Chandrika Prasad Yadav vs State Of Bihar & Ors on 5 April, 2004

Equivalent citations: AIR 2004 SUPREME COURT 2036, 2004 AIR SCW 2163, 2004 AIR - JHAR. H. C. R. 1526, (2004) 4 JT 264 (SC), 2004 (5) SRJ 244, 2004 (3) SLT 121, 2004 (4) SCALE 201, 2004 (4) ACE 146, 2004 (6) SCC 331, 2004 (4) JT 264, (2004) 18 ALLINDCAS 324 (SC), (2004) 3 JCR 57 (SC), (2004) 2 RECCIVR 568, (2004) 3 PAT LJR 133, (2004) 4 SCALE 201, (2004) 2 WLC(SC)CVL 177, (2004) 3 JLJR 13, (2004) 18 INDLD 156, (2004) 2 BLJ 636

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Bench: Chief Justice, S.B. Sinha, S.H. Kapadia

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           CASE NO.:
Appeal (civil)  1999 of 2003

PETITIONER:
Chandrika Prasad Yadav

RESPONDENT:
State of Bihar & Ors.

DATE OF JUDGMENT: 05/04/2004

BENCH:
CJI, S.B. Sinha & S.H. Kapadia.

JUDGMENT:
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J U D G M E N T With Contempt Petition (Civil) No. 174/2003 S.B. SINHA, J:

The extent of jurisdiction of election tribunal to direct recounting of votes is the primal question involved in this appeal which arises out of a judgment and order dated 18.11.2002 passed by a Division Bench of the High Court of Judicature at Patna in L.P.A. No. 1149/2002 dismissing the appeal arising out of an order dated 7.10.2002 passed in Writ Petition marked as CWJC No. 5004/2002 whereby and whereunder a learned Single Judge of the High Court allowed the writ petition filed by the respondent herein questioning an order of the election tribunal dated 20.10.2001.

BACKGROUND FACTS:

The private parties hereto contested an election for the post of Mukhiya of Raj Gamhariya, Gram Panchayat. The said election was held on 19.4.2001 and the votes polled therein were counted on 20.5.2001. The contention of the appellant was that

the returning officer had informed him that he had secured 900 votes out of which 150 had been declared invalid and, thus, he got 670 valid votes whereas the respondent Mahendra Rai had secured only 622 votes. However, when the result was finally declared on 21.5.2001, the 4th respondent herein was declared elected by securing allegedly 32 more votes than the appellant herein. The total votes polled by the appellant was shown as 670 and votes polled by the 4th respondent was shown as 702.

The appellant allegedly moved an application for recounting of votesbefore the returning officer but the same was not entertained. The appellant thereafter filed an election petition questioning the election of the 4th respondent herein before the learned Munsif, Raxoul, East Champaran primarily on the ground of irregularities in counting of votes. Before the election tribunal, the parties adduced their respective evidences whereafter the learned Munsif by an order dated 20.10.2001 directed inspection and recounting of ballot papers; pursuant to or in furtherance whereof the Returning Officer, East Champaran was directed to produce the ballot papers.

Aggrieved thereby and dissatisfied therewith, a writ petition was filed by the 4th respondent herein which was, however, withdrawn. Recounting of the ballot papers was held on 23.3.2002 as a result whereof the appellant was said to have secured 671 votes; whereas the 4th respondent secured 667 votes. The Election Petition, therefore, thereafter was allowed by a judgment and order dated 6.4.2002. The 4th respondent being aggrieved by and dissatisfied therewith filed a writ petition before the Patna High Court which was marked as CWJC No. 5004/2002. By an order dated 7.10.2002, the said writ petition was allowed whereagainst a Letters Patent Appeal was filed by the appellant herein which was dismissed by a Division Bench of the High Court. Hence this appeal by special leave.

SUBMISSIONS:

Mr. Amarendra Sharan, learned senior counsel appearing on behalf of the appellant would submit that the High Court committed a manifest error in passing the impugned judgment purporting to rely upon or on the basis of the decision of this Court in Ram Rati (Smt.) Vs. Saroj Devi and Others [(1997) 6 SCC 66] wherein it has been held that it is mandatory for the election petitioner to file an application for recounting of votes before the returning officer in terms of the election rules, although the same has since been overruled by a 3-Judge Bench of this Court in Sohan Lal Vs. Babu Gandhi and Ors. [JT 2002 (9) SC 474: (2003) 1 SCC 108].

The learned counsel would urge that as in a democracy the rule of majority should prevail, the learned Munsif was within his jurisdiction to direct recounting of votes upon satisfying itself the necessity therefor and in that view of the matter the High Court should not have interfered with the said judgment.

