

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Civil Writ Jurisdiction Case No.5501 of 2022**

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Dev Narayan Sahu @ Dev Narayan Sah, Son of Late Ram Vriksh Shah, Resident of Village - Mehsaul, Ward No. 7, P.O. - Mehsaul, P.S. -Runnisaidpur, District – Sitamarhi.

... .. Petitioner/s

Versus

1. The State of Bihar, through the Chief Secretary, Government of Bihar, Patna.
2. The State Election Commission (Panchayat), Sone Bhawan, Bir Chand Patel Path, Patna through the State Election Commissioner.
3. The State Election Commissioner, The State Election Commission (Panchayat), Sone Bhawan, Bir Chand Patel Path, Patna.
4. The Secretary, The State Election Commission (Panchayat), Sone Bhawan, Bir Chand Patel Path, Patna.
5. The District Election Officer (Panchayat), Sitamarhi, District - Sitamarhi.
6. The Returning Officer, Panchayat Election, 2021, Runnisaidpur Block, District - Sitamarhi.
7. Saji Ahmad, Son of Safi Ahmad, Resident of Village and P.O. Mehsaul, P.S. Runnisaidpur, District - Sitamarhi.

... .. Respondent/s

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Acts/Sections/Rules:

- Bihar Panchayat Act, 2006 - Sections 138, 141, 142
- Bihar Panchayat Election Rules, 2006 - Rules 72 , 73, 74, 76 and 79

Cases referred:

- Election Commission of India v. Ashok Kumar, reported in (2000) 8 SCC 216
- Anil Vasudev Salgaonkar v. Naresh Kushali Shigaonkar, (2009) 9 SCC 310
- Nanhoo Mal and others v. Hira Mal and others, AIR 1975 SC 2140
- N.P. Punnuswami v. Returning Officer, Namakkal and others, AIR 1952 SC 64
- Jyoti Basu v. Debi Ghosal, (1982) 1 SCC 691
- Sarvepalli Ramaiah v. District Collector, Chittoor, reported in (2019) 4 SCC 500
- Suresh Prasad Yadav v. Jai Prakash Mishra [(1975) 4 SCC 822]

Writ - filed to declare the election of a respondent as Mukhiya void alleging certain improprieties.

Petitioner has questioned the action of the Returning Officer, as well as the District Election Officer, who without there being any report submitted by the expert team of Bharat Electronic Limited and only on the basis of the recommendation of an engineer has recommended for holding of fresh election at Booth of the concerned village.

Held - There was no evidence before the Munsif that the ballot box had been tempered with and acting on the recommendation of the Engineer without scientific report of malfunctioning of EVM is not substantive and pervasive. (Para 27)

The action of the Collector in observing that the EVM has been either tempered or is non-functional is a mere suspicion and reconsidering for re-poling is in defiance of the direction of the Apex Court and requires interference by this Court in absence of the expert scientific report which was not available before him or provided to the petitioner. The bar of alternative remedy will not come in a way to the petitioner. However, considering the disputed question, the Tribunal is directed to proceed on the basis of the materials, and on the basis of the technical report of Bharat Electronic Limited to decide the dispute in accordance with law. Petitioner is at liberty to file election petition before the Tribunal. (Para 28)

The BEL is directed to submit scientific report before the Tribunal relating to EVM machine which has recorded votes of election. (Para 29)

In case the State Election Commission is not in a position to bring the expert report relating to the EVM machine from the team of engineer of Bharat Electronic Limited, then in that case, the Tribunal must proceed to declare the subsequent election, be not held in accordance with the provision of Zila Panchayat Raj Act, 2006, having not followed the mandate of Article 243(o) of the Constitution of India. (Para 32)

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Resident of Village - Mehsaul, Ward No. 7, P.O. - Mehsaul, P.S. -  
Runnisaidpur, District – Sitamarhi. ... .. Petitioner/s  
Versus

- 1. The State of Bihar, through the Chief Secretary, Government of Bihar, Patna.
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  - 4. The Secretary, The State Election Commission (Panchayat), Sone Bhawan, Bir Chand Patel Path, Patna.
  - 5. The District Election Officer (Panchayat), Sitamarhi, District - Sitamarhi.
  - 6. The Returning Officer, Panchayat Election, 2021, Runnisaidpur Block, District - Sitamarhi.
  - 7. Saji Ahmad, Son of Safi Ahmad, Resident of Village and P.O. Mehsaul, P.S. Runnisaidpur, District - Sitamarhi.
- ... .. Respondent/s

