Rashmi Jaiswal vs District Election Officer/District ... on 3 March, 2025

Author: Pankaj Bhatia

Bench: Pankaj Bhatia

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

?Neutral Citation No. - 2025:AHC-LKO:12711

Court No. - 7

Case :- MATTERS UNDER ARTICLE 227 No. - 969 of 2025

Petitioner :- Rashmi Jaiswal

Respondent :- District Election Officer/District Magistrate,Sitapur And 17 Others

Counsel for Petitioner :- Gaurav Mehrotra,Akber Ahmad,Ankit Tripathi,Harsh Vardhan Mehro

Counsel for Respondent :- Anurag Kumar Singh,C.S.C.,Murli Manohar Srivastava

Hon'ble Pankaj Bhatia,J.

1. Heard Mr. Gaurav Mehrotra, Shri Rajeev Raman Srivastava, Mr. Akber Ahmed, Mr. Ankit Tripathi and Ms. Shhreiya Agarawal, learned counsel for the petitioner, Mr. Murli Manohar Srivastava, learned counsel, who appears for contesting respondent No.7, Mr. Anurag Kumar Singh, learned counsel for respondent Nos.1 to 4.

2. The present petition has been filed challenging an order dated 20th January, 2025 passed by the learned District Judge, Sitapur in Election Petition No.3 of 2023, wherein he has rejected the application for recounting of the votes as filed by the petitioner merely on the ground that the said relief can be granted only at the time of final disposal as an order of recounting would amount to

final disposal of the election petition.

3. Challenging the said order, the submission of learned counsel for the petitioner is that the petitioner had contested an election held for the post of Chairperson, Nagar Palika, Sitapur. In the said election, it is argued that respondent No.7 was declared elected. Aggrieved against the election of respondent No.7, an election petition was filed by the petitioner as prescribed under Section 19 of the Municipalities Act, 1916.

4. The submission of learned counsel for the petitioner is that in the election petition filed, in paragraph 11, it was specifically stated that the number of votes as polled and informed by the Officer of the Control Room, the number of the votes polled were 67,841. However, in the record of the Returning Officer, the the number of votes were shown as 66,998. He further argues that in paragraph 11, it was specifically pleaded that in yet another report of the Returning Officer, the total number of votes polled were shown as 66,990.

5. He argues that as the petitioner was apprehending unfairness in the election, the petitioner had approached this Court earlier by filing Writ-C No.3610 of 2023, which was disposed of on 02.05.2023, observing that all steps shall be taken to ensure free and fair election. He further argues that yet another Writ-C No.3831 of 2023 was also disposed of with similar observations vide judgement dated 12.05.2023. He argues that along with the election petition, the petitioner had moved an application for decision on the application filed for recounting in view of the discrepancies as stated in the election petition. As the same was not being decided, the petitioner approached this Court by filing an application under Article 227 No.2287 of 2024, which was disposed of on 08.05.2024, wherein the Court had granted liberty to the petitioner to move an application for early disposal, which was directed to be considered within a period of three weeks. In terms of the said liberty, the petitioner had approached the Tribunal to decide the application. However, instead of deciding the application for recounting, the District Judge vide its order dated 22.10.2024, disposed of the urgency application only and did not pass any order on the application for recounting, as such, the petitioner once again approached this Court by filing an application under Article 227 No.5640 of 2024, which was disposed of on 29.11.2024, directing the court to decide the interim application, if not already decided and also directed that the application for recounting shall also be decided in accordance with law, if not already decided. In terms of the said directions given by this Court on 29.11.2024, the order impugned came to be passed.

6. While doing so, the District Judge held that the burden of proving the averments as contained in the election petition was on the petitioner and in case, the petitioner succeeds in discharging the said burden by leading appropriate evidence, the court can consider to passing directions for recounting. It also recorded that the petition was pending for framing of issues and at that stage, it would not be proper to decide the request for recounting. It was also observed that a similar observation was made in the earlier order dated 22.10.2024 and in that circumstances, the petitioner cannot be given interim relief, which would amount to a final relief.

