

(2019) 03 PAT CK 0008

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 21476 Of 2018

Brij Bhushan Prasad

APPELLANT

Vs

State Election Commission Panchayat And Ors

RESPONDENT

Date of Decision : 06-03-2019

Acts Referred:

Bihar Panchayat Raj Act, 2006 — Section 139, 140, 140(1), 140(2)(a)(b)
Representation Of People Act, 1951 — Section 100
Bihar Panchayat Rules, 2006 — Rule 79, 79(4), 80, 81, 82
Madhya Pradesh Panchayat Election Rules, 1994 — Rule 76

Citation : (2019) 2 PLJR 395

Hon'ble Judges : Rajeev Ranjan Prasad, J

Bench : Single Bench

Advocate : S.B.K. Mangalam, Ajay, Pratik Kumar Sinha, Ashish Kumar Lal, Amit Shrivastava, P.N. Shahi, Dharendra Kumar

Final Decision : Disposed Off

Judgement

This writ application has been preferred seeing the following reliefs :-

"(I) For issuance of an appropriate writ in the nature of CERTIORARI for quashing the judgment and order dated 11.10.2018 passed by the learned Civil Judge, Junior Division-cum-Election Tribunal, Danapur in Election Case No. 08 of 2016, whereby and where under the learned Civil Judge, Junior Division has been pleased to set aside the election of the petitioner and after setting aside the election direction has been issued to the Respondent no.3. for recounting of votes on the ground that the judgment under challenge is perverse and ,therefore, wholly unsustainable in law.

(II) For issuance of an appropriate writ in the nature of MANDAMUS ,commanding and directing the Respondent Authorities for reinstatement of the writ petition to the post which he was holding on the date of the impugned judgment as also for restraining the Respondent no.3 from any recounting of votes as directed by the impugned judgment.

(III) For issuance of any other appropriate writ/writs, order/orders, direction/directions for which the writ petitioner would be found entitled under the facts and circumstances of the case."

The petitioner also preferred two interlocutory application being I.A. No. 9037 of 2018 and I.A. No. 123 of 2019 seeking an interim stay of the judgment and order dated Patna High Court CWJC No.21476 of 2018 dt.06-03-2019 11.10.2018 passed by learned Civil Judge (Junior Division), Danapur in Election Case No. 8 of 2016. I.A. No. 9037 of 2018 was taken up for consideration by this Court on 19.12.2018 when an interim order was passed as under :-

"In the meantime, even if, recounting, which is in process, is completed, the concerned authority shall not declare the result."

In view of the aforesaid interim order already available on the record, when this case was taken up on 21.01.2019 this Court declared that I.A. No. 9037 of 2018 as also I.A. No. 123 of 2019 have lost there significance.

Mr. S.B.K. Mangalam, learned counsel representing the petitioner has canvassed the following grounds for setting aside the impugned judgment :-

(i). The impugned judgment suffers from perversity and is without jurisdiction because it has set aside the election before recording a finding that in fact it is some other candidate, who had obtained the majority of the valid votes in the election impugned. It is perverse also because by the impugned judgment the learned Tribunal has vested the jurisdiction upon the District Magistrate for recounting of votes for declaration of result and issuance of certificate.

(ii). The order of recounting cannot be passed on mere asking and on vague allegations made in the Election Petition.

(iii). Ext. 1 which is said to be the petition filed by the election petitioner before the Returning Officer for recounting in terms of Rule 79 of Bihar Panchayat Rules, 2006 (hereinafter referred to as 'the Rules, 2006') was admitted with an objection on behalf of the returned candidate (the petitioner) but the objections were never considered and decided. It is, thus, a case where the election petitioner had neither followed the mandatory provisions of Rule 79 of the Rules, 2006 nor there was any explanation in the plaint as to the circumstances under which such petition was not filed immediately taking objections with regard to counting before the Returning Officer.