Appearance :  
For the Petitioner/s : Mr. S.B.K. Manglam, Advocate  
Mr.Awnish Kumar, Advocate  
For the State : Mr. Kumar Alok (Sc7)  
For the SEC : Mr. Ravi Ranjan, Advocate

CORAM: HONOURABLE MR. JUSTICE PURNENDU SINGH  
ORAL JUDGMENT  
Date : 29-01-2024

Heard Mr. S.B.K. Manglam, along with Mr. Awnish  
Kumar, learned counsels appearing on behalf of the petitioner;  
Mr. Kumar Alok, learned SC7 for the State and Mr. Ravi



Ranjan, learned counsel for the SEC.

2. Petitioner has filed the writ petition *inter alia* for following relief(s):-

*(I) For issuance of an appropriate writ in the nature of mandamus commanding and directing the respondent authorities to declare the election of the respondent no.7 as the Mukhiya of Gram Panchayat Raj, Gangwara Bujurg under Runnisaidpur Block of Sitamarhi District, void on the ground that for the election of respondent no.7, the respondent nos.5 and 6 had crossed all their limits when they had undertaken a re-poll in Booth No.213 of Gram Panchayat Raj, Gangwara Bujurg after the counting of votes already polled in the said booth on 12.12.2021 by altogether a different Presiding Officers and based upon said re-poll, there was a re-counting and in the said recounting, the respondent no.7 was declared elected though in view of the votes polled in all 13 booths of the said Gram Panchayat, the petitioner was winning the election by a margin of 25 votes.*

*(II) For issuance of an appropriate writ in the nature of mandamus, commanding and directing the respondent nos.1,2 and 3 to deal with respondent nos.5 and 6 with iron hands since they have committed a fraud upon the democracy and the electorates residing in Gram Panchayat Raj, Gangwara Bujurg by holding a re-poll in Booth No.213 of the said Gram Panchayat and declaring the respondent no.7 as a returned candidate from the post of Mukhiya of said Gram Panchayat, otherwise, it will difficult to sustain the democracy and the democratic institution in the State of Bihar.*

*(III) For a declaration that though the*



*State Election Commission has been constituted to ensure the constitution of grass root democracy by holding a free and fair election but it has miserably failed to conduct a free and fair Panchayat Election, 2021 at least in the petitioner's gram Panchayat when it remained a silent spectator even when the fraud committed by the respondent nos.5 and 6 was duly communicated to the State Election Commission by the petitioner.*

*(IV) 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.”*

3. Learned counsel appearing on behalf of the petitioner submitted that the petitioner had been declared as a returned candidate in the poll held on 12.12.2021 for the post of Mukhiya of Gram Panchayat Raj Gangwara Bujurg, having received the largest number of total votes in favour of the petitioner is 1073 in all 13 booths, as would appear from Annexure P1, to which no objection was made by any of the participating candidates, including respondent No.7. In favour of respondent no.7, altogether 1048 votes were cast and a specific statement has been made in this regard in paragraph 9 of the writ petition.

4. Learned counsel submitted that in absence of any objection alleging that the EVM machine was malfunctioning



from the candidates to the office on duty who were present at the time of casting of the vote on 12.12.2021 or its counting, the action of the respondent no. 6, who is the Returning Officer, directing for holding re-poll of booth No.213 on 15.12.2021 is illegal and biased in favor of respondent no. 7, who had secured less votes than the petitioner. On the basis of re-poll dated 15.12.2021 in booth no. 213, respondent no. 7 has been declared as returned candidate by a margin of 62 votes, which is an illegal action in absence of any objection raised and application filed by respondent no.7 for recounting of votes on 12.12.2021. Learned counsel further submitted that the petitioner has raised specific objection in his complaint dated 18.12.2021 before the State Election Commission, Gangwara Bujurg, Gram Panchayat Sitamarhi regarding the biased actions of the respondents concerned favoring respondent no. 7.

