

(2006) 09 MP CK 0016

In the Madhya Pradesh High Court

Case No : Writ Petitions No. 7633, 9419 of 2005 and 3422 of 2006

Rafik Khan

APPELLANT

Vs

Sub-Divisional Officer-Cum-Prescribed Authority and Others

RESPONDENT

Date of Decision : 04-09-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 15
Conduct of Elections Rules, 1961 — Rule 53, 55, 56, 57, 60
Representation of the People Act, 1951 — Section 100, 100(1), 117, 118, 122

Citation : (2007) 3 JLJ 244

Hon'ble Judges : K.K. Lahoti, J

Bench : Single Bench

Advocate : Umesh Trivedi, K.L. Panday and Awadhesh Gupta, for the Appellant;
Sanjay Sharma, Ravindra Bisen, Rahul Jain and Sunita Verma, for the Respondent

Final Decision : Allowed

Judgement

K.K. Lahoti, J.—This batch of Petitions is decided by this order as the question involved in all the cases is common. All the Petitions are being filed on the ground that in the election Petition filed against the returned candidate, whether a recounting may be directed without recording evidence and satisfaction of the Election Tribunal that recounting is justified. Or where the recounting has been held in compliance of the order passed by the Tribunal in the aforesaid circumstances, and the result of election has changed, whether the order which has been passed without recording evidence and satisfaction of the Tribunal may be interfered in writ jurisdiction.

2. In WP No. 7663/2005 (Rafik Khan v. Sub-Divisional Officer, Waraseoni and Ors.), Petitioner Rafik Khan has challenged order dated 30.7.2005 by which the Election Tribunal directed recounting. The Petitioner was proceeded ex parte as he has failed to appear before the Election Tribunal after receiving the notice. Thereafter, the Election Tribunal by order dated 19.7.2005 after proceeding ex parte against the Petitioner considered the pleadings, record and found that

recounting appears to be necessary and directed recounting. The recounting was held on 25.7.2005, the result of election changed and the Petitioner who was a returned candidate, his election was declared as void and Respondent No. 2 Jameel Ahmad declared as the returned candidate by a margin of 3 votes for the office of Panch of Ward No. 18, Gram Panchayat Pandharwani.

3. In WP No. 3422/2006 (Sevan Shah v. State of M.P. and Ors.) Petitioner Sevan Shah has challenged the order dated 22.2.2006 of Election Tribunal-cum-Sub-Divisional Officer, Amarwada in Election Petition No. 6-A-89(21) 2004-05. In this case the Election Tribunal after receiving the reply filed by the returned candidate considered the matter on the basis of pleading and documents and directed the returning officer to remain present alongwith record of election. Thereafter recounting was held and in the recounting, Petitioner Sevan Shah who was a returned candidate, his election was set aside and Respondent Ravikar Shah was declared as a returned candidate with a margin of 5 votes.

4. In WP No. 9419/2005 (Brijlal v. Shri Man Singh and Ors.), Petitioner Brijlal has challenged order dated 22.8.2005 by the Election Tribunal-cum-Sub-Divisional Officer, Naihar, District Balaghat Annexure P-4, by which the Election Tribunal after serving notice of the election Petition to Respondents sent for the record of the election. The returned candidate filed the reply. The Election Tribunal considered the reply of Petitioner and other Respondents and on the basis of pleadings and documents filed by the parties directed recounting of votes. In compliance of order passed by the Election Tribunal the recounting was done and the Petitioner Brijlal who was a returned candidate, his election was set aside and Respondent Man Singh was declared as a returned candidate with a margin of 12 votes. In the recounting the result of election was changed.

In all the cases no evidence was recorded by the Election Tribunal and the case was decided on the basis of pleading and documentary evidence produced by the parties.

5. The Petitioners have challenged the order passed by the Election Tribunal on the ground that the Tribunal without considering the pleading, recording the evidence directed recounting, which order is not sustainable under the law. It is submitted that the legal position has been settled by the apex Court that without recording satisfaction by the Election Tribunal that too after considering the pleading, the evidence and material on record, the recounting shall not be directed. On the aforesaid grounds the Petitioners challenged the impugned order passed by the Election Tribunal.

