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**(2014) 03 GAU CK 0007**  
**In the Gauhati High Court**  
**Case No : W.P. (C) No. 1495 of 2014**

Md. Fazal Ahmed

APPELLANT

Vs

Md. Nozmul Islam and Others

RESPONDENT

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**Date of Decision :** 18-03-2014

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** (2014) 03 GAU CK 0007

**Hon'ble Judges :** Biplab Kumar Sharma, J

**Bench :** Single Bench

**Advocate :** M.H. Rajborbhuiya, Advocate and Mr. B. Chakraborty, Advocate for the Appellant; B.J. Ghosh, G.A., Assam, Mr. S.K. Talukdar, Advocate and Mr. J.M.A. Choudhury, Advocate for the Respondent

**Final Decision :** Dismissed

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## Judgement

B.K. Sharma, J.—Heard Mr. M.H. Rajborbhuiya, learned counsel along with Mr. B. Chakraborty, learned counsel for the petitioner. Also heard Mr. S.K. Talukdar, learned counsel representing the respondent No. 1. I have also heard Mr. B.J. Ghosh, learned State Counsel appearing for the respondent No. 2. This writ petition is directed against the order dated 03/03/2014 passed by the learned District Judge, Karimganj, acting as the Election Tribunal in Misc. (Election) Case No. 26/2013. By the said order, accepting the prayer of the election petitioner i.e. the respondent No. 1, recounting of votes/ballots which is said to be fixed on day-after-tomorrow (20/03/2014). The matter pertains to election for the post of GP President, namely, No. 84 Malua, Srigouri G.P., for which election was held on 12/02/2013 and the results were declared on 15/02/2013. As against total 1212 votes secured by the petitioner, his nearest rival i.e. the respondent No. 1 secured 1210 votes. Thus, there is a difference of only 2 votes.

2. Being dissatisfied with the election results, the petitioner preferred the election petition which has been registered and numbered as Misc. (Election) Case No. 26/2012. In the election petition, the petitioner has alleged

discrepancies in counting of votes but for which, according to him he would have won the election. In paragraph 3 of the election petition, the petitioner had stated about the alleged malpractices in counting of votes.

3. The respondent No. 2 in responding to the election petition has also submitted written objection denying the pleas raised in the election petition. It is on record that while the election petitioner examined 2 witnesses as PW-1 and PW-2, the respondent No. 1 i.e. the winning candidate examined altogether 6 witnesses as DW-1 to DW-6.

4. On the basis of the evidence on record, the learned District Judge, Karimganj having passed the impugned order dated 03/03/2014 ordering for recounting of ballots, the petitioner has approached this Court by filing the instant writ petition.

5. Learned counsel appearing for the writ petitioner has made available the entire evidence on record. He has also placed reliance on 3 decisions, two of which are of this Court. They are judgment and order dated 12/12/2013 passed in WP(C) No. 4825/2013 (Smti. Jahanara Begum v. Smti. Layla Begum and 3 others); the decision reported in Rekha Rani Bharalua Vs. Kabita Gogoi and Others, and the decision of the Apex Court reported in P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen and Others, .

6. Learned counsel for the petitioner by placing reliance on the aforesaid decisions has emphasized the need to observe restraint in ordering recounting of ballots. According to him the secrecy of ballot is required to be maintained and no order should be passed mechanically towards recounting of votes. In the aforesaid decisions, it has been held that the justification for an order of recounting of votes should be provided by the materials placed by an election petitioner at the threshold before an order for recounting is actually made. In Ram Sewak Yadav Vs. Hussain Kamil Kidwai and Others, , the Apex Court has set out the circumstances when an order for inspection of ballot papers can be ordered in the following terms:--

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.