It is his submission that the Civil Judge (Junior Division) while exercising his jurisdiction in terms of the provisions of the Bihar Panchayat Raj Act, 2006 (hereinafter referred to as 'the Act of 2006') is competent to decide an election dispute but while doing so the learned Civil Judge is obliged and bound to act within the frame work of the limitation prescribed under the statute. Learned counsel referred the provisions of Sections 139 and 140 of the Act of 2006 to submit that the grounds provided under those provisions would be the only grounds available to an election petitioner to challenge the election for a

declaration that the election is void. Section 140 of the Act of 2006 provides the grounds of which the candidate other than the returned candidate may be declared to have been elected. Under Section 140(1) of the Act of 2006 it is provided that if any person who has filed an Election Petition has in addition to calling in question the election of the returned candidate claims a further declaration that he himself or any other candidate has been duly elected and the prescribed authority is of opinion that in fact the petitioner or such other candidates received a majority of valid votes, the prescribed authority shall after declaring the election of the returned candidate to be void declare the petitioner or such other candidate as the case may be to have been duly elected.

It is submitted that under Section 140 of the Act of 2006, the Election Tribunal has to consider as to whether in the impugned election any other candidate has received a majority of valid votes, according to Mr. Mangalam, it is only after recording such a finding to this effect, an Election Tribunal would be competent to move ahead, set aside the election of returned candidate and declared any other candidate to have been duly elected, who in the opinion of the Court has received the majority of the valid votes and this opinion can be formed only after the votes have been recounted under the supervision of the Court itself.

Assailing the impugned judgment, learned counsel has drawn the attention of this Court towards third paragraph at Page 86 of the writ petition which is the impugned judgment of the learned Tribunal wherein the learned Tribunal has observed that "Thus from the discussions made above, it is clear that the petitioner is not entitled to the relief for setting aside the election of returned candidate", it is submitted that having said so the learned Civil Judge could not have in the same breath been pleased to set aside the election of the writ petitioner as there was no recording of finding that in fact the election petitioner or any other candidate received a majority of the valid votes.

It is submitted that the direction of the learned Civil Judge to the District Magistrate, Patna to get the ballot of each Booth for the post of Mukhiya of Dariyapur Panchayat, Patna recounted under his supervision and declare the result of election and for preparation of final result sheets based upon counting and issuance of certificate in favour of the returned candidate is an order without jurisdiction. According to learned counsel, under Section 140 (2) (a) (b) of the Act of 2006, the word "Prescribed Authority" means an authority appointed under the provisions of the Act or under any rules or regulation framed thereunder for all any other purposes of the Act.

It is submitted that Hon'ble Supreme Court in the case of Jyoti Basu and others vs. Devi Ghoshal and others reported in AIR 1982 SC 983 has held that the election disputes are statutory creations and therefore, those are subject to statutory limitations and election petition is a communication of common law nor an equity. The Hon'ble Supreme Court has held that the principles of equity would apply in the matters relating to election disputes. It is said to be special jurisdiction and a special jurisdiction has to be exercised in accordance with

statute creating it.

As regards his second submission on the issue of recounting, learned counsel has submitted that the direction for recounting is also illegal as according to him, since Section 139 of the Act of 2006 is *pari materia* to Section 100 of the Representation of People Act, 1951, therefore, following the long line of judgments of the Hon'ble Supreme Court in relation to the recounting of votes through the process of Court, the recounting of votes cannot be done on mere asking. Learned counsel submits that the order of recounting cannot be passed for roving inquiry to fish out materials in support of the vague allegations made in the Election Petition. He has relied upon the judgment of the Hon'ble Supreme Court in the case of *Ramsewak Yadav Vs. Hussain Kamil Kidwai and others* reported in AIR 1964 SC 1249 (paragraph 7), *Dr. Jagjit Singh Vs. Giani Kartar Singh and Others* reported in AIR 1966 SC 773 (paragraph 31) and the judgment of the Hon'ble Apex Court in the case of *Beliram Bhalaik Vs. Jai Beharilal Khachi* and another reported in AIR 1975 SC 283 (paragraph 45 and 46).

Referring to the judgment of the Hon'ble Supreme Court in the case of *Bhabhi Vs. Sheo Gobind and others* reported in AIR 1976 SC 2117 learned counsel submits that in this case the Hon'ble Supreme Court has laid down the six conditions in paragraph 15 of the judgment before a court can order for inspection of Ballot papers in an Election Petition. To support this ground, learned counsel has also relied on the judgment of the Hon'ble Apex Court in the case of *Chanda Singh Vs. Choudhary Shiv Ram Verma and others* reported in AIR 1975 SC 403,

Suresh Prasad Yadav Vs. Jai Prakash Mishra and others reported in AIR 1975 SC 376 and in the case of *P.K.K. Shamsudden Vs. K.A.M. Mappillai Mohindeen and others* reported in (1989) 1 SCC 526 (paragraph 13).