Per contra, Learned Counsel for Respondents/election Petitioners supported the order passed by the Election Tribunal on the ground that infact there was serious illegality and irregularity in the counting process and the Election Tribunal considering the allegations made in the Petition and material produced before it has rightly directed for recounting. After passing of the order of recounting in the matter, recounting has been held, in which the result of election has substantially

changed. The result of recounting reflects that infact there was serious illegality in the counting, which has been corrected by the Election Tribunal by passing the impugned order. It is submitted that there is no jurisdictional error in the impugned order warranting interference of this Court. Even if there is some procedural irregularity, then it cannot be looked into after the result of recounting has come on record.

6. The parties in support of their contention have placed reliance to the following judgments of apex Court:

1. Ram Sewak Yadav v. Hussain Kamil Kidwai and Ors. 1964 SC 1249;
2. H.D. Revanna Vs. G. Puttaswamy and Others, ;
3. Mahendra Pal Vs. Ram Dass Malanger and Others, ;
4. Vadivelu Vs. Sundaram and Others, ;
5. P.H. Pujar Vs. Kanthi Rajashekhar Kidiyappa and Others, ;
6. Sohan Lal Vs. Babu Gandhi and Others, ;
7. T.A. Ahammed Kabeer Vs. A.A. Azeez and Others, ;
8. Jibontara Ghatowar Vs. Sarbananda Sonowal and Others, ;
9. Hohila Tiwari v. State of Bihar and Ors. 2005 12 SCC 342;

Following judgments of this Court:

1. Gayatri Bai (Smt.) v. Alka Sharma 1997 11 MPWN 98;
2. Chandrawati (Smt.) v. Smt. Vijay Rajkumari and Ors. 2003(2) JLJ 232;
3. Mubarak Master Vs. Hansraj Tanwar and Others, ;

7. Before proceeding further it will be appropriate to refer certain provisions of M.P. Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as "Act" for short), and M.P. Panchayat Nirvachan Niyam, 1995 (hereinafter referred to as "Nirvachan Niyam" for short). The relevant section of "Act" is Section 122, which is reproduced as under:

122. Election Petition - (1) An election under this Act shall be called in question only by a Petition presented in the prescribed manner :

(i) in case of Gram Panchayat or Gram Sabha to the Sub-Divisional Officer (Revenue);

(ii) in case of Janpad Panchayat to the Collector; and

(iii) in case of Zila Panchayat to the Divisional Commissioner and not otherwise.

(2) No such Petition shall be admitted unless it is presented within thirty days from the date on which the election in question was notified.

(3) Such Petition shall be inquired into or disposed of according to such procedures as may be prescribed.

The relevant rules under "Nirvachan Niyam" are as under:

77. Counting of votes - (1) Every ballot paper which is not rejected under Rule 76 shall be counted:

Provided that no cover containing tender ballot papers shall be opened and no such ballot paper shall be counted.

(2) After the counting of votes in respect of a polling station has been completed, the Returning Officer or such other officer authorised by him, shall make the entries in result sheet in Form 16 for Panchas and in Part one of the result sheet in Form 17,18 and 19 for Sarpanch, Members of Janpad Panchayat and Zila Panchayat respectively and announce the total number of votes polled by each candidate.

(3) All valid ballot papers shall be bundled together and kept along with the bundle of rejected ballot papers in a separate packet which shall be sealed and on which shall be recorded the following particulars, namely :

(a) the number of the ward and name of Gram Panchayat in case of election of Panch, the name of Gram Panchayat in case of election of Sarpanch, the number of constituency of Janpad Panchayat or Zila Panchayat as the case may be, in case of election of Member of Janpad Panchayat or Zila Panchayat;

(b) the number and name of the polling station where the ballot papers have been used; and

(c) the date of counting.

78. Counting to be continuous - The Returning Officer or such other officer authorised by him, shall as far as practicable, proceed continuously with the counting of votes and shall, during any intervals when the counting has to be suspended, keep the ballot papers, packets and other papers relating to the election sealed with his own seal and the seals of such candidates or their election or counting agents as may be desirous of affixing their seals and shall cause adequate precautions to be taken for their safe custody during such intervals.

80. Recount of votes - (1) After an announcement has been made by the Returning Officer or such other officer authorised by him, of the total number of votes polled by each candidate under Sub-rule (2) of Rule 77, a candidate or, in his absence, his election agent or his counting agent may apply in writing to the Returning Officer or such officer authorised by him, for a recount of all or any of the votes already counted, stating the grounds on which he demands such recount.

(2) On such an application being made the Returning Officer or such other officer

authorised by him shall decide the matter and may allow the application in whole or in part or may reject it in toto if it appears to him to be frivolous or unreasonable.

