during the counting process including the one that swastika symbol pressed light ink was not being counted in favour of the appellant and despite grievance being made in that behalf, no heed was paid by the Returning Officer. At the same time, it was also noticed that some invalid votes cast in favour of respondent No. 1 were accepted and counted as valid disregarding the objection taken in that behalf. The election case proceeded for trial and after recording of evidence of the witnesses produced by the concerned parties, the Election Tribunal after due evaluation of the evidence, accepted the grievance of the appellant that the result sheet prepared by the election officer was not proper as the counting of votes was not done by the officials as per rules. The Election Tribunal proceeded to record finding of fact in favour of the appellant and answered the issue in the following words:
>
> "……
>
> By perusal documentary evidences as well as plaint on record its appear that applicant has tried his level best to brought all material facts in his plaint and supported by his evidences, it is also appeared that as soon as plaintiff got knowledge that some irregularities is going on while counting votes and he came to know that his 216 valid votes has been rejected due light ink on the ballot but same type of has been counted in favour of returned candidate then immediately he has made an application to concerned officers for recounting which is marked Ex.1, same has been made in his plaint as well as supported by oral as well as documentary evidences. Plaint of this case make out a prima facie case with regard to the valid votes of the plaintiff rejected. In this

case all the aforesaid conditions are fulfilled by the petitioner which are discussed above. Thus, in the light of the discussions made above this tribunal finds that there were irregularities in the counting of votes in the present case, the result sheet prepared was irregular, not proper and counting of votes by the officials not done as per rule. Thus, there issue goes in favour of the petitioner."

Finally, the Election Tribunal proceeded to pass the following order:

ORDER

In the light of the aforesaid issues it is clear that in the counting the Rule 79 of the Bihar Panchayat Election Rules were not followed by the counting authorities and hence on this sole issue the election petition is fit to be allowed, but as per the discussion in issue No.3, 4 and 5 this tribunal found that there were irregularities in the counting of votes in the present case and the result sheet prepared was irregular and not proper. However, in the issue No.6 it is found by this tribunal that:

i) The O.P. no.1 was not properly declared Mukhiya.

ii) It is not proved by the petitioner that she has got more votes than the votes of the O.P. No.1.

Thus, from the discussion made above it is clear that the petitioner has is not entitled to the relief of setting aside election of returned candidate. However, from the discussions and findings of the above issues it is also clear that the petitioner has been able to prove that the final result for the post of Mukhiya of Gram Panchaayt Raj. Dariyapur is not proper and the O.P. No.1 was not properly declared as Mukhiya but the final result can be ascertained by the proper and minute recounting only. Hence, the petitioner is entitled to the relief as discussed above only.

Hence, in the light of findings of the all the issues in this case. It is hereby ordered that the final result for the post of Mukhiya of Dariyapur Panchayat, Block Naubatpur, District Patna is declared as null and void. The certificate in favour of the O.P. No.1 as return candidate is declared void. It is ordered to the O.P. No.15 i.e. the District Magistrate, Patna cum District Election Officer, Patna to get the ballots of each booth for the post of Mukhiya Dariyapur Panchayat recounted under his supervision within one month from the date of receipt of

> this order. It is also ordered the District Magistrate, Patna Cum Election Officer Patna to take over the election material which is laying in safe custody of this court for recounting purpose and thereafter keep it as per law/rules. It is also ordered that the final result shall be prepared for each candidate after recounting and the certificate shall be issued in favour of the return candidate. Let a copy of this judgment be sent to District Magistrate Cum District Election Officer, Patna and Election Commission. All the petitions pending in this case are disposed of as not pressed. Accordingly, the case is allowed on contest against those who have appeared in this case and Ex-parte against who has not appeared.
>
> Judgment pronounced and delivered by me in open court.
>
> Typed and corrected by me."

This order was assailed by respondent no. 1 by way of Civil Writ Jurisdiction Case (CWJC) No. 21476/2018 before the High Court. The learned single Judge, after due consideration of the evidence on record, as considered by the Election Tribunal was pleased to uphold the finding of fact recorded by the Election Tribunal in the following words:

> "…….
>
> Keeping in mind the aforesaid judicial pronouncements on the subject when this Court proceeds to consider as to whether the learned Election Tribunal has considered the materials available on the record and whether based on such materials a prima facie satisfaction regarding the truth of allegation for recounting of votes has been taken? This Court finds that the learned Election Tribunal has discussed the case of the election petitioner which specifically pointed out that the ballot papers containing Swastik symbol pressed with light ink was not being counted in favour of the election petitioner whereas those were being counted in favour of the returned candidate (petitioner). The case of the election petitioner was supported by AW 2, AW 3, AW 4 and AW 5. The learned Election Tribunal has discussed the evidences of the witnesses who have stated that they were present at the time of counting and had supported the case of the election petitioner. In fact, one Akhileshwar Kumar who has deposed as O.P.W.1 has supported the case of the applicant in his examination-in-chief. The learned Election Tribunal has discussed his evidence also in the impugned judgment. On going

> through the discussions made by the Election Tribunal in the judgment, this Court finds that he has dealt with the deposition of the witnesses produced on behalf of the returned candidate as well. It has been found that the returned candidate and his witnesses has either deposed that they were not present at the time of counting or they have no knowledge regarding valid or invalid votes. The Tribunal held that the returned candidate has made contradictory statements regarding valid and invalid votes when compared with other witnesses of his side. After a careful perusal of the entire materials available on the record, this Court is of the considered opinion that in the plaint the election petitioner has made a categorical and positive allegation and he has supported his allegations by bringing witnesses who were present at the time of counting. In these conditions if the Election Tribunal has found itself primafacie satisfied and has come to a conclusion that a recounting of vote is required, this Court finds no reason to take any other view.