Apart from the aforesaid judgments, learned counsel has also referred the judgments of the Hon'ble Supreme Court in the case of *M.R. Gopalakrishnan Vs. Thachady Prabhakaran and others* reported in 1995 Suppl. (2) SCC 101, *Vadivelu Vs. Sundaram and Others* reported in (2000) 8 SCC 355, *V.S. Achuthanandan Vs. P.J. Francis and Another* reported in (2001) 3 SCC 81, and *M. Chinnasamy Vs. K.C. Palanisami and others* reported in 2003 (10) SCALE 103.

Mr. Manglam has further submitted that in relation to the Panchayat Raj Act, 2006 the first matter which traveled up to the Hon'ble Supreme Court is the case of *Chandrika Prasad Yadav Vs. State of Bihar and others* reported in (2004) 6 SCC 331. In this case also the recounting order was passed by learned Election Tribunal and in recounting of votes by the Election Tribunal by itself, the election petitioner was declared elected. The Judgment of the learned Munsif was, however, set aside by the Hon'ble High Court vide judgment and order dated 07.10.2002 passed in C.W.J.C. No. 5004 of 2002. The election petitioner took the matter in appeal before the Division Bench but the appeal failed. Thereafter, the matter went to the Hon'ble Supreme Court and the Hon'ble Supreme Court also

dismissed the appeal of election petitioner affirming the judgment of the Hon'ble Single Judge and Division Bench of the Hon'ble Court. In paragraph 20 of the said judgment, their Lordship of the Hon'ble Supreme Court were pleased to hold that 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 (4) an objection to the said effect has been taken recourse to."

It is submitted that in the case of Banwari Yadav vs. State of Bihar and others reported in 2007 (4) PLJR 169 which was also a case of similar to the case of Chandrika Yadav (supra) the Election Tribunal had passed an order of recounting and after the recounting of votes the Election Tribunal had declared the election petitioner to have been duly elected. The writ petition was filed by Banwari Yadav whose election was set aside by the Election Tribunal and the election petitioner was declared elected. Relying on different judgments of the Hon'ble Supreme Court, the Hon'ble Single Judge vide its judgment in the case of Banwari Yadav (supra) was pleased to allow the writ petition setting aside the judgment of the learned Election Tribunal even when after counting, the election petitioner was declared elected. The Judgment of the Hon'ble Single Judge in Banwari Yadav case (supra) was affirmed by the Division Bench in L.P.A. No. 705 of 2007 (Raj Kishor Shukla Vs. Banwari Yadav & Ors.) since reported in 2008 (1) PLJR 593.

It is lastly submitted by learned counsel for the petitioner that the case of the election petitioner in the Election Petition is that his 216 valid votes were illegally rejected at the time of counting by the Returning Officer on the ground that the ink was faint by which the votes were polled. In the Election Petition the election petitioner did not disclose the Booth Number or Table Number whereas his votes were rejected. Regarding objection being raised at the time of counting, it was the case of the election petitioner that he had filed petition for recounting before the Returning Officer. The petition for recounting was marked as Ext. 1 with objection. The Returning Officer of the Election was examined as witness No. 2 on behalf of Respondent no. 13 to 16 of the Election Petition and in her examination-in-chief as also in her cross-examination she had denied any illegality in counting. With respect to the claim of the election petitioner that he had filed an application before the Returning Officer, this fact was categorically denied by her in paragraph 35 and 39 of her cross-examination. No proof was brought on record by election petitioner that he had filed Ext. 1 before the Returning Officer. Even he had not filed any petition to call for his petition of recounting from the custody of the District Election Officer. An objection raised on admission of Ext. 1 was never considered and the learned Civil Judge, Junior Division has relied upon Ext. 1 which remained in the category of objected documents. It is, thus, submitted that the witnesses examined on behalf of election petitioner though submitted the Election Petition but no documentary evidence regarding any illegality in counting of ballot papers was brought on record.