7. In the instant case, on perusal of the election petition, what is found is that there is specific allegation of malpractices in counting of votes. For a ready reference, paragraphs 3, 4 and 5 of the election petition are reproduced below:--

3. That at the time of counting of ballots, the petitioner and his election agent on duty at the counting tables detected that the officials deputed by the Deputy Commissioner, was doing serious illegalities and irregularities in counting the votes of the petitioner. Those officials being influenced by the principal O.P. No. 1 were committing malpractices in making the bundles of 25 of the polled ballots - and in receiving the illegal and doubtful votes in favour of the principal O.P. No. 1 and also in rejecting the valid votes polled in favour of the petitioner. While making bundles these officials have kept more than 25 ballots such as 26 to 30 ballots of the petitioner in one bundle of the petitioner and made the bundles of the principal O.P. No. 1 with less than 25 ballots. In some of the bundles of the petitioner the top and the bottom ballots were placed with the ballot of the principal O.P. No. 1 and counted it as his ballots. Thus those officials by exercising illegal power, intentionally were reducing the number of votes polled in favour of the petitioner. The petitioner himself, his counting agents engaged in the different tables were continually objecting against this and demanded to examine and recount the bundles but none paid any heed. Rather they were threatened by those officials and police personnel on duty with dire consequence if they raise this objection.

After the counting is over, the counting officials declared that the petitioner has secured 1210 votes and the principal O.P. No. 1 has secured 1212 votes i.e. 2 votes more. The petitioner immediately submitted an application to the Returning Officer, the Deputy Commissioner, Karimganj explaining the ground of his objection against the counting and prayed for recounting. The Deputy Commissioner although received the application but did not take any step. Ultimately the counting supervisor declared the principal O.P. No. 1 elected to the post of the President of 84 No. Malua-Srigouri Gaon Panchayat.

4. The petitioner begs to state that he has won the election. Actually he has secured more than 1300 valid votes and the principal O.P. No. 1 has secured less than 1212 votes. Because of the irregularities committed by the counting officials, they failed to give account of 158 numbers of ballot papers. In the election of the President, the Officials has given the account of total votes polled at 6028. While in the election of the A.P. member, the total votes polled is shown at 6386. The same voter has casted two votes simultaneously. That apart, the votes of the petitioner marked with thumb impression has been illegally rejected.

5. That the above mentioned illegalities and the irregularities have materially affected the election of the principal O.P. No. 1 and his election is void and liable

to be set aside and cancelled and the petitioner is entitled to be declared as has been elected. The illegalities committed by the principal O.P. No. 1 & 2 constitutes the cause of action for filing of this case.

8. In the evidence adduced by the PW-1 and PW-2 specifically stated about the malpractices committed during the counting of ballots. PW-1 in his evidence stated thus:--

In the counting hall since beginning of the counting of ballots, I myself and my aforesaid agents detected that the officials entrusted for counting of ballots are involved in malpractices who were doing illegalities and irregularities in sorting of polled ballots and in making of the bundles of 25 number of ballots. These officials intentionally rejected a good number of my valid votes and kept these votes aside the bundles. Conversely a good number of ballots of other contesting candidates were taken in the bundles of the O.P. No. 1. Not only this those officials made my bundles with 26 to 30 numbers of ballots showing it to be bundles containing 25 number of ballots and they also made bundles for the O.P. No. 1 with less than 25 ballots just to increase the number of bundles in favour of the O.P. No. 1. In some bundles votes of mine and other candidates were taken in the top and bottom with the votes/ballots of the O.P. No. 1 showing the same to be his bundles.

All these illegalities were done by the officials being in active collusion with the O.P. No. 1 with malafide intention to show him elected.

When these malpractices came to our notice, I/my election agent and other agents too raised objection but none paid any heed to it. Rather the Police personnel threatened not to make any noise. At the end of the counting, those officials declared that I had secured 1210 votes and the O.P. No. 1 secured 1212 votes. I was dissatisfied with the said result and immediately after that I filed a petition to the D.C., Karimganj and requested him for holding re-counting. But ultimately the D.C. Karimganj declared the O.P. No. 1 as has been elected.

Ext-1 is the copy of the petition dated 15/02/2013 submitted to the D.C. for recounting. Ext. 1(1) is my signature.