In the opinion of this Court, learned Tribunal has rightly taken the view as under:

> "in this case all the aforesaid conditions are fulfilled by the petitioner which are discussed above. Thus, in the light of the discussions made above this Tribunal finds that there were irregularities in the counting of votes in the present case, the result sheet prepared was irregular not proper and counting of votes by the official was not done as per Rule. Thus, this issue goes in favour of the petitioner."
>
> By virtue of the aforesaid discussions, this Court finds that the direction for recounting of votes cannot be faulted with, there is no illegality much less any material illegality and this Court sitting in its supervisory writ jurisdiction does not find any reason to interfere with the aforesaid direction."

The learned single Judge of the High Court, however, reversed the order passed by the Election Tribunal of setting aside the election before the recounting of votes. The learned single Judge instead relegated the parties before the Election Tribunal for the limited purpose of passing appropriate orders only after the recount results become available. In fact, the recounting process was completed during the pendency of the said writ and the result was kept in sealed envelope. Resultantly, the learned single Judge thought it proper to relegate the parties before the Election

Tribunal for passing consequential orders after perusal of the recount results kept in sealed envelope.".

21. To answer the issue raised by the petitioner in this petition with regard to vague pleadings which do not form a ground to interfere in the election petition and order for recount of votes, it is apt to reproduce the relevant paragraphs, i.e. paras 9 and 10 in which the election petitioner has made pleadings in this regard so as to form an opinion whether those pleadings are sufficient for order of recount of votes or fulfilment of requirement of Rule 80 of Niyam, 1995.

9. ''यह कि मतदान केन्द्र क्र. 211 ग्राम सगोड़ी कला में मतगणना का कार्य रात्रि 07:00 बजे जब प्रारंभ किया गया जब मतदान केन्द्र में उत्तरवादी क्र. 2 को अपने 15–20 समर्थकों के साथ मतदान केन्द्र की बाउन्ड्री के भीतर अनाधिकृत रूप से मौजूद रहे जिस पर याचिकाकर्ता ने आपत्ति दी थी किन्तु याचिकाकर्ता की आपत्ति अमान्य करते हुये पीठासीन अधिकारी ने मतगणना प्रारंभ करदी, जबकि मतगणना केन्द्र पर पर्याप्त मात्रा में रोशनी की व्यवस्था नहीं थी विद्युत आपूर्ति मतगणना के समय अनेकों बार बाधित हुई तब मतगणना केन्द्र में अंधेरा हो गया था और मतों की सुरक्षा का कोई इन्तजाम पीठासीन अधिकारी द्वारा नहीं किया, तथा मतपत्रों का अवलोकन भी याचिकाकर्ता के गणना अभिकर्ताओं को नहीं कराया जा रहा था, मतदान केन्द्र क्रमांक 211 सगोड़ी कला में मतगणना के समय चारों ओर की खिड़कियां खुली रखी गई थी, जिनसे उत्तरवादी क्र. 2 के समर्थक मतगणना प्रभावित करने के लिये निरंतर दबाव बना रहे थे, उत्तरवादी क्र. 2 के अनेक समर्थ हाथों में पत्थर लेकर उत्तरवादी क्र. 2 को विजयी घोषित करने दबाव बना रहे थे। इस दबाव के चलते मतदान केन्द्र क्रमांक 211 में याचिकाकर्ता के पक्ष में डाले गये विधिमान्य मतपत्रों को निरस्त मतपत्रों की श्रेणी में डाला गया, मतदान केन्द्र क्रमांक 211 में निरस्त किये 18 मतों में याचिकाकर्ताओं के विधिमान्य मत डाले गये है। मतदान केन्द्र क्रमांक 209 व 210 की गणना में याचिकाकर्ता 161 मतों से आगे था, मतदान केन्द्र क्रमांक 211 की मतगणना पश्चात् याचिकाकर्ता 4 मतों से विजयी हुआ था जिसकी घोषणा भी की गई थी, किन्तु उत्तरवादी क्रमांक 2 व उसके समर्थकों के दबाव के कारण