7. Shri Gaurav Mehrotra, learned counsel appearing on behalf of the petitioner argues that the District Judge erred in not deciding the application on the ground that granting of interim relief

would amount to grant of final relief, which according to him, is contrary to the judgement of this Court in the case of Mohd. Mustafa Vs. Up Ziladhikari Phoolpur and others 2007 (6) AWC 5536. The reliance has been placed on paragraph 23, which is quoted herein-below:-

> "23. We have carefully examined the reasoning given by a learned Single Judge in Abrar's s case (supra) wherein the learned Single Judge opined that the disposal of an application for recount would amount to be a final order as it disposes of the application for recount finally. As explained by us, hereinabove, a mere order for recount does not finally alter the status of the contesting parties and it does not, in any way, finally determines the status of an elected candidate. The finality comes only after the disposal of the ejection application as the relief of setting aside an election or dismissing an election application comes at the final stage and not by mere disposal of an application of recount or ordering recount on deciding the issue framed for this purpose."

8. He further relies upon the judgement of learned Single Judge in the case of Smt. Rajesh Vs. State of U.P. and others; Writ-C No.60883 of 2014, wherein the following was observed:-

> "There cannot be any dispute to the proposition that order of recounting is an interlocutory order and unless and until the election is set aside or the election petitioner has been declared elected, this would not result in the disposal of the election petition or allowing the election petition. The order dated 1.11.2014, therefore, cannot be said to be a consequential order. This Court while allowing the writ petition had observed only that as there was certain overwriting and cutting in the counting sheet and margin of votes between the election petitioner and the winning candidate was only one vote, there was no reason to interfere in the order of recounting passed by the prescribed authority. The merits of the election of respondent no. 4 was not subject matter of adjudication before this Court. The order dated 1.9.2014, therefore, would not result in final adjudication on the merits of the election petition between the parties."

9. His next submission is that law with regard to the recounting was summarized by the Hon'ble Supreme Court in the case of Mahendra Pal Vs. Ram Dass Malanger and others (2000) 1 SCC 261 with the following effect:-

> "30. 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 35310 whereas a perusal of statement of "roundwise detailed result of counting, certified copy whereof is Ex. P-3, records that the total number of valid and rejected votes counted for the purpose of declaring the result were 35318. 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 returned 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.
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> 31. Indeed, recount of ballot papers cannot be ordered just for the asking but it is equally well settled that while maintenance of secrecy of ballot is sacrosanct, maintenance of purity of election is equally important."

10. In the light of the said, it is argued that the District Judge has erred in not deciding the application on its own merits and the observations based upon which the exercise of discretion has been denied is arbitrary and illegal.

11. Learned counsel for the respondent, on the other hand, strongly opposes the argument by arguing that it is very well settled that the relief of recounting, is based upon pleadings and evidence to be led, which can be led only after framing of issues. He argues that in the present case, even issues have not been framed and thus, any order of recounting of votes at this stage, would be without there being any material evidence to justify the recounting.

12. He further argues that at the time of recounting, no objections with regard to the allegations of improper recounting of votes were raised and the allegations for the first time were raised as an afterthought, which is also contrary to the provisions contained in the Municipalities (Conduct of Election of P and EP) Order, 1983, wherein in Order 31, the Returning Officer is duly empowered to order of recounting, if he is not satisfied on the basis of the material available with regard to accuracy of the previous counting. He argues that in absence of any material, at the instance of the petitioner at the time of recounting, its exercise cannot be claimed at this stage as is being done by the petitioner.

13. My attention has also been drawn to the judgement of the Hon'ble Supreme Court in the case of Vadivelu Vs. Sundaram and others (2000) 8 SCC 355 with emphasis on paragraphs 18 and 20, which are as under:-

> "18. From the above pleadings, it is evident that the appellant has not set forth material facts or particulars required for re-count of votes. To justify his contention that there was irregularity or illegality in the counting, except making some general and bald allegations, no other details are given. Though an allegation is made that electoral roll contained the names of dead persons, that the 1st respondent took advantage of the same, and that some persons had impersonated and cast votes in his favour, no details are given as to who committed such irregularity. The appellant has also not mentioned as to how many such votes had been cast in favour of the 1st

respondent. So also, the appellant has not alleged the nature of the illegality or irregularity said to have been committed by the counting officers. How and in what manner there was improper acceptance of invalid votes and improper rejection of valid votes also is not explained by the appellant. In short, the Election Petition is bereft of all details and the appellant, while examined as PW 1, could not supplement anything by way of evidence.