In fact I received more than 1300 votes and I was elected in the said election but to show me having been defeated, my votes were illegally decreased and the number of votes for the O.P. No. 1 was illegally increased than the actual votes polled in his favour. Because of the malpractices adopted by those officials, they failed to give account of 158 numbers of votes and ballot papers. In the result sheet of my election total votes polled was shown 6028 while in the result sheet of A.P. member, total votes polled was shown at 6386. The same voters had cast votes for both the post at a time. So, I am confirmed that these 158 numbers of ballots were not counted and might have been taken out of counting.

9. The PW-2 also in his statement stated about the malpractices committed during the counting of ballots. Both the witnesses were thoroughly cross

examined by the petitioner. Referring to those cross examination part, the learned counsel for the petitioner submits that there being contradictions in the veracity of the statements made by the election petitioner, the learned Tribunal ought not to have ordered for recounting of votes. He has also referred to the testimony of the DWs.

10. I have very carefully considered the cross examination part of the PWs and also the evidence adduced by the DWs. On perusal of the said evidence I do not find anything leading to any contradictions in respect of the specific case of the election petitioner i.e. the respondent No. 1. In this context, the learned Election Tribunal has made the following significant observation:--

It reveals that no reason for such difference of votes could be brought by the Ops in their evidence. Rather the evidence of anomalies in the counting supported by above substantial differences of polled votes strongly establishes that there is a prima-facie case for going to recounting. Evidence as disclosed both in the cross examination and examination in chief of the PWs also clearly shows that in spite of repeated objections and information of grievances regarding the anomalies in the counting no step was taken. It so appears as the PW 1 in his cross examination asserted that at the initial stage of the anomaly he did not file any written complaint but at the end of the counting he submitted written complaint before the ARO but the ARO did not receive the same asking to submit the same to RO who received the complaint but did not issue any receipt. The piece of evidence goes to show that the petitioner from the initial stage of the counting had grievances about the anomaly. So there is cause of action arose on the date of the counting itself for filing the case.

As regards procedural aspect of this case it is submitted for the petitioners that all the cited decisions of the OP side are not relevant in as much, most of the same relates to the Assembly or MP election. Further it is submitted that Panchayat Act is a comprehensive one and all the procedures are categorically mentioned in the rules of the Act and therefore all procedures as required to be followed in the aspect of Peoples Representation Act need not be followed. I find sufficient force upon the contention.

From the above and consideration of the evidence in its entirety it is arrived that there is a strong prima facie case having cause of action. Therefore justice demands that an appropriate order shall be passed for recounting of ballots. So Deputy Commissioner, Karimganj is asked to send all the ballots of the concerned G.P. to enable early recounting of the ballots.

11. As noted above, the decisions on which the learned counsel for the petitioner has placed reliance are to persuade to take a view that the recounting of votes as has been ordered by the learned election Tribunal was not warranted as the election petitioner i.e. the respondent No. 1 failed to disclose any prima-facie case and materials in support of the same. Needless to say that the ratio of a decision will have to be understood on the facts-situation of the case (See

Ambica Quarry Works Vs. State of Gujarat and Others, ).

12. The learned Election Tribunal having arrived at the prima-facie satisfaction on the basis of the evidence on record to order for recounting of votes, this Court exercising writ jurisdiction under Article 226 of the Constitution of India, cannot sit on appeal over the said findings arrived at appreciating the evidence by the learned Election Tribunal. There is nothing to show that the findings arrived at by the learned Tribunal is based on no evidence or perverse finding. Under similar circumstances, this Court in the order dated 10/02/2014 passed in WP(C) No. 656/2014 (Bichitra Das v. Commissioner, Assam State Election Commission of Panchayat Election) and judgment and order dated 18/02/2014 (Ajoy Sarkar v. State of Assam and others) has already upheld the orders for recounting of votes, one of which was carried on appeal and as submitted, the same after argument has been withdrawn. For all the aforesaid reasons, I do not find any merit in the writ petition and accordingly it is dismissed, without however, any order as to costs.