It is submitted that the allegation of the election petitioner that his 216 votes were improperly rejected was accepted by learned Civil Judge and the order of recounting was passed without their being any prima-facie consideration on the part of the learned Civil Judge. Learned counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of Mahanth Ram Prakash Dass Vs. Ramesh Chandra and others reported in (1999) 9 SCC 420 and the judgment of the Hon'ble Supreme Court in the case of Mahendra Pratap versus Krishan Pal and Others reported in (2003) 1 SCC 390. Submission is that the election petitioner had placed reliance on fabricated document in support of his bald objections and had misled the court for which the petitioner should have been prosecuted for commission of perjury of the Court by placing a fabricated document in evidence.

On the aforementioned ground, learned counsel has submitted that the impugned judgment as a whole is liable to be set aside as there cannot be a saving of order for recounting, if it is proved that the Tribunal had no jurisdiction to protect the District Magistrate to declare the result.

On the other hand, Mr. Pushkar Narayan Shahi, learned Senior Counsel representing the contesting respondents has submitted that the impugned judgment insofar as it directs recounting of votes does not suffer from any illegality or infirmity, thus, that part of the judgment under challenge is not required to be interfered with. As regards the declaration setting aside of the election by the impugned judgment, learned Senior Counsel submits that the election of the returned candidate could not have been set aside at this stage and to that extent the judgment of the learned Munsif may be modified. Learned Senior Counsel submits that by virtue of the interim order of the Court now recounting has taken place in presence of the parties. It is submitted that in the democracy which we have in our country the will of the people must be will and, therefore, at this stage no fruitful purpose would be served by setting aside the impugned judgment and remitting the matter back to the learned Munsif/Election Tribunal. He has relied upon the judgment of the Hon'ble Apex Court in the case of Rupadhar Pujari Vs. Gangadhar Bhatra reported in 2004 (7) SCC 654.

Learned Senior Counsel has submitted that it is, in fact, the end result which matters.

Mr. Ajay, learned counsel representing the State has supported the contention of learned Senior Counsel representing the private respondents to the extent that once the recounting has taken place, the results may be allowed to be declared based on such recounting.

Mr. Amit Shrivastava, learned counsel representing the State Election Commission submits that so far as the legal position is concerned it cannot be denied that the election of the returned candidate should not have been set aside simultaneously while a direction for recounting of votes was being issued.

Having heard learned counsel for the parties and upon perusal of the records this

Court proceeds to consider the submissions as under :-

Consideration Having heard learned counsel for the parties and upon perusal of the records, on facts this Court finds that in the plaint presented before the learned Election Tribunal, the respondent no. 5 made a statement in paragraph 9 of the plaint that during the counting it was found that Swastik symbol pressed with light ink was not being counted in favour of the election petitioner which was reported to the Returning Officer and the Returning Officer assured that all the valid votes will be counted but the votes of the petitioner were rejected and even invalid votes of returned candidate (petitioner) was counted as valid votes. The election petitioner also made a statement that he immediately made an application before the Returning officer for recounting of votes because 216 valid votes of the petitioner were rejected illegally. In this connection, the election petitioner brought on record the application dated 04.06.2016 which was said to have been submitted with the Block Election Officer for recounting. This application dated 04.06.2016 was exhibited as Ext. 1 (with objection). The contention of Mr. Manglam is that no such application was ever submitted with the Block Election Officer which will be evident from the deposition of the then Block Election Officer, namely, Varsha Tarvey (O.P.W. 2) who denied to have received any such application. It is true that Ext. 1 was marked an exhibit with objection and therefore, before final hearing of the election petition, the parties were required to be heard as regards the admissibility of Ext. '1' but what appears to this Court is that so far as Ext. 1 is concerned, the same was identified as an exhibit when the election petitioner who was APW 1 deposed and proved his signature on the application dated 04.06.2016. This Court will have no hesitation in saying that a mere marking of Exhibit of a document is not a proof of the contents mentioned therein. It is always open for the contesting party to contend that the contents of the exhibit so marked at the instance of the other party are still required to be proved in accordance with law. It is well settled in law that the fact that a document is exhibited only establishes that it has been formally proved for making exhibit.