20. The appellant-Election Petitioner in this case has not stated as to when did he file the application for re-count. He has stated that he had given an application to the Returning Officer for recounting of votes and the request for recounting was not accepted. At the time of the evidence also, the appellant has not stated as to when did he file the application. In cross-examination, he stated that at about 10.00 p.m. on 14.10.1996, it was announced through loud speaker that the 1st respondent was elected and he denied the allegation that the application for re-count was made at 11.45 p.m. The 1st respondent was examined as RW 1. He deposed that the result of the election was declared at 10.30 p.m. and in all probability, the appellant filed an application for re-count after the result of the election was declared. Therefore, the application for re-count was not filed in accordance with Rule 66 of the Tamil Nadu Panchayats (Elections) Rules, 1995."

14. Reliance has also been placed on the Full Bench judgement of this Court in the case of Ram Adhar Singh Vs. District Judge and others 1985 SCC Online All 246, wherein the Full Bench had summarized the law with regard to the recounting in paragraph 14 to the following effect:

"14. The Principles laid down in Bhabhi's case (supra) have again been applied and followed by that Court in the case of N. Narayanan v. S. Semmalai, (1980) 2 SCC 537: AIR 1980 SC 206 (at P. 213) wherein it observed thus:-

"Finally, the entire case law on the subject regarding the circumstances under which recount could be ordered was fully summarised and catalogued by this Court in case of Bhabhi v. Sheo Govind, (1975) Suppl SCR 202: ((1976) 1 SCC 687: AIR 1975 SC 2117) to which one of us (Fazal All, J) was a party and which may be extracted thus:

"The Court would be justified in ordering a recount of the ballot papers only where; (1) the election petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded;

(2) On the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting, and (3) The Court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties."

15. He further emphasizes on the judgement of the Hon'ble Supreme Court in the case of Tanaji Ramchandra Nimhan Vs. Swati Vinayak Nimhan and others (2006) 2 SCC 300, wherein the Supreme Court had held as under:-

> "9. This Court after referring to a number of prior decisions, has held in Mahendra Pal vs. Ram Dass Malanger and others [(2002) 3 SCC 457] that an order for recounting cannot be made as a matter of course. Unless the election petition had laid the foundation and there was clinching evidence to support the case set up by the election petitioner, a recount normally could not be ordered. In Chandrika Prasad Yadav Vs. Sateof Bihar & Ors. [(2004) 6 SCC 331], relying on an earlier decision in M. Chinnasamy Vs. K.C. Palanisamy & Ors. [(2004) 6 SCC 341], a bench of three Judges (to which one of us S.B. Sinha, J. was a party) held that an election petition seeking a recount must contain a concise statement of material facts and clear evidence in support of the facts pleaded. It was held that a small margin of victory by itself was not a ground for ordering recount. A roving and fishing inquiry was not permissible while directing recount of votes. The requirement of maintaining secrecy of ballot papers had also to be kept in mind before directing a recount. The requisites for ordering recount are a prima facie case and pleading of material facts detailing the irregularities in counting of votes. Going by the tests laid down by these decisions, it is clear that the election petitioner in the case on hand has not made out a specific case for recount. In other words, except generally asserting that the process of counting was undertaken hurriedly and suggesting that mistakes might have occurred because of the haste shown, she has not been able to establish specifically any flaw either in the matter of segregation of votes polled in the ward by colour, segregation of the votes polled by each candidate, or in the matter of bundling of the votes into 25 or in the matter of identification of the invalid votes which were clearly shown to all the counting agents before being deposited in the box kept separately for invalid votes. It is true that there could be a suspicion that in view of the announcement of an award for the returning officer who finished the counting process first, there might have been some hurry in the process of counting. But such a general feeling or possibility cannot be a substitute for clear pleading and evidence in support of a prayer for recounting of the votes. After all, only 15,000 odd votes were involved and there were 10 tables and each table dealt with only about 40 ballot boxes. Admittedly each ballot paper was shown to the agents before it was deposited into the receptacle kept for it and at best the evidence is that it was done with some haste."