याचिकाकर्ता को 2 मतों से पराजित घोषित कर दिया। मतगणना उत्तरवादी क्र. 2 के दबाव में मनमाने तरीके से की जा रही थी, जब याचिकाकर्ताओं के गणना अभिकर्ता ने सख्त आपत्ति ली तो उत्तरवादी क्र. 2 व उसके समर्थकों ने याचिकाकर्ता व गणना अभिकर्ताओं को मतगणना केन्द्र से बाहर निकाल दिया, जब कुछ देर बाद याचिकाकर्ता का गणना अभिकर्ता पुनः मतगणना केन्द्र में गया तब तक मतों की गणना लगभग पूर्ण होने वाली थी, इसी समय याचिकाकर्ता के गणना अभिकर्ता ने पीठासीन अधिकारी सगौड़ी कला पोलिंग बूथ को मतदान केन्द्र के अन्दर रिकाउन्टिंग हेतु हाथ से लिखकर आवेदन पत्र दिया था, किंतु पीठासीन अधिकारी ने आवेदन पत्र लेने से मना करते हुये शेष मत बिना किसी को अवलोकन कराये गिनते हुये मतों को सीलबन्द कर दिया इस तरह पीठासीन अधिकारी ने मतों की गणना में अवैधानिक प्रक्रिया अपनाते हुये उत्तरवादी क्र. 2 को अनुचित लाभ पहुॅचाने की दृष्टि से दूषित मतगणना की है, याचिकाकर्ता के बार बार अनुरोध के पश्चात् भी पीठासीन अधिकारी ने पुनः मतगणना नहीं कराई।''

10. ''यह कि मतों की पुनर्गणना कराये जाने का अधिकारी अधिनियम में वर्णित है पीठासीन अधिकारी ने याचिकाकर्ता की पुनर्गणना के अनुरोध को अमान्य करते हुये याचिकाकर्ता को संविधान प्रदत्त अधिकार से वंचित किया है तथा उपरोक्त परिणाम एक बार की गणना पर आधारित है जो कि दूषित से की गयी है।''

22. Considering the pleadings made in the election petition and also the judgements on which parties have placed reliance, I am of the opinion that though it is pleaded that some irregularities have been committed during the course of counting of votes and objection with regard to the same was raised and application was moved for recount but that application has not been accepted. When this was the specific allegation made in the election petition and statement with regard to the same has been made by the agent who was there at the time of counting of votes substantiated that he made an application before the Returning Officer but that has been rejected and has also raised his grievance

before the Returning Officer but that application has not been accepted, it is suffice to say that there was sufficient pleading with regard to the irregularities and as per Rule 80, the counting agent has tried to fulfil the requirement to raise a demand of recounting of votes but that was not accepted by the Returning Officer and, therefore, the ground has been taken in the election petition with a specific pleading.

23. In a case of Chandeshwar (**supra**), the Supreme Court has considered that some of the valid votes declared invalid and some of the votes which should have been counted in favour of election petitioner were counted in favour of return candidate and grievance raised before the Returning Officer but it was not accepted and no heed was paid by the Returning Officer then except election petition, no other mode available. In this case also, the grievance was made about the irregularities committed during the course of counting of votes and that has also been substantiated by adducing evidence. The election tribunal after due evaluation of evidence accepted the grievance of the election petitioner and ordered for recounting of votes. As Shri Yadav has pointed out that in pursuance to order of recount of votes, the recounting also got done and election petitioner secured more than two votes than that of the present petitioner/return candidate but because of the interim order passed by this Court in the writ petition, result has not been declared. He has placed reliance on several judgements saying that once recounting is allowed, its effect cannot be ignored. Although those judgements in the existing circumstances do not favour the respondent for the reason that the order of recounting passed by the election tribunal is in question in this writ petition and if it is found that the said order is not proper, the effect of recounting in all subsequent proceedings would go. Thus, in my opinion, the submission made by counsel for the petitioner criticizing the order of the election tribunal on the ground that

issue is not framed, in view of the above discussion has no substance and secondly, the election petition contained vague pleading and as such, recounting could not be ordered, is also without any substance.

24. As has been discussed that under the existing circumstances when inspite of irregularities pointed out by the agent of the election petitioner, if Returning Officer not accepted the grievance and also refused to accept the application in which request for recounting of votes had been made, no other remedy was available with the defeated candidate but to file an election petition and raise the said grievance. Even otherwise, the pleadings made in paras 9 and 10 of the election petition are not so vague and not laying any foundation that order for recounting of votes cannot be made and election petition could have been dismissed.

25. Merely because election petitioner was not present in the counting centre but information conveyed to him by his agent and those information became his personal knowledge and, therefore, in the verification column he has stated that whatever pleaded in the election petition is of his personal knowledge. The submission of Shri Upadhyay does not convenience this Court that the averments made in the election petition and verification of election petitioner does not fulfil the requirement of proper pleading and that averments can also not be considered to be of personal knowledge of election petitioner.

26. It is not a case which could be considered to be a case of no pleading. On the contrary, it is a specific pleading about submitting a written application before the Returning Officer by the counting agent, therefore, this Court cannot say about non compliance of Rule 80 of Niyam, 1995. Thus, as per this Court, there was sufficient pleading which has also been substantiated by leading evidence and, therefore,

the order of Election Tribunal, does not suffer from any illegality and irregularity.

27. *Ex-consequentia*, the petition suffers from any substance, is hereby **dismissed.**

(SANJAY DWIVEDI)
JUDGE

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