In the present case the contention of the election petitioner that he had submitted an application dated 04.06.2016 (Ext. 1) with the Election Officer is a matter of fact which could have been established by bringing cogent evidences. The Election Officer deposed in the present case as O.P.W. 2. In her cross-examination she has denied that the election petitioner had given any application. She also denied accepting it. Under these circumstances, the election petitioner could have called for the original official records to prove that such an application (Ext. 1) was submitted with the Election Officer but this exercise was not undertaken. The Election Tribunal has, however, relied on Ext. '1' as a very important document and has taken a view that by the said document (Ext. 1) the election petitioner had prayed for recounting by giving reasons. In my opinion, merely because the application dated 04.06.2016 was marked Ext. 1, the same could not have been treated as proof of fact that the said letter was submitted with the Block Election Officer (O.P.W. 2).

The aforesaid view of this Court brings it to a next question as to whether on this ground alone that the election petitioner was unable to prove that he had submitted his application dated 04.06.2016 with O.P.W. 2, his election petition was liable to be thrown out.

It appears that before the Election Tribunal a number of judgments were cited including that of the judgment of the Hon'ble Supreme Court in the case of Ramrati Devi vs. Saroj Devi reported in (1997) 6 SCC 66 : AIR 1997 SC 3072. In the said case the Hon'ble Supreme Court was considering the requirement of Rule 76 of the M.P. Panchayat Election Rules 1994. It was held that "in the light of mandatory language of the Rule 76 of the Rules it is incumbent upon a candidate or an agent, if the candidate was 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 adducement of the evidence and consideration of the alleged irregularities in the counting".

The aforesaid judgment in the case of Ramrati Devi (supra) was however, overruled by Hon'ble three Judges Bench of the Supreme Court in the case of Sohan Lal V. babu Gandhi and Others reported in (2003) 1 SCC 108. The Hon'ble Supreme Court considered the M.P. Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 and the rules framed thereunder particularly Rule 80 of the Rules. After analyzing the aforesaid provisions in paragraph 14 their Lordship of the Hon'ble Supreme Court held as under:

"14. In view of Section 122 and the Rules, we are unable to agree with the ratio laid down in Ram Rati case¹. It is not correct to hold that, in an election petition, after the declaration of the result, the court or tribunal cannot direct re-counting of votes unless the party has first applied in writing for re-counting of votes. There is no prohibition in the Act or under the Rules prohibiting the court or tribunal to direct a re-counting of the votes. Even otherwise, a party may not know that the re-counting is necessary till after the result is declared. At this stage, it would not be possible for him to apply for re-counting 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 a case is made out, it may direct re-count 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 case 1 is not correct."

Rules 79, 80, 81 and 82 of the Bihar Panchayat Election Rules, 2006 are quoted hereunder for ready reference:

"79. Recounting of votes.-The candidate or in his/her absence his/her election agent or counting agent may make a written application to the Returning Officer or the Officer authorised by him/her for recounting of votes stating therein the grounds for the same.

(2) The Returning Officer or the Officer authorised by him/her may, fully or

partially, accept or reject the application stating the reasons for the same.

(3) If the Returning Officer or the Officer authorised by him/her accepts fully or partially the application under sub-rule(2), he/she shall get the ballotpapers recounted and amend the result of the counting in the form prescribed in sub-rule(2) of Rule 76 and declare the result.

(4) After that, any application for further re-counting shall not be entertained.

1. [(1997) 6 SCC 66 : AIR 1997 SC 3072]

80. Equality of votes.-If after the completion of the counting of votes two or more candidates secure equal number of votes which may be the maximum, the Returning Officer shall draw a lot among such candidates and the candidate in whose favour the lot is drawn, shall be deemed to be that he/she has secured an additional vote and the Returning Officer will declare the result of the counting of votes accordingly.

81. Declaration of results:- (1) After recording the particulars of the election result in Form-21, the Returning Officer or the Officer authorised shall declare that candidate elected as Member of Gram Panchayat/ Panch of Gram Katchahry / Mukhiya/Sarpanch/Member of Panchayat Samiti/Member of Zila Parishad, as the case may be, who has secured the largest number of valid votes and shall certify it in the same Form.