16. In view of the rival pleadings and the law as argued, it is essential to notice the scheme of Section 19 of the U.P. Municipalities Act, 1916, which prescribes the manner in which, an election can be questioned. Sections 19(1) and 19(2) of the said Act are quoted herein-below:-

> "19. Power to question municipal election by petition. - (1) The election of any person as a member of a [Municipality] may be questioned by an election petition on the ground-

(a) that such person committed during or in respect of the election proceedings a corrupt practice as defined in Section 28;

(b) that such person was declared to be elected by reason of the improper rejection or admission of one or more votes, or any other reason was not duly elected by a majority of lawful votes;

(c) that such person was not qualified to be nominated as a candidate for election or that the nomination paper of the petitioner was improperly rejected.

(2) The election of any person as a member of a [Municipality] shall not be questioned, -

(a) on the ground that the name of any person qualified to vote has been omitted from, or the name of any person not qualified to vote has been inserted in the electoral roll or rolls;

(b) on the ground of any non-compliance with this Act or any rule, or of any mistake in the forms required thereby, or of any error, irregularity or informality on the part of the officer or officers charged with carrying out this Act or any rules, unless such non-compliance, mistake, error, irregularity or informality has materially affected the result of the election. "

17. In the light of the said, the contention of learned counsel for the petitioner was that the entire foundation of the petition filed by the petitioner was premised on the 19(1)(b). He argues that in terms of the pleadings as contained and filed by the petitioner, there was a specific allegation with regard to the number of the votes being polled being different in respect of the two reports and in fact, there is a third report, which in turn further is differing in terms of the number of polls voted. He, thus, argues that there was a specific pleading and the evidence in the form of the Government records itself and thus, the primary burden of pleadings and evidence was discharged by the petitioner.

18. He draws my attention to the written statement filed by the State Authorities as well as respondent No.7, wherein none of them have denied the existence of the reports as pleaded and relied upon in the election petition filed by the petitioner.

19. In the light of the said, prima facie what flows is that there was a specific pleading, no denial in the written statement and the evidence relied upon were the documents furnished by the Election Authorities was on record. The law as emphasized by both the counsels and as explained by the Supreme Court is that the recounting can be done only if there is sufficient material and evidence to establish any foul play warranting a recounting.

20. In the present case, the pleading was effectively contained in three paragraphs of the election petition. The evidence relied upon was the evidence furnished by the Government Authorities. In

the absence of any denial in the written statement filed either by the State Authorities or by respondent No.7 and there being no denial that the evidences proposed to be relied upon to carry charge of irregular counting being either forged, fabricated or non-existent, there was no denial of the evidence also.

21. It is very well settled that the issues are framed based upon the pleadings and its denial and the said issues are to be decided based upon the evidence to be led by both the parties. In the present case, as there was no denial, probably the need for framing of an issue with regard to the pleadings and documents proposed to be relied upon may not arise. There being no denial of three different numbers said to be the number of the votes polled, probably there may be no necessity for framing of an issue to that effect also.

22. In view thereof, it was incumbent upon the District Judge to have decided the application for recounting based upon the pleadings and the evidence led, to which there is no denial in the written statement by either of the parties and there being no material to controvert the documents of the Government Authorities proposed to be relied upon.

23. In view of the said, I have no hesitation in holding that the District Judge has erred in holding that the issue has to be decided after the pleadings and evidence are led and issues are framed. He has further erred in holding that granting the application at this stage would amount to a final relief, which is also contrary to the law as laid down by this Court in the cases of Mohd. Mustafa Vs. UP Ziladhikari and others (supra) and Smt. Rajesh Vs. State and Others (supra).

24. Thus, on all counts, the impugned order dated 20th January, 2025 cannot be sustained and is quashed. The matter is remanded to the District Judge to decide the application for recounting based upon the pleadings and evidence as contained in the election petition and relied upon by the petitioner by passing a fresh order within a period of four weeks from today.

25. The petition is disposed of in terms of the above.

Order Date :- 3.3.2025 Ashutosh