5. A counter affidavit has been filed on behalf of the District Election Officer and the Returning Officer-cum-Block Development Officer, Runnisaidpur, Sitamarhi stating that during counting of votes polled for booth No.213 Gram Panchayat, Gangwara Bujurg under Runnisaidpur block of Sitamarhi district on 15.12.2021, a technical defect in the CU(H63448) was reported by the BEL Engineer, and so, on the



recommendation of the returning officer, (Panchayat)-cum-Block Development Officer, Runnisaipur, the District Election Officer, Panchayat-cum- District Magistrate, Sitamarhi by letter dated 14.12.2021 after due review in Form 'Kh', recommended for re-poll for Booth No.213 and forwarded the same to the Secretary, the State Election Commission, Bihar, Patna. Learned counsel submitted that the petitioner cannot take benefit of the counting which was held on 12.12.2021 due to malfunctioning of the EVM machine. The result-sheet of re-counting of Booth No. 213 dated 15.12.2021 (Annexure P/3) shows that the petitioner, namely, Dev Narayan Sahu @ Dev Narayn Sah got 190 votes whereas respondent no.7, namely, Saji Ahmad got 77. It is to be noted that, on the date of voting dated 12.12.2021, i.e before recounting of Booth No. 213, on the basis of the EVM machine, the petitioner had received total 218 votes and respondent no.7 had received only 18 votes. Learned counsel appearing on behalf of the State on these grounds, submitted that law is well settled that any dispute arising out of election, the remedy lies before the Election Tribunal by filing election petition and as such the writ petition is not maintainable.

6. The State Election Commission has not filed their



counter affidavit. However, Mr. Ravi Ranjan, learned counsel appearing on behalf of State Election Commission, submitted that the State Election Commission has no role after the election process is over and he submitted that petitioner has remedy before the Election Tribunal by filing an election petition.

7. Learned counsel admits that there is no statement with respect to the technical expert report with respect to the non-functioning of the EVM machine which calls for re-polling at booth No.213 on 15.12.2021 and counting based on the other EVM machine have not been brought on record.

8. Having heard the rival submissions made on behalf of the parties, the admitted fact is that the respondent no.7 has not made any objection with respect to non-functioning of the EVM machine, and the Block Development Officer-cum-Returning Officer *suo motu* assumed that there is technical defect in the EVM machine in CU(H63448) on a report from the Engineer of the BEL. The report of BEL has not been brought on record. Without any report of BEL report of engineer with respect to the defect in the EVM machine, the District Election Officer(Panchayat)-cum-District Magistrate informed the Secretary, State Election Commission for re-poll of Booth No.213.





9. Having heard the rival submission of the rival parties and materials available on records, the question with respect to any interference by this Court that it can enter into the question, as to whether, on mere statement made in counter affidavit that the District Election Officer has acted within his jurisdiction and the State Election Commission on the recommendation of the District Magistrate can be held to have acted in all fairness in cancelling the election held on 12.12.2021 and in announcing the date of re-polling on 15.12.2021 in which the respondent No.7 was declared returned candidate in facts and circumstances that the EVM Machines containing votes cast on 12.12.2021 was malfunctioned and on which basis the petitioner was declared returned candidate and on the basis of voting held on 15.12.2021, the respondent no. 7 was held winning candidate.

10. Before proceeding to analyze the facts, the law with respect to interference by the Court in executing power under 226 in election matter, is no more *res integra*. The power of judicial review in election matter is a concept which is no longer in issue.

11. The High Court in exercise of its power of judicial review under Article 226, may look into the material on



record to determine any illegality in decision making process coupled with irrationality and perversity. The Hon'ble Supreme Court in the case of **Election Commission of India v. Ashok Kumar**, reported in **(2000) 8 SCC 216**, has held as follows:-

“18. Is there any conflict between the jurisdiction conferred on the High Courts by Article 226 of the Constitution and the embargoes created by Article 329 and if so how would they coexist came up for the consideration of a Constitution Bench of this Court in *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency* [(1952) 1 SCC 94 : AIR 1952 SC 64] . The law enunciated in *Ponnuswami* [(1952) 1 SCC 94 : AIR 1952 SC 64] was extensively dealt with, also amplified, by another Constitution Bench in *Mohinder Singh Gill v. Chief Election Commr.* [(1978) 1 SCC 405 : AIR 1978 SC 851] The plenary power of Article 329 has been stated by the Constitution Bench to be founded on two principles:

(1) the peremptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion;

(2) the provision of a special jurisdiction which can be invoked by an aggrieved party at the end of the election excludes other form, the right and remedy being creatures of statutes and controlled by the Constitution.