(2) One copy each duly signed of Form 21 shall be sent to the District Election Officer and through him/her to the Commission and the Director of Panchayat Raj.

82. Election Certificate.-After the declaration of the election result, the Returning Officer shall grant a Election Certificate in Form -22 to the candidate so elected."

It is apparent from a reading of the aforesaid provisions that under sub-Rule (4) of Rule 79, once the result is declared, further recounting shall not be entertained. After going through the aforesaid Rules and Judgment of the Hon'ble Supreme Court in the case of Sohan Lal (supra) this Court is of the view that even if the submission of Mr. Manglam is accepted to the extent that the election petitioner was unable to prove the submission of his application dated 04.06.20-16 with O. P.W. 2 which was marked Exhibit 1 with objection, it cannot be held that the election petition could not have been entertained. This Court is also of the view that neither under the Act nor under the Rules there is any provision prohibiting the Election Tribunal to direct a recounting of the votes. The ratio of the judgment in the case of Ramrati Devi (supra) has also been overruled by a Larger Bench of the Hon'ble Supreme Court.

Now coming to the next question as to whether the Election Tribunal was justified in directing recounting of votes on the basis of the materials available on the record and whether the order of the Tribunal satisfies the test laid down by the Hon'ble Supreme Court in the case of Bhabhi (supra), this Court finds that in the

case of Bhabhi (supra) the Hon'ble High Court had directed for a sample inspection of ballot papers without considering the election petition, the affidavit and the oral evidence. It is in these conditions the Hon'ble Supreme Court was considering the challenge thrown to the order of the Hon'ble High Court. The Hon'ble Apex Court relied upon the judgment in the case of Ramsewak Yadav (supra) wherein the Hon'ble Supreme Court had occasion to consider and hold that an order for inspection could not be granted as a matter of routine but only under special circumstances and the Hon'ble Supreme Court observed as follows:-

"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".

The question with regard to an order of the Election Tribunal granting inspection of ballot papers came for consideration again before the Hon'ble Supreme Court in the case of Dr. Jagjit Singh (supra) in which the Hon'ble Supreme Court observed on the facts of that case that the discretion to allow inspection of ballot papers should not be used in such a way so as to make a roving or fishing inquiry in order to discover materials for declaring the election void. In the case of Jitendra Bahadur Singh v. Krishna Behari reported in (1970) 1 SCR 852 = AIR 1970 SC 276 the Hon'ble Supreme Court reversed the order of the learned Election Judge granting inspection of ballot papers because it was found that the learned Election Judge had not followed the essential conditions laid down before granting the prayer of inspection of ballot papers. In the facts of the said case it was held that the allegations were vague and indefinite, no material fact was pleaded and further that the petitioner was present at the time of counting and when he did not take any objection regarding illegal rejection of the votes.

The same principles were followed by the Hon'ble Supreme Court in the case of Sumitra Devi Vs. Shiv Shankar Prasad Yadav reported in 1973 (2) SCR 920 : AIR 1973 SC 215 in which Hon'ble Mathew, J. after reviewing the previous authorities held:

"In the case at hand, the allegations in the election petition were vague and the petition did not contain an adequate statement of the material facts. The evidence adduced by the appellant to prove the allegations was found unreliable. No definite particulars were also given in the application for inspection as to the illegalities alleged to have been committed in the counting of the ballot papers. A recount will not be granted as a matter of right but only on the basis of evidence of good grounds for believing that there has been a mistake in the counting. It has to be decided in each case whether a prima facie ground has been made out for ordering an inspection."

There is a long list of the judgments of the Hon'ble Supreme Court consistently on this issue. In the case of Bhabhi (supra) after discussing all the judgments the Hon'ble Supreme Court in paragraph 15 their Lordships laid down the following tests:

"15. Thus on a close and careful consideration of the various authorities of this Court from time to time it is manifest that the following conditions are imperative before a court can grant inspection, or for that matter sample inspection, of the ballot papers:

- (1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;
- (2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;
- (3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;
- (4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;
- (5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and
- (6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials.