(3) Every decision of the Returning Officer or such other officer authorised by him, under Sub-rule (2) shall be in writing and contain the reasons therefor.

(4) If the Returning Officer or such other officer authorised by him, decides under Sub-rule (2) to allow an application either in whole or in part, he shall :

(a) count the ballot papers again in accordance with his decision;

(b) amend the result sheet to the extent necessary after such recount; and

(c) announce the amendment so made by him.

(5) After the total number of votes polled by each candidate has been announced under Sub-rule (2) of Rule 77 or Sub-rule (4) the Returning Officer or such other officer authorised by him shall complete and sign the result sheet and no application for a recount shall be entered thereafter:

Provided that no step under this Sub-rule shall be taken on the completion of the counting until the candidates and election agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by Sub-rule (1).

(6) The counted ballot papers shall be bundled and kept in the manner mentioned in Sub-rule (3) of Rule 77.

(7) Result sheets in Form 16, 17, 18 and 19 for Panch, Sarpanch, Member of Janpad Panchayat and Member of Zila Panchayat respectively, prepared by such other officers as are authorised by the Returning Officer, shall be submitted by them, in separate envelopes to the Returning Officer for compilation and tabulation of votes polled by each candidate.

(8) The Returning Officer on receipt of result sheets under Sub-rule (7) shall enter or cause to be entered the total number of votes polled by each candidate contesting for a seat of Sarpanch, Member of Janpad Panchayat or Member of Zila Panchayat at each polling station of the concerned constituency in subsequent part of parts of form 17, 18 and 19 respectively and complete and sign the result sheet.

8. Now the law laid down by the apex Court is to be referred. In Ram Sewak Yadav (supra), the apex Court held that the Election Tribunal is having power for the production of ballot papers and their inspection, but the aforesaid power is to be used on certain condition to be fulfilled. The apex Court held thus :

An election Petition must contain a concise statement of the material facts on which the Petitioner relies in support of his case. If such material facts are set out the Tribunal has undoubtedly the power to direct discovery and inspection of documents with which a civil Court is invested under the CPC when trying a suit.

But the power which the civil Court may exercise in the trial of suits is confined to the narrow limits of Order 11. Code of Civil Procedure. Inspection of documents under Order 11 CPC may be ordered under Rule 15, of documents which are referred to in the pleadings or particulars as disclosed in the affidavit of documents of the other party and under Rule 18(2) of other documents in the possession of power of the other party. The Returning Officer is not a party to an election Petition and an order for production of the ballot papers cannot be made under Order 11 Code of Civil Procedure. But the Election Tribunal is not on that account without authority in respect of the ballot papers. In a proper case where the interests of justice demand it, the Tribunal may call upon the Returning Officer to produce the ballot papers and may permit inspection by the parties before it of the ballot papers; that power is clearly implicit in Sections 100(1)(d) (iii), 101, 102 and Rule 93 of the Conduct of Election Rules, 1961. This power to order inspection of the ballot papers which is apart from Order 11 CPC may be exercised, subject to the statutory restrictions about the secrecy of the ballot paper prescribed by Sections 94 and 128(1).

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 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.

It must be remembered that the rules framed under the Representation of the People Act, 1951, set up an elaborate machinery relating to the stage of counting of votes by the Returning Officer, and provide ample opportunity to the candidate who has contested the election or his agents to remain present and to keep an eye on any improper action which may be taken by the Returning Officer. Rule 53 provides for the admission of only certain classes of persons to the place fixed for counting and amongst such persons are expressly included candidates, their election agents and counting agents, who may watch the counting subject to the directions which the Returning Officer may give. Rule 55 deals with the procedure for scrutiny and opening of ballot boxes. The Returning Officer has to