On these principles the conclusions arrived at in *Ponnuswami case* [(1952) 1 SCC 94 : AIR 1952 SC 64] were so stated in *Mohinder Singh Gill case* [(1978) 1 SCC 405 : AIR 1978 SC 851] : (SCC p. 426, para 26)

“(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that *elections should be concluded as early as possible according to time schedule* and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, *so that the election proceedings may not be unduly retarded or protracted.*

(2) In conformity with this principle, the scheme of the election law in this country as



well as in England is that no significance should be attached to anything which does not affect the 'election'; and, if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, *would have the effect of vitiating the 'election' and enable the person affected to call it in question*, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any court *while the election is in progress.*"

**19.** However, the Constitution Bench in *Mohinder Singh Gill case* [(1978) 1 SCC 405 : AIR 1978 SC 851] could not resist commenting on *Ponnuswami case* [(1952) 1 SCC 94 : AIR 1952 SC 64] by observing (vide para 25) that the non obstante clause in Article 329 pushes out Article 226 where the dispute takes the form of calling in question an election, except in special situations pointed out at, but left unexplored in *Ponnuswami case* [(1952) 1 SCC 94 : AIR 1952 SC 64] .

**24.** In *Digvijay Mote v. Union of India* [(1993) 4 SCC 175] this Court has held that the powers conferred on the Election Commission are not unbridled; judicial review will be permissible over the statutory body, i.e., the Election Commission exercising its functions affecting public law rights though the review will depend upon the facts and circumstances of each case; the power conferred on the Election Commission by Article 324 has to be exercised not mindlessly nor mala fide nor arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the presidential notification nor existing legislation.

**32.** For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:

(I) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration



of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

(2) Any decision sought and rendered will not amount to “calling in question an election” if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

(3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

(4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the court.

(5) The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the court would act with reluctance and shall not act, except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material.”

*(emphasis supplied)*



12. The material facts as a cause of action in an election petition has been considered in **(2009) 9 SCC 310 (Anil Vasudev Salgaonkar v. Naresh Kushali Shigaonkar)** holding as follows :

*“57. It is settled legal position that all “material facts” must be pleaded by the party in support of the case set up by him within the period of limitation. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact will entail dismissal of the election petition. The election petition must contain a concise statement of “material facts” on which the petitioner relies.”*

13. It is relevant to take note of provisions of the Bihar Panchayat Act, 2006, for proper adjudication of the present writ petition:--

**“138. Bar to interference by Courts in electoral matters.** - Notwithstanding anything contained in this Act-

(a) The validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 243 K of the Constitution of India shall not be called in question in any Court;

(b) no election to any Panchayat shall be called in question except by an election petition presented to the prescribed authority under this Act.”

14. Rules 72 , 73, 74, 76 and 79 of the Bihar Panchayat Election Rules, 2006 are reproduced hereinafter:-

*72. Selection of place of counting of votes.- The section of place for counting of votes shall be made by the District Election Officer under the directions of the Commission.*



*73. Supervision of counting of votes.-  
The counting of votes shall be done under the direction, supervision and control of the Commission.*

***“ 74. Entry into the place fixed for Counting. - (1)***

*The Returning Officer or the Officer authorised by him shall remove from the place of counting all other persons except -*

*(a) Such persons to whom he/she appoints to assist the counting;*

*(b) Persons authorised by the Commission or District Election Officer;*

*(c) Public servants on duty in connection with the election; and*

*(d) The candidate, Election Agent and Counting Agent.*

*(2) Before opening the ballot box on the table of counting, the Counting Agents present there shall be allowed to inspect the ballot boxes and their seals for satisfying themselves that they are not tampered.*

*(3) If the Returning Officer or the Officer authorised by him/her is satisfied that a ballot box has been tampered with, he/she shall adopt the following procedure with regard to that ballot box-*

*(a) The ballot papers contained in that ballot box shall not be counted;*

*(b) A report in connection with the clause (a) above shall be sent to the Commission immediately through the District Election Officer.*

*(4) On receiving information under sub-rule 3(b) and taking into consideration the material circumstances the Commission shall give necessary direction to the District Election Officer. The District Election Officer shall take further action according to the direction of the Commission.”*