If all these circumstances enter into the mind of the Judge and he is satisfied that these conditions are fulfilled in a given case, the exercise of the discretion would undoubtedly be proper."

The reliance placed by learned counsel for the petitioner on the judgment of the Hon'ble Supreme Court in the case of Chandrika Prasad Yadav (supra) may not help the case of the petitioner inasmuch as the facts situation of that case was

different and distinct. There was a totally vague pleading which led to interference by this Court. So far as the judgment in the case of Banwari Yadav (supra) is concerned, again this judgment has been rendered in the facts of its own case as recorded in paragraph 22 of the judgment. It further appears that in course of hearing the learned writ Court was not informed that Ram Rati Devi (supra) has been held not laying down the correct law. Sohan Lal (supra) was not cited at the Bar. Further, in the case of Raj Kishor Shukla (supra) the Hon'ble Division Bench of this Court was dealing with a case where an application was filed by the election petitioner with the Block Election officer after declaration of result. No order was passed thereon, thereafter he filed an election petition in which the grounds which he agitated in the election petition were not there in the petition filed before Block Election Officer. The learned Writ Court found that the plaint was containing only vague grounds. There was no basis for a direction for re-counting hence, the order of the Election Tribunal for a re-count of votes was set-aside. Both these cases were thus decided by this Court in a different facts situation.

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 prima-facie 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 last but equally contested issue is with regard to the declaration of the Election Tribunal that the certificate in favour of the returned candidate is void. It appears that the learned Election Tribunal has clearly erred at this stage, inasmuch as, in the opening line of the same paragraph wherein the Tribunal has declared that the result of the petitioner is null and void, held that

"thus, from the discussions made above it is clear that the petitioner is not entitled to the relief of setting aside the election of returned candidate....."

In course of argument even Mr. P. N. Sahi, learned Senior Counsel representing the private respondent and the State while arguing on law accepted the legal position to the extent that the Election Tribunal while directing for recounting of votes could not have simultaneously declared the election of the returned candidate null and void. In terms of Sections 139 and 140 of the Act of 2006 it is only the prescribed authority i.e. the Election Tribunal who is competent to declare the result of the returned candidate null and void. Therefore, such power could not have been conferred upon the District Magistrate, Patna which has been done in the present case by the learned Election Tribunal.

Apparently, the direction of the learned Tribunal holding that the election of the returned candidate is null and void and then after recounting of votes by the District Magistrate, Patna -cum-District Election Officer, the District Magistrate-Election Officer shall declare the final result and shall issue the certificate accordingly cannot sustain. Thus, while saving the order of the learned Election Tribunal for recounting of votes by the District Magistrate-cum-Election Officer, this Court sets aside the part of the impugned judgment by which the learned Election Tribunal declared the certificate of the returned candidate null and void and directed the District Magistrate, Patna to declare the result after recounting and to issue a certificate accordingly in favour of the returned candidate.

This Court has been informed that during the pendency of the writ application the counting of votes have taken place as per direction of the learned Election Tribunal, subject to the interim order of this Court dated 19.12.2018 which reads

as under:

"In the meantime, even if, recounting, which is in process, is completed, the concerned authority shall not declare the result."

At this stage, this Court would take note of paragraph 28 of the judgment of the Hon'ble Apex Court in the case of T.A. Ahammed Kabeer v. A.A.Azeez and others reported in AIR 2003 Supreme Court 2271 which reads 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 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."

The result is kept in a sealed envelope which has been kept in possession of the Registrar General of this Court. Since this Court has set aside the part of the impugned judgment, let the matter be remitted to the court of learned Civil Judge (Junior Division) -cum-Election Tribunal, Danapur who will now proceed to dispose of the Election Case No. 8 of 2016 in accordance with law. Let the sealed envelope be returned to learned counsel for the State Election Commission who will produce the same before the learned Election Tribunal, Danapur on 14th March, 2019 for further action.

For convenience of the parties and early disposal of the case, this Court directs the Election Tribunal, Danapur to take up the matter on 14th of March, 2019 and dispose it off within one month from the date of receipt/production of a copy of this judgment. The parties shall also co-operate in early disposal of the matter.

This writ application is allowed in part, subject to the observations and directions made hereinabove. All the interlocutory applications are also disposed of accordingly.