satisfy himself that "none of the ballot boxes has in fact been tampered with" and before any ballot box is opened at the counting table, the counting agents present at that table are allowed to inspect the seal affixed thereon and to satisfy themselves that it is intact. If the Returning Officer is satisfied that any ballot box has in fact been tampered with, he is prohibited from counting the ballot papers contained in that box and he has to follow the procedure prescribed in that behalf in S.58, Clause (1) of R.56 provides for the scrutiny and rejection of ballot papers. Clause (2) sets out detailed provisions relating to cases in which the Returning Officer shall reject a ballot paper. By Clause (3) it is provided that before rejecting any ballot paper under Sub-rule 2, the Returning Officer shall allow each counting agent present a reasonable opportunity to inspect such ballot papers. The Returning Officer has then to record on every ballot paper which he rejects the grounds of rejection. All the rejected ballot papers are required to be put in one bundle, Rule 57 deals with the counting of vote. Each ballot paper which is not rejected is counted as one valid vote. The Returning Officer has to make the entries in a result sheet in Form 20 after counting of the ballot papers contained in all the ballot boxes used at the polling stations. Clauses 3 of Rules 57 enacts an elaborate set of rules about the entries to be made in respect of the counting and scrutiny of the ballot papers. By Rule 60 counting has to be continuous, and Rule 63(1) provide that after the completion of the counting, the Returning Officer shall record in the result sheet in Form 20 the total number of votes polled by each candidate and announce the result. By Clause (2) of Rule 63 it is provided that after such announcement is made, a candidate or his election agent may apply in writing to the Returning Officer for a recount of all or any of the ballot papers already counted stating the grounds on which he demands such recount. The Returning Officer must decide the application and record his reasons in support of his decision and he may allow the application in whole or in part or may reject it if it appears to him to be frivolous or unreasonable. After the total number of vote polled by each candidate has been announced, the Returning Officer must complete and sign the result sheet in Form 20 and after such form is completed no application for recount may be entertained. Under Rule 64 the declaration of the result of the election is made by declaring elected a candidate who has secured the largest number of valid votes, and the Returning Officer is required to complete and certify the return of election.

The apex Court held that recounting may be directed considering the nature of allegations made in the election Petition. The Tribunal would be justified in refusing an order where inspection is claimed with a view to fish out materials in support of a vague plea in the case set out in the Petition. There must be a concise statement of material facts on which the election Petitioner relies and to make out a case for recount, but if the material facts are not stated in the election Petition, the election Petitioner cannot be permitted to make out a case by fishing out the case by inspection of ballot paper.

In H.D. Revanna (supra), the apex Court considering the case where the

recounting was directed by the Returning Officer, held thus:

As regards the second contention of Learned Counsel for the Appellant, the question whether the Returning Officer was justified in ordering recounting in the circumstances of the case and whether such recounting fell within the scope of Rule 63 has to be decided at the trial. No opinion can be expressed at this stage on that question before the parties adduce evidence in that regard.

There is no merit in the contention that the election Petition does not set out any illegality committed at the time of recounting. The various averments in the Petition are to the effect that the order directing recount was itself an illegality vitiating the result of the election and also that in the course of such recounting, several illegalities were committed whereby the result of the election was materially effected. It is specifically averred in the Petition that a large number of ballot papers which were invalid and were liable to be rejected were counted as valid votes in favour of the Appellant. The attempt of the Learned Counsel for the Appellant is to divide the election Petition into two separate compartments, one dealing with recounting and the other with corrupt practices. It is not possible to dissect the election Petition in that manner. The allegations regarding invalid votes no doubt find a place in paragraph 3 but they have to be read together with averments relating to recounting.

In *Mahendra Pal* (supra), the apex Court considering the scope of recounting of votes in the election Petition held, that the Petitioner should specifically aver the total number of votes issued to the voters, total number of votes polled and counted, particulars of irregularity in counting votes also be spelt out, only then recount of ballot papers can be ordered. The apex Court held thus:

In the present case, it is not disputed, as indeed it cannot be, 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 paper 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.

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.

Our perusal of various paragraphs of the election Petition and particularly of the averments contained in paragraphs 10 to 13, 16 and 20, go to show that sufficient material facts, to provide a cause of action, for trial of the election Petition have been provided in the election Petition. In various sub-para of paragraph 11 of the election Petition, particulars of irregularities have also been spelt out. The non-mention of serial numbers of the improperly counted ballot papers, keeping in view the averment made in paragraph 16 of the Petition, could not be a ground to non-suit the election Petitioner at the threshold, without trial more particularly because of the discrepancy between Ex.P-2 and Ex.P-3. Pleadings have to be read as a whole to ascertain their true import. It is the substance and not merely the form, which is required to be looked into for construing the pleadings. The intention of the party needs to be gathered from the tenor and terms of his pleadings taken as a whole. These well settled principles appear to have been lost sight of by the learned designated Judge. Construed reasonably, the averments in the election Petition, in our opinion, do make out a case for the Petition proceeding to trial. Whether or not a case is eventually made out to justify recount/inspection would depend upon the evidence led by the parties in support of their pleadings at the trial.