Mr. Sharan would submit that the learned Munsif had assigned valid and cogent reasons in support of his order upon taking into consideration the pleadings of the parties and the evidences brought on records and in that view of the matter the High Court erred in setting aside the same.

Mr. Rakesh Dwivedi, learned senior counsel appearing on behalf of the 4th respondent, on the other hand, would contend that the High Court has rightly proceeded on the premise that the pleadings of the appellant being vague and general in nature, no case was made out for recounting of votes. The learned counsel pointed out that prayer for recounting of votes made by the appellant was on the basis that he had filed a proper application before the returning officer but he failed to prove the said fact nor brought on the records of the case a copy thereof. As regard the findings of the learned Munsif to the effect that the Ex. A/20 contained cutting and over-writing, the learned counsel would submit that no such case had been made out in the election petition. It was pointed out that in any event having regard to the fact that 100 valid votes had not been counted so far as the appellant is concerned; and in fact more than 400 votes polled by the 4th respondent herein were held to be not valid and, thus, the appellant herein was not prejudiced at all.

Drawing our attention to the judgment of the learned Single Judge as also the Division Bench of the High Court, the learned counsel would urge that the High Court analysed the pleadings of the appellant made in his election petition and came to the conclusion that the same are absolutely vague and general in nature and no reliance thereupon could have been placed by the learned Munsif. Filing of an application before the returning officer for recounting of votes may not be mandatory but Mr. Dwivedi would aruge that the same goes a long way to show that as to on what basis the recounting was sought for. The order of the returning officer allowing or rejecting the same, the learned counsel would contend, be of great assistance for the Election Tribunal to judge the correctness thereof.

STATUTORY PROVISIONS:

Section 140 of the Bihar Panchayat Raj Act, 1993 mandates that the election of Mukhiya shall not be called in question before any forum except by way of an election petition. The State of Bihar in exercise of its power conferred upon it under Section 121 of the said Act framed rules known as Bihar Panchayat Election Rules. It is not in dispute that various provisions exist as regard rejection or acceptance of votes and the right of a candidate or his authorised agent to question the same by filing an appropriate application therefor before the prescribed authority. Rule 79 of the Rules provides that the candidate or in his absence his agent or his counting agent can file an application to the election officer or the officer(s) authorised by him praying for recounting and the basis therefor. On reciept of such an application, the election officer can accept either in whole or in part the same or reject the same wherefor reasons are required to be assigned. In the event of election officer accepting either in

whole or in part such a prayer of the candidate, he would recount the votes whereafter the result or the number of votes polled may be amended. However, no application would be accepted for further recounting.

ANALYSIS OF REUIREMENTS OF LAW :

The law relating to recounting of votes is now well- settled. The provisions of the Act and the rules framed thereunder provide that in relation to an election petition the provisions of the Code of Civil Procedure would apply. An election petition, therefore, must contain coincise statement of material facts. It is well-settled that the question as to what would constitute material facts would depend upon the facts and circumstances of each case.

We have been taken through the averments made in the election petition. The learned Single Judge of the High Court in his judgment dated 7.10.2002 upon noticing paragraphs 6 to 11 and 17 of the election petition held:

"10. From the pleadings of respondent No. 4, it is manifest that the allegations made by him were quite vague and did not come up to the stringent standards laid down by the Supreme Court."

The appellant has not produced before us a copy of the affidavit affirmed in support of the Election Petition to show as to how the averments made in the Election Petition were verified.

Our attention has also been drawn to paragraphs 19 to 21 by Mr. Sharan which read as under:

"19. That, in all 16 Booths were in the electoral area of Gram Panchayat Raj, Gamhariya Kala, vide Booth No. 106 to

121.

20. That, the dependent No. 1 has wrongly been declared elected, by a margin of 32 votes, as against the plaintiff.

21. That, as a matter of fact, the plaintiff has got, near about 200 excess valid votes than the defendant No. 1."

The averments made in the said paragraphs do not improve the appellant's case inasmuch as therein also no material fact has been averred as to how and in what matter the so-called valid votes were kept out of consideration or invalid votes had been taken into consideration. The appellant in paragraph 11 of the election petition categorically stated that a request was made to the returning officer for recounting of the votes but he did not pay any heed thereto. In the aforementioned situation, it was obligatory on the part of the appellant to prove the said fact. The averments made in the election petition clearly go to show that the appellant was aware of his right to file an

appropriate application before the returning officer praying for a recounting. If the said application was not entertained, he should have proved the said fact by bringing on record the original application which was refused to be accepted or a copy thereof. He should have also adduced evidence in that behalf before the learned Munsif.