***“ 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 ballot papers 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.”*

15. To ensure impartiality and transparency, as envisaged under Rule 76 which mandates recording of result of counting candidate wise in Form- 19 by the Returning Officer. It is gainful to reproduce Rule 76:

***“ 76. Counting of votes. - (1) Except the 'rejected' votes, each ballot paper shall be counted.***

*(2) On completion of the counting of votes the Returning Officer or the Officer authorised by him shall record the result of counting candidate wise in Form -19 in case of Member of Gram Panchayat/Panch of Gram Katchahry and in Form - 20 in the case of Mukhiya/Sarpanch/Member of Panchayat Samiti/Member of Zila Parishad.*

*(3) Thereafter, the valid votes will be sealed in a separate packet be bundled together along with the rejected votes and the following particulars to be recorded on that, viz.-*

*(a) the name of the Gram Panchayat and the number of the territorial constituency concerned in case of the election of Member of the Gram Panchayat/Panch of Gram Katchahry, the name and number of the Gram Panchayat in case of the election of Mukhiya/Sarpanch and the name of the Panchayat Samiti/Zila Parishad and number of the concerned territorial constituency in case of the election of Member of Panchayat Samiti/Zila Parishad,*

*(b) the name and serial number of the polling station to which the ballot papers belong; and*



*(c) the date of counting.”*

16. Upon close consideration of the Act, 2006 the definition of corrupt practice is to be found in *section 141* and which entails a disqualification under *section 142*. *Rule 106* requires allegations to be made of corrupt practices. *Rule 108* requires that the election petition shall contain statement of material facts and details signed and verified by the petitioner in the manner prescribed under Order 6 Code of Civil Procedure. *Rule 53* provides for votes to be cast through ballot papers. *Rule 54* provides for ballot box. *Rule 58* provides for the presiding officer to regulate number of voters who may enter the polling station at a time and remove other persons. *Rule 59* provides for closing and sealing of the ballot box prior to commencement of the poll. *Rule 60* provides for the Presiding officer to be satisfied of the identity of the voter. The identity of a voter can be challenged under *Rule 61*. Ballot papers are issued under *Rule 62*. *Rule 66* provides for sealing of ballot boxes after close of the polls. *Rule 70 and 71* provides for adjournment of poll during the period of poll and in case of emergencies. *Rule 74 (d)* permits the candidate, the election agent and the counting agent to be present at the place of counting. *Rule 74 (2)* provides that before opening the ballot box the counting agent present there





shall be allowed to inspect the ballot boxes and their seals for satisfying themselves that they are not tampered. *Rule 75* provides for scrutiny of ballot papers and their rejection. *Rule 79* provides for recounting of votes on a written application made to the returning officer by the candidate/election agent/counting agent. *Rule 81 and 82* provides for declaration of results and issuance of the election certificate. *Rule 97* provides for counting of votes in presence of the members present at the meeting.

17. The burden of proof by virtue of *Rule 111* of Bihar Panchayat Rules, 2006, the provisions of Indian Evidence Act, 1872 have been made applicable to election petitions, as well. As per *Section 102* of the Indian Evidence Act the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Also, *Section 106* provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

18. In *Nanhoo Mal and others v. Hira Mal and others*, *AIR 1975 SC 2140*, a three-Judge Bench of the Apex Court placed reliance on the law laid down in the case of *N.P. Punnuswami v. Returning Officer, Namakkal and others*, *AIR 1952 SC 64* that right to vote and to stand in election is



creature of statute. Relevant paragraph No.5 is reproduced hereinafter:

*“5. It follows that the right to vote or stand for election to the office of the President of the Municipal Board is a creature of the statute, that is, the U.P. Municipalities Act and it must be subject to the limitations imposed by it. Therefore, the election to the office of the President could be challenged only according to the procedure prescribed by that Act and that is by means of an election petition presented in accordance with the provisions of the Act and in no other way. The Act provides only for one remedy, that remedy being an election petition to be presented after of the election is over and there is no remedy provided at any intermediate stage. These conclusions follow from the decision of this Court in Ponnuswami's case (AIR 1952 SC 64) (supra) in its application to the facts of this case. But the conclusions above stated were arrived at without taking the provisions of article 329 into account. The provisions of Article 329 are relevant only to the extent that even the remedy under Article 226 of the Constitution is barred as a result of the provisions. But once the legal effect above set forth of the provision of law which we are concerned with is taken into account there is no room for the High Courts to interfere in exercise of their powers under Article 226 of the Constitution. Whether there can be any extraordinary circumstances in which the High Courts could exercise their power under Article 226 in relation to elections it is not now necessary to consider.”*

19. The Apex Court in catena of judgments has cautioned the Courts from venturing into frivolous election petitions which fail to disclose material grounds for taking action and from refraining to pass order for inspection and recount of the ballot papers as a matter of course.