In *Vadivelu* (supra), the apex Court reiterated the law and held that recounting cannot be ordered on the basis of general and bald allegations. An election Petition should contain details regarding illegality or irregularity alleged to have been committed. The election Petitioner who is seeking recounting should allege and prove that there was improper acceptance of invalid votes or improper rejection of valid votes. The Tribunal can order recount only after its satisfaction about the truthfulness of the allegations. The apex Court, held thus:

The result of the analysis of the above cases would show that this Court has consistently taken the view that recount of votes could be ordered very rarely and on specific allegation in the pleadings in the election Petition that illegality or irregularity was committed while counting. The Petitioner who seeks recount should allege and prove that there was improper acceptance of invalid votes or improper rejection of valid votes. If only the Court is satisfied about the truthfulness of the above allegation, it can order recount of votes. Secrecy of ballot has always been considered sacrosanct in a democratic process of election and it cannot be disturbed lightly by bare allegations of illegality or irregularity in counting. But if it is proved that purity of elections has been tarnished and it has materially affected the result of the election whereby the defeated candidate is seriously prejudiced, the Court can resort to recount of votes under such circumstances to do justice between the parties.

From the above pleadings, it is evident that the Appellant has not set forth material facts or particulars required for recount 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 PW1, could not supplement anything by way of evidence.

The Appellant-election Petitioner in this case has not stated as to when did he file the application for recount. 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 loudspeaker that the 1st Respondent was elected and he denied the allegation that the application for recount was made at 11:45 p.m. The 1st Respondent was examined as RW1. 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 recount after the result of the election was declared. Therefore, the application for recount was not filed in accordance with Rule 66 of the Tamil Nadu Panchayats (Elections) Rules, 1995.

In P.H. Pujar (supra), the apex Court reiterated the law that the reecount of votes could be ordered very rarely and on specific allegations in the pleading in the election Petition that illegality or irregularity was committed during counting. The election Petitioner seeking recount should allege and prove that there was improper acceptance of votes or improper rejection of valid votes. It should not be casually ordered on mere ipse dixit of the election Petitioner and merely because margin of defeat of the Petitioner is meagre. The apex Court held thus:

In Vadivelu Vs. Sundaram and Others, , this Court speaking through one of us, Balakrishnan, J. considered the question whether recount was justified or not, the circumstances under which it could be ordered, on a survey on some of the earlier decisions held that the recount of votes could be ordered very rarely and on specific allegations in the pleading in the election Petition that illegality or irregularity was committed while counting. The Petitioner seeking recount should allege and prove that there was improper acceptance of votes or improper rejection of valid votes. If only the Court is satisfied about the truthfulness of the said allegations it can order recount of votes. Secrecy of ballot has always been considered sacrosanct in a democratic process of election and it cannot be disturbed lightly by bare allegations of illegality and irregularity in counting. But if it is proved that purity of elections has been tarnished and it has materially

affected the result of the election whereby the defeated candidate is seriously prejudiced, the Court can report to recount of votes under such circumstances to do justice between the parties. In T.H. Musthaffa Vs. M.P. Varghese and Others, , upholding the view taken by the High Court that the pleadings are insufficient to order recount, it was noticed that the pleadings raised in the case did not refer to either Rule 39 or Rule 56 of the Rules much less to the "Pamphlet Showing Illustrative Cases of Valid and Invalid Postal and Ordinary Ballot Papers" issued by the Election Commission of India nor are there any specific allegations found in the case and the allegation made in the course of the Petition that there is wrong acceptance of invalid votes without clarifying as to how many votes were liable to be rejected for using wrong instrument by the voters by expressing their preference, it was said in absence of such plea, the learned Judge could not have granted the relief for recount. It was further said that in this view, the evidence could not be looked at in this regard in absence of appropriate pleadings. The Court said "unless the Appellant had put fourth his case in the pleadings and the Respondents are put on notice, the Respondents cannot make an admission at all and there is no such admission in the course of the pleadings. If the pleadings did not contain the necessary foundation for raising an appropriate issue, the same cannot go to trial. Any amount of evidence in that regard will be futile.

The recount of the votes cannot be ordered in a casual manner. It cannot be ordered only because the margin of defeat is meagre. For seeking recount, proper foundation is to be laid in the pleadings by setting out material facts and later proving it by adducing requisite evidence. The recount cannot be ordered on the ipse dixit of the election Petitioner. It can be ordered in rare cases where specific allegations are made and proved so as to do complete justice between the parties.