In his order dated 20.10.2001, the learned Munsif held:

> "In view of documentary as well as oral evidence I find that there are sufficient materials available on record to show that allegation of petitioner, about illegal reception of votes in favour of opposite party and mischief in preparation of result are clearly evidence and euitch (sic) about something hidden. In Pvt (sic) 4/12 G.P. Mahendra Rai was shown to have got 81 votes but on the very first look of form 20(A/12) shows that 31 was made 81 and in A/13 total votes 237 was changed into figure 287. There is no initial in any cutting like wise in Ext. A/20 Mahendra Rai was shown to have got 509 votes but it was out (sic) and 122 votes have been shown in favour of Mahendra Rai. There is no initial of any officer on this cutting too. In oral evidence D.W.-9 and D.W.-12 have supported the petitioner allegations."

The learned Munsif in his order dated 20.10.2001 failed to analyse the evidences adduced by the parties. He also did not state as to what materials were brought on record to show that there had been illegal reception of votes in favour of the opposite party. Reference to Ex. 4/12 only shows certain interpolation but whether the same had materially affected the result or not had not been taken into consideration.

Mr. Dwivedi is right in pointing out that whereas the appellant could have claimed 100 more votes on the basis thereof, 509 votes polled by the 4th respondent had been brought down to 122 votes. There is also nothing on record to show that as to how and in what manner D.W.-9 and D.W.-12 had supported the allegations made by the petitioner.

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

It is well-settled that an order of recounting of votes can be passed when the following conditions are fulfilled:

> (i) A prima facie case;
>
> (ii) Pleading of material facts stating irregularities in counting of votes;
>
> (iii) A roving and fishing inquiry shall not be made while directing recounting of votes; and

(iv) An objection to the said effect has been taken recourse to.

The requirement of maintaining the secrecy of ballot papers must also be kept in view before a recounting can be directed. Narrow margin of votes between the returned candidate and the election petitioner by itself would not be sufficient for issuing a direction for recounting.

In M. Chinnasamy Vs. K.C. Palanisamy & Ors. [2003 (10) SCALE 103] this Court upon noticing a large number of decisions held that it is obligatory on the part of the Election Tribunal to arrive at a positive finding as to how a prima facie case has been made out for issuing a direction for recounting holding:

> "Apart from the clear legal position as laid down in several decisions, as noticed hereinbefore, there cannot be any doubt or dispute that only because a recounting has been directed, it would be held to be sacrosanct to the effect that although in a given case the court may find such evidence to be at variance with the pleadings, the same must be taken into consideration. It is now well-settled principle of law that evidence adduced beyond the pleadings would not be admissible nor any evidence can be permitted to be adduced which is at variance with the pleadings. The court at a later stage of the trial as also the appellate court having regard to the rule of pleadings would be entitled to reject the evidence wherefor there does not exist any pleading."

It was further held that for the said purpose the Tribunal must arrive at a finding that the errors are of such magnitude which would materially affect the result of the election. As regard standard of proof, this Court held:

> "The requirement of laying foundation in the pleadings must also be considered having regard to the fact that the onus to prove the allegations was on the election petitioner. The degree of proof for issuing a direction of recounting of votes must be of a very high standard and is required to be discharged. [See Mahender Pratap vs. Krishan Pal and Others - (2003) 1 SCC 390].
>
> (See also Mukand Ltd. Vs. Mukand Staff & Officers Association, JT 2004 (3) SC 474) The order of the learned Munsif did not satisfy the statutory requirements.
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> RULE 79 OF BIHAR PANCHAYAT ELECTION RULES, 1995 WHETHER MANDATORY OR DIRECTORY Rule 79 as noticed hereinbefore enables a candidate to file an appropriate application for recounting of votes. Rule 79 unlike rules framed by other States does not say that such an application would not be maintainable after declarations of the votes polled by the parties or prior thereto. Such an application, therefore, can be filed at any point of time. The very fact that Sub-rule (3) of Rule 79 provides for amendment of the result relating to the votes polled by the respective candidates and as, such amended result is required to be announced in the prescribed form under Sub-rule (2) of Rule 79, the same itself is a pointer to the fact

