

**(2009) 08 PAT CK 0019**  
**In the Patna High Court**  
**Case No : CWJC No. 13529 of 2007**

Animesh Kumar Rai @ Guddu Rai@ Animesh Kumar  
Vs  
The State of Bihar and Others

APPELLANT  
RESPONDENT

**Date of Decision :** 24-08-2009

**Acts Referred:**

**Citation :** (2009) 08 PAT CK 0019

**Final Decision :** Allowed

## **Judgement**

Ajay Kumar Tripathi, J.—The origin of the present writ application is an order dated 29.9.2007 passed by learned Munsif-cum- Election Tribunal, Gopalganj in Election Petition No. 2 of 2006.

2. By virtue of this order the Election Tribunal has directed the Returning Officer to bring all the ballot boxes containing ballot papers of Grampanchayat Raj Siswan for the purpose of verification and recounting of votes cast in the said election on the basis of the allegation made in the election petition filed by respondent No. 7, Biresh Rai. The impugned order therefore is annexure-4 which is the subject matter of challenge in the present writ application.

3. The basic fact is that the petitioner is the Mukhiya who was returned candidate on the declaration of the result after counting. Private respondent No. 7 lost election by 99 votes and he decided to challenge the result and the election of the present petitioner by filing Election Petition No. 2 of 2006 before learned Munsif, Gopalganj who was acting as Election Tribunal in the matter of election of Gram Panchayat.

4. The primary submission which has been made on behalf of the petitioner against the decision of learned Munsif who has embarked on an exercise of recounting is that it is a fishing and roving enquiry which has been ordered to be made without corresponding facts having been pleaded and established in the election petition or the trial thereof. Recounting is not to be done as a matter of course because there are mandatory requirements under the law to be followed.

The order of learned Munsif is not only erroneous but also in the teeth of such legal decisions. From the pleadings in the plaint or the evidence which has been led in the election petition it does not emerge that the private respondent had complied with the requirement of Rule 79 of the Bihar Panchayat Raj Rules, 2006 (hereinafter referred to as the Rules). In this regard the decision of Hon''ble Supreme Court rendered in the case of Chandrika Prasad Yadav Vs. State of Bihar and Others, as well as the case of Hoshila Tiwari v. State of Bihar and Ors. 2008(4) PLJR (SC) 62 has been relied on.

5. It is also submitted there should be pleadings and material facts to support the same, which is not only requirement of law but it is also necessary for establishing the allegations made in the election petition. But a plain reading of the plaint would show that except for wild allegation nothing specific has been alleged or pleaded. Petition is motivated from the fact that the private respondent had lost election by 99 votes. In support of the above contention reliance has been placed on a decision rendered in the case of Virender Nath Gautam Vs. Satpal Singh and Others, (emphasis on paragraphs 30 to 35). Another argument is that there is no proper verification of the plaint which is required under the Rule and absence of proper verification could also be fatal for the election petition as is the view of Hon''ble Supreme Court in the case of Baldev Singh Vs. Shinder Pal Singh and Another, . Requirement of law has been stated in Section 137 of the Act read with Rule 108 which has been made under the Act.

6. The allegation made in the election petition according to the petitioner is that large number of his votes amounting to almost 400 have been intentionally and illegally declared to be invalid with the sole purpose to help the present petitioner as many ballot papers not having Swastik Mark were excluded.

7. The evidence which has come during the course of trial of the election petition according to the petitioner does not corroborate the allegation. A reading of the impugned order itself would show that learned Munsif seems to be more impressed by what the newspapers reported on the issue such as supply of defective rubber stamp bearing Swastik Mark which came to be used in the election rather than the actual state of affairs based on which the declaration of the result was made. The defective Swastik Mark was an issue at that point of time but the matter was set to rest on the direction which had come to be issued by the State Election Commission as well as the judicial pronouncement of the Division Bench in the matter of the kind in the case of The Bihar State Election Commission and Others Vs. Meera Devi and Others, If that is the law and if that is the decision which stood clarified that vote not carrying Swastik Mark was to be declared invalid and was universally applied. The allegation made by the private respondent in the election petition that more than 400 votes belonging to him were intentionally removed is a presumption and not established by evidence. In fact, during the course of counting the invalid votes were separated from the valid votes and thereafter valid votes were finally counted and result

declared. This fact is borne out from the written statement which came to be filed by the official respondents. The total invalid votes from all the booths added up together were 418 from the total votes counted was 3276.

8. Based on the above fact learned Senior counsel submits that it is only a presumption that out of said 418 invalid votes, 400 belonged to the private respondent. The rejection of votes from various booths are varied and it is only presumption and supposition of the private respondent petitioner which formed the basis for ordering recount as has been done by learned Munsif. It is also urged that it is the considered opinion of the Court including the apex court that the secrecy and the sanctity of the votes after the result must be maintained and the same cannot be violated by ipse dixit.

9. Private respondent has also filed his counter affidavit in which it is stated and submitted that there was large scale bungling in counting of votes by the official respondents at the behest of the petitioner and the same can only be verified after the recounting is done under the supervision of the court. The actual truth will emerge only if the recounting is done under the gaze of the Tribunal. There is specific allegation that about 400 ballot papers of this respondent were illegally declared to be invalid only to facilitate the return of the present petitioner. It is also submitted that protest was lodged before the Returning Officer but the same was not entertained. Complaint was made before the District Magistrate as well as the State Election Commission through Fax as the Returning Officer did not give him justice. It is also urged that no harm will be caused if the position is verified by the Election Tribunal. As far as the objection of the petitioner that the election petition was not duly verified, the stand of the respondent is that it is not mandatory and it is curable and the court ought to have given opportunity to this respondent to do so. Another stand of the private respondent is that the issue to be decided in the election petition is not Rule 79 but Rule 75 of the Rules, 2006.

10. The Court has had the benefit of being taken through the impugned order passed by learned Munsif in the light of averments made in the election petition. Reading of two would show that the election petition actually lacks material fact based on which no recounting can be ordered. There is also force in the submission of the learned Counsel for the petitioner that despite their being absence of pleading and evidence with regard to non-fulfillment of the requirements of Rule 79 learned Munsif was inclined to order recounting. It is also noticeable that learned Munsif seems to be more impressed by various news items which had been published in reaching the conclusion, despite failure of the election petitioner to corroborate or substantiate the allegation he had made in the plaint that all 400 votes cast in his favour were declared invalid.

11. No doubt, there was some confusion with regard to the Swastik Mark but the same stood clarified or resolved by the State Election Commission before counting. What is being done now by the Election Tribunal itself amounts to fishing and roving enquiry. A reading of the impugned order does not show that

it is a case or claim of recounting but a new exercise now counting to be carried out under the supervision of the Tribunal. This according to law it is not being permissible.

12. The law being well settled both by this Court as well as the apex Court on such issue, learned Munsif has exceeded his jurisdiction by ordering the Returning Officer to produce all the ballot boxes with the ballot papers for the purpose of verification and recounting which is borne out from the operative portion of the impugned order contained in annexure-4.

13. The petitioner therefore has made out a case for interference. The order dated 29.9.2007 passed in Election Petition No. 2 of 2006 is hereby set aside and the writ application is allowed. It is clarified that if there are any other issues before the Tribunal then the Tribunal can proceed in the matter in accordance with law but if this was the only issue then the matter be allowed to rest.