In Sohan Lal (supra), the apex Court considering the scope of Rule 80 of Nirvachan Niyam and Provisions of M.P. Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 held that the Returning Officer cannot direct recount of votes or change the result of the election after declaration of result, and only remedy of an aggrieved party is an election Petition u/s 122 of the Act. The Act empowers the Tribunal to direct recount of votes. The apex Court held thus:

Thus under Sub-rule (5) once the result sheet is completed and signed, no application for recount can be entertained.

Rule 81 also provides that after the counting of the votes, the Returning Officer shall prepare a return and declare the candidate who has the largest number of votes to have been elected. Under Rule 83, a certificate is to be granted to the returned candidate who has been declared elected. Under Rule 84 after the certificate has been granted, the election officer or the Returning Officer can only correct clerical or arithmetical mistakes.

Thus, after declaration of results, the Returning Officer has no power either to direct recount or to change the results of the election. Once the result is

declared, the only remedy of an aggrieved party is an election Petition u/s 122.

In the case, as stated above, the Appellant had been orally told that he had won. He only came to know that Respondent No. 1 had been declared elected after the result was declared. At this stage, he could not have approached the Returning Officer for recount. The only remedy, therefore, available to the Appellant was to file an election Petition.

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 u/s 122. In such 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 T.A. Ahammed Kabeer (supra), the apex Court considered the scope of recounting, and also the scope of interference where the Election Tribunal ordered recounting and the result of election was changed and it was found that the election Petitioner has in fact got highest votes in comparison to the candidate who was initially declared as a returned candidate. Considering the question, the apex Court held thus:

The task before an election Judge is ticklish. It is often urged and also held that the success of a winning candidate should not be lightly set aside and the secrecy of ballot must be zealously guarded. On account of a rigid following of these principles the election Courts are inclined to lean in favour of the returned candidates and place the onus of proof on the person challenging the result of election, insisting on strict compliance with the rules of pleadings and excluding such evidence from consideration as is in divergence with the pleadings. However, what has so developed as a rule of practice should not be unduly stretched; for the purity of the election process needs to be preserved unpoluted so as to achieve the predominant goal of democracy that only he should represent the constituency who has been chosen by the majority of the electors. This is the purpose and object of the election law.

Though the inspection of ballot papers is to be allowed sparingly and the Court may refuse the prayer of the defeated candidate for inspection if, in the garb of seeking inspection, he was indulging into a roving enquiry in order to fish out materials to set aside the election, or the allegation made in support of such prayer were vague or too generalized to deserve any cognizance. Nevertheless,

the power to direct inspection of ballot papers is there and ought to be exercised if, based on precise allegations of material facts, also substantiated, a case for permitting inspection is made out as is necessary to determine the issue arising for decision in the case and in the interest of justice. As held by the Constitution Bench in *Ram Sewak Yadav Vs. Hussain Kamil Kidwai and Others*, , an Election Tribunal has undoubtedly the power to direct discovery and inspection of documents within the narrow limits of Order XI of Code of Civil Procedure. Inspection of documents under Rule 15 of Order XI of CPC may be ordered of documents which are referred to in the pleadings or particulars as disclosed in the affidavit of documents of the other party, and under Rule 18(2) of other documents in the possession or power of the other party. The Returning Officer is not a party to an election Petition and an order for production of the ballot papers cannot be made under Order XI of Code of Civil Procedure. But the Election Tribunal is not on that account without authority in respect of the ballot papers. In a proper case where the interest of justice demand it, the Tribunal may call upon the Returning Officer to produce the ballot papers and may permit inspection by the parties before it of the ballot paper which power is clearly implicit in Sections 100(1)(d)(iii), 101, 102 and Rule 93 of the Conduct of Election Rules, 1961. This power to order inspection of the ballot papers which is apart from Order XI CPC may be exercised, subject to the statutory restriction about the secrecy of the ballot paper prescribed by Sections 94 and 128(1). However, the Constitution Bench has cautioned, by the mere production of the sealed boxes of ballot papers before the Election Tribunal pursuant to its order the ballot papers do not become part of the record and they are not liable to be inspected unless the Tribunal is satisfied that such inspection is in the circumstances of the case necessary in the interest of justice.

It is true that a recount is not 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.