20. Hon'ble Supreme Court in the case of **Suresh Prasad Yadav v. Jai Prakash Mishra [(1975) 4 SCC 822]**, has held



that recount of ballot papers cannot be matter of course and has laid down conditions for interference as follows:-

*“Before dealing with these contentions, we may recall, what this Court has repeatedly said, that an order for inspection and recount of the ballot papers cannot be made as a matter of course. The reason is twofold. Firstly such an order affects the secrecy of the ballot which under the law is not to be lightly disturbed. Secondly, the Rules provide an elaborate procedure for counting of ballot papers. This procedure contains so many statutory checks and effective safeguards against trickery, mistakes and fraud in counting, that it can be called almost foolproof. Although no hard and fast rule can be laid down, yet the broad guidelines, as discernible from the decisions of this Court, may be indicated thus:*

*The Court would be justified in ordering a recount of the ballot papers, only where:*

- (1) The election petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded,*
- (2) On the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting; and*
- (3) The Court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties.”*

*These principles were reiterated in Chanda Singh v. Chapter Shiv Ram Verma [(1975) 4 SCC 393] where speaking for this Court, Krishna Iyer, J. observed thus: (SCC p. 399, para 8)*

*“On all hands, it is now agreed that the importance of the secrecy of the ballot must not be lost sight of, material facts to back the prayer for inspection must be bona fide, clear and cogent and must be supported by good evidence. We would only like to stress that in the whole process, the secrecy is sacrosanct and inviolable except where strong prima facie circumstances to suspect the purity, propriety and legality in the counting is made out by definite factual averments, credible probative*



*material and good faith in the very prayer. We may even say that no winning candidate should be afraid of recount and, conditions as they are, a sceptical attitude expecting the unexpected may be correct, informed of course by the broad legal guidelines already set out.”*

21. The Apex Court in ***Jyoti Basu v. Debi Ghosal, (1982) 1 SCC 691*** has held that an election petition is statutory proceeding which is regulated by those rules which statute makes and applies, therefore, the election of an elected representative must be challenged only in manner provided in relevant statute. Relevant paragraph of the said judgment is reproduced hereinafter:-

*“A right to elect, fundamental though it is to democracy, is, anomalously enough neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected, and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, court is put in a strait-jacket. ....”*

22. It is to be noticed that the Article 243-O of the



Constitution of India is in *pari materia* to Article 329(b) so far as the bar to interference by the courts in electoral matters is concerned. Thus, in view of the bar contained in Article 243-O(b) of the Constitution of India and the position of law settled by the Hon'ble Supreme Court as stated above, the validity of any election under the provisions of the Act of 2006 can be called in question only by way of election petition under the provisions of Section 137 of the Act of 2006 and the Rules made thereunder. It must be borne in mind that Article 243-O(b) bars the interference by Courts in matters of election to any Panchayats called in question except by way of an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State. In light of this provision, a distinction needs to be drawn between “ *an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State*” and other incidental matters not provided for in the relevant Acts and Rules made by the State Legislature. The bar is specifically with respect to the former but the latter is not to be read as barred from any interference by the Courts where the exceptional circumstances so require. If such circumstances exist, the alternative remedy can be by-



passed.

23. In the present case, the petitioner has questioned the action of the Block Development Officer-cum-Returning Officer, as well as the District Election Officer-cum-District Magistrate, who without there being any report submitted by the expert team of Bharat Electronic Limited and only on the basis of the recommendation of an engineer has recommended for holding of fresh election at Booth No.213 of the concerned village. This Court in exercise of power of judicial review to correct the action of the District Magistrate who has in mala fide and without jurisdiction and without obtaining expert report of Bharat Electronic Limited with respect to working of EVM machine simply on the recommendation of an engineer has declared for re-polling assessing the machine has found the machine to be defective.