that even after announcement of result for recounting an application would be maintainable. It may be true that only because such an application had not been filed before the returning officer by itself may not preclude the Election Tribunal to go into the question of requirement of issuing a direction for recounting but there cannot be any doubt whatsoever that Rule 79 serves a salutary purpose. Counting of ballot papers in terms of the rules takes place in presence of the candidate or his counting agent. When an agent or a counting agent or the candidate himself notices improper acceptance or rejection of the ballot papers, he may bring the same to the notice of the prescribed authority. As noticed hereinbefore, in a given case, an application for recounting either before announcement of the result or thereafter, would be maintainable. Once an application is filed by an agent or a counting agent or the candidate himself pointing out the irregularities committed by the officers appointed for the counting the ballot papers, immediate redressal of grievances would be possible. As indicated hereinbefore, while filing such an application the basis for making a request for recounting of votes is required to be disclosed. The returning officer is statutorily enjoined with a duty to entertain such an application, make an inquiry and pass an appropriate order in terms of Sub-rule (2) of Rule 79 either accepting in whole or in part such requests or rejecting the same wherefor he is required to assign sufficient or cogent reasons. In the event, such an application is allowed either in whole or in part, he is statutorily empowered to amend the results also.

Ordinarily, thus, it is expected that the statutory remedies provided for shall be availed of. If such an opportunity is availed of by the Election Petitioner; he has to state the reasons therefor. If no sufficient explanation is furnished by the Election Petitioner as to why such statutory remedy was not availed of, the Election Tribunal may consider the same as one of the factors for accepting or rejecting the prayer for recounting. An order of the prescribed authority passed in such application would render great assistance to the Election Tribunal in arriving at a decision as to whether a prima facie case for issuance of direction for recounting has been made out.

In Ram Rati (supra) a 2-Judge Bench of this Court while interpreting Rule 76 of M.P. Panchayat Elections Rules, 1994 held:

"...In the light of the mandatory language of Rule 76 of the Rules, it is incumbent upon a candidate or an agent, if the candidate was not present, to make an application in writing and give reasons in support thereof, while seeking recounting. If it is not done, then the tribunal or the court is not empowered to direct recounting even after adduction of evidence and consideration of the alleged irregularities in the counting..."

A 3-Judge Bench, however in Sohan Lal (supra) while considering the provisions of M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 and the Rule 80 of the Rules framed thereunder held:

> "13. In view of Section 122 and the rules, we are unable to agree with the ratio laid down in Ram Rati's case. It is not correct to hold that, in an election petition, after the declaration of the result, the Court or Tribunal cannot direct recounting of votes unless the party has first applied in writing for recounting of votes. There is no prohibition in the Act or under the rules prohibiting the Court or Tribunal to direct a recounting of the votes.
>
> Even otherwise a party may not know that the recounting is necessary till after result is declared. At this stage, it would not be possible for him to apply for recounting to the Returning Officer. His only remedy would be to file an Election Petition under Section 122. In such a case, the Court or the Tribunal is bound to consider the plea and where case is made out, it may direct recount depending upon the evidence led by the parties. In the present case, there was obvious error in declaring the result. We, therefore, hold that the ratio laid down in Ram Rati's case is not correct."

In Vadivelu Vs. Sundaram and Others [AIR 2000 SC 3230] wherein this Court while considering a pari materia provision contained in T.N. Panchayats Act, 1994 as also upon noticing a large number of decisions observed:

> "The appellant-election petitioner could not make out a case for re-count of votes. He filed the application for re-count before the Returning Officer only after the declaration of result and that was rightly rejected by the Returning Officer. The appellant had no case that the illegality or irregularity, if any, committed had materially affected the result of the election. Taking all the aspects into consideration, we are of the view that the learned Single Judge was perfectly justified in holding that the Election Tribunal erred in appointing a Commissioner and ordering the re-count of votes. The counsel for the appellant contended that the powers of the revisional court are not as wide as the powers of the appellate court and, therefore, the learned Single Judge should not have set aside the order passed by the Election Tribunal. We do not find any force in this contention. When there is error of jurisdiction or flagrant violation of the law laid down by this Court, by exercising the revisional powers, the court can set aside the order passed by the Tribunal to do justice between the parties. The illegality committed by the Election Tribunal has been corrected by the revisional order. We find no merit in the present appeal and the same is dismissed."

Vadivelu (supra) was relied upon by the High Court and in our opinion having regard to the averments made by the appellant in his Election Petition the ratio of the said decision applies to the fact of the present case also.

The question as to whether a statute is directory or mandatory would not depend upon the phraseology used therein. The principle as regard the nature of the statute must be determined having regard to the purpose and object the statute seeks to achieve. (See P.T. Rajan Vs. T.P.M. Sahir and Ors., 2003 (8) SCALE 165) CONCLUSION :

For the reasons aforementioned, we are of the opinion that the judgment of the High Court does not call for any interference. The appeal as also the contempt petition are accordingly dismissed. No costs.