So also, once the Court exercises its jurisdiction to enter into the question of improper reception, refusal or rejection of any vote, or the reception of any vote which is void by reference to the election result of the returned candidate u/s 100(1)(d)(iii), as also as to the result of the election of any other candidate by reference to Section 97 of the Act consistently with its (sic.) cannot refuse to give effect to the result of its findings as to the validity or invalidity of the votes for the purpose of finding out true result of recount though the actual finding as to validity or otherwise of the votes by reference to number may be at variance with the pleadings. In short, the pleadings and proof in the matter of recount

have relevance for the purpose of determining the question of jurisdiction to permit or not to permit recount. Once the jurisdiction to order recount is found to have been rightly exercised, thereafter, it is the truth as revealed by the result of recounting that has to be given effect to.

The apex Court summarised the law thus:

We have already stated that rigorous rule propounded by the Constitution Bench in Jabar Singh's case has met with criticism in some of the subsequent decisions of this Court though by Benches of lesser coram and an attempt at seeking reconsideration of the majority opinion in Jabar Singh's case has so far proved to be abortive. The view of the law taken by the Constitution Bench in Jabar Singh's case is binding on us. Analysing the majority opinion in Jabar Singh's case and the view taken in several decisions of this Court, referred to hereinabove, we sum up the law as under:

(1) In an election Petition wherein the limited relief sought for is the declaration that the election of returned candidate is void on the ground u/s 100(1)(d)(iii) of the Act, the scope of enquiry shall remain confined to two questions : (a) finding out any votes having been improperly cast in favour of the returned candidate, and (b) any votes having been improperly refused or rejected in regard to any other candidate. In such a case an enquiry cannot be held into and the election Petition decided on the finding (a) that any votes have been improperly cast in favour of a candidate other than the returned candidate, or (b) any votes were improperly refused or rejected in regard to the returned candidate.

(2) A recrimination by the returned candidate or any other party can be filed u/s 97(1) in a case where in an election Petition an additional declaration is claimed that any candidate other than the returned candidate has been duly elected.

(3) For the purpose of enabling an enquiry that any votes have been improperly cast in favour of any candidate other than the returned candidate or any votes have been improperly refused or rejected in regard to the returned candidate the election Court shall acquire jurisdiction to do so only on the two conditions being satisfied: (i) the election Petition seeks a declaration that any candidate other than returned candidate has been duly elected over and above the declaration that the election of the returned candidate is void; and (ii) the recrimination Petition u/s 97(1) is filed.

(4) A recrimination Petition must satisfy the same requirements as that of an election Petition in the matter of pleadings, signing and verification as an election Petition is required to fulfil within the meaning of Section 83 of the Act and must be accompanied by the security or the further security referred to in Section 117 and 118 of the Act.

(5) The bar on enquiry enacted by Section 97 read with Section 100(1)(d)(iii) of the Act is attracted when the validity of the votes is to be gone into and adjudged or in other words the question of improper reception, refusal or

rejection of any vote or reception of any vote which is void is to be gone into. The bar is not attracted to a case, where it is merely a question of correct counting of the votes without entering into adjudication as to propriety, impropriety or validity of acceptance, rejection or reception of any vote. In other words, where on a recount the election Judge finds the result of recount to be different from the one arrived at by the Returning Officer or when the election Judge finds that there was an error of counting the bar is not attracted because of the Court in a pure and simple counting carried out by it or under its directions is not adjudicating upon any issue as to improper reception, refusal or rejection of any vote or the reception of any vote which is void but is performing mechanical process of counting or recounting by placing the vote at the place where it ought to have been placed. A case of error in counting would fall within the purview of Sub-clause (iv), and not Sub-clause (iii) of Clause (d) of Sub-section (1) of Section 100 of the Act.

Similar question was considered by the apex Court in *Jibontara Ghatowar* (supra), wherein the apex Court held thus:

So also, once the Court exercises its jurisdiction to enter into the question of improper reception, refusal or rejection of any vote, or the reception of any vote which is void by reference to the election result of the returned candidate u/s 100(1)(d)(iii), as also as to the result of the election of any other candidate by reference to Section 97 of the Act and enters into scrutiny of the votes polled, followed by recount, consistently with its findings on the validity or invalidity of the votes, it cannot refuse to give effect to the result of its findings as to the validity or invalidity of the votes for the purpose of finding out the true result of the recount though the actual finding as to the validity or otherwise of the votes by reference to number may be at variance with the pleadings. In short, the pleadings and proof in the matter of recount have relevance for the purpose of determining the question of jurisdiction to permit or not to permit recount. Once the jurisdiction to order recount is found to have been rightly exercised, thereafter it is the truth as revealed by the result of recounting that has to be given effect to.