24. Of recent, the Apex Court in the case of ***Sarvepalli Ramaiah v. District Collector, Chittoor***, reported in (2019) 4 SCC 500 has held as follows:-

“40. Administrative decisions are subject to judicial review under Article 226 of the Constitution, only on grounds of perversity, patent illegality, irrationality, want of power to take the decision and procedural irregularity. Except on these grounds administrative decisions are not interfered with, in exercise of the



extraordinary power of judicial review.

**43.** Judicial review under Article 226 is directed, not against the decision, but the decision-making process. Of course, a patent illegality and/or error apparent on the face of the decision, which goes to the root of the decision, may vitiate the decision-making process...”

25. The “material facts” required in an election petition has been considered in **(2009) 9 SCC 310 (Anil Vasudev Salgaonkar v. Naresh Kushali Shigaonkar)** holding as follows :

“57. It is settled legal position that all “material facts” must be pleaded by the party in support of the case set up by him within the period of limitation. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact will entail dismissal of the election petition. The election petition must contain a concise statement of “material facts” on which the petitioner relies.”

26. Considering the facts that the petitioner has filed objection dated 18.12.2021( Annexure 4), the matter is required to be examined on the basis of the expert scientific report of the Bharat Electronic Limited, whether, the EVM machine containing the votes cast by the voters at Booth No. 213 on which the petitioner was declared returned candidate has to be scientifically examined by the Bharat Electronic Limited and report that the same was not operating and till the report is



submitted it will be too early to draw any conclusion by this Court on the basis of allegation made by the respondent no.7 and so found by the District Magistrate.

27. There was no evidence before the Munsif that the ballot box had been tempered with and acting on the recommendation of the Engineer without scientific report of malfunctioning of EVM is unsubstantive and pervasive.

28. The action of the Collector in observing that the EVM has been either tempered or is non-functional is a mere suspicion and reconsidering for re-polling is in defiance of the direction of the Apex Court in **Suresh Prasad Yadav (Supra)** and contrary to the decision of the Apex Court held in **Anil Vasudev Salgaonkar Vs. Naresh Kushali Shigaonkar (supra)** and requires interference by this Court in absence of the expert scientific report which was not available before him or provided to the petitioner. The bar of alternative remedy will not come in a way to the petitioner. However, considering the disputed question, the Tribunal is directed to proceed on the basis of the materials, including the objection filed by the petitioner dated 18.12.2021 before the Election Commission and on the basis of the technical report of Bharat Electronic Limited to decide the dispute in accordance with law. Petitioner is at liberty to file





election petition before the Tribunal.

29.The BEL is directed to submit scientific report before the Tribunal relating to EVM machine which has recorded votes of election held on 12.12.2021 with respect to Booth No.213 within a period of six weeks from the date of communication of this order.

30.The action of the District Magistrate being against the law laid down by the Apex Court, as referred above, inasmuch as, recommending for holding and conducting a fresh election on booth No.213 can only be sustained unless the defects are confirmed by the expert report about the alleged malfunctioning of the EVM machines.

31. The petitioner and returned candidate must appear before the Election Tribunal within one week. The State is directed to ensure to communicate the respondent no.7, who is the declared returned candidate.

32. The Tribunal is further directed that in case the State Election Commission is not in a position to bring the expert report relating to the EVM machine from the team of engineer of Bharat Electronic Limited, then in that case, the Tribunal must proceed to declare the subsequent election, which was held on 15.12.2021 with respect to Booth No.213 to



be not held in accordance with the provision of Zila Panchayat Raj Act, 2006, having not followed the mandate of Article 243(o) of the Constitution of India. The above exercise in any case must be concluded by the Tribunal within a period of one month from the date of passing of this order.

33. As the question with respect to the fairness of the State authority has been questioned, the State Election Commission is duty bound to produce the report of expert team of engineer of Bharat Electronic Limited before the Tribunal within a period of one week from the date of communication of this order, so that no further manipulation can be done at any level.

34. The question of limitation shall not come in a way of the petitioner. The Tribunal is required to judge the fairness of the State authorities, as well as, the commission in deciding the election petition on merits.

35. The writ petition stands disposed of.

**(Purnendu Singh, J)**

Sanjay/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	