The law so laid down clinches the issue. On the averments made in the pleadings and on the material made available before the Court in the present case a clear case for directing a recount was made out. Certainly the election Petitioner was not indulging into a roving inquiry or trying to fish out material. The High Court has also not held so. Therefore, the High Court did acquire a jurisdiction to permit a recount. Once a recount was ordered the decision of the case would depend on the result of the recount which shall have to be given effect to.

The judgment of *Hoshila Tiwari* (supra), is based on the rules of Bihar Panchayat Election Rules, 1995, which is a different provision in comparison to the Rule 80 of the M.R Panchayat Nirvachan Niyam, 1995.

This Court in *Gayatribai, Chandrawati and Mubarak Master* (supra), has held that

in the election Petition the recounting of votes cannot be I ordered without pleadings, framing issues and recording evidence. The election Petitioner should disclose illegalities and irregularities in counting of votes in the pleading and this fact should be proved by cogent evidence and in absence of pleading and proof no recounting can be ordered.

9. Now, in the light of aforesaid judgments, present cases may be seen. It is not in dispute that in the aforesaid cases the Election Tribunal issued notice to the other side, received the reply and considering the pleading and documents produced before it directed for recounting. After recounting the result of election has changed, but before directing recounting it was the duty of Election Tribunal to see that the success of a winning candidate should not be lightly set aside and the secrecy of ballot must be zealously guarded. The onus of proof on the person challenging the result of election, shall be on strict compliance with the rules of pleadings and excluding such evidence which is in divergence with the pleadings. The recount should not 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 Tribunal 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 Tribunal. The Tribunal after considering the pleading and evidence, if records a satisfaction that counting was not done in accordance with the Rules or there are serious illegalities or irregularities in the counting, on being satisfied it may direct for recounting. Once the recount has been allowed by the Tribunal after recording aforesaid satisfaction, the result of recount, if changes, then the recount has to be given effect to. The only question is to be seen that recounting has been permitted within the well settled parameters of exercising jurisdiction. In all the aforesaid cases the Tribunal without recording evidence and its satisfaction within the parameters as held by the apex Court and this Court in the aforesaid cases directed recount. Though it is true that after the recount the result of election has changed substantially and election Petitioner has been found to be a candidate who got the verdict of people, but the jurisdictional fact is missing. Until and unless firstly the Tribunal records its finding after recording the evidence of election Petitioner and of the Respondent (returned candidate) and thereafter on recording its own independent satisfaction that counting was either illegal or irregular and on being satisfied that recounting is necessary then only the recount ought to have been ordered, but without recording aforesaid finding and satisfaction if recount has been done the aforesaid recounting is not sustainable under law.

10. In the aforesaid circumstances, the order passed by the Election Tribunal directing recount is not sustainable. Accordingly it is quashed. The matter is remanded back to the Tribunal with following directions:

(i) If no written statement has been filed by the returned candidate the Election Tribunal shall extend an opportunity of thirty days from the date of receipt of this order to the returned candidate to file written statement and thereafter proceed

with the case. The Tribunal while receiving the evidence shall also receive all the documents produced by the parties necessary to decide the controversy between the parties and if necessary, shall be within its jurisdiction to send for the record of the election.

(ii) The Election Tribunal on the basis of pleading of parties, shall frame issues and record the evidence of parties.

(iii) Thereafter the Tribunal firstly shall decide the question whether the recounting is necessary and for this the Election Tribunal shall record its satisfaction about the necessity of recounting following the law as settled by the apex Court and this Court in the aforesaid judgments.

(iv) If the Tribunal arrives at a conclusion that recounting is necessary it shall pass an order and thereafter direct recounting to be held after a period of 15 days from the date of the order and the recounting shall be done in the presence of parties willing to remain present during recounting.

(v) The aforesaid period of 15 days may be availed by the aggrieved parties to approach this Court for the redressal of grievance, if any.

(vi) That after the recounting the Election Tribunal shall be free to decide the matter, in accordance with law.

(vii) In all the cases which are decided by this order if, after the change of result, the successful candidate or the election Petitioner has been given charge then, till the decision of election Petition the charge of Panchayat shall remain with the Up-Sarpanch and neither the returned candidate nor the winning candidate shall hold the charge of Panchayat so that the interest of Panchayat and its funds be safeguarded.

With the aforesaid directions these Petitions are allowed and order passed by the Election Tribunal is set aside and the matter is remitted back to the Election Tribunal to decide the matter expeditiously, as far as possible within a period of three months from the date of communication of this order. In the peculiar facts there shall be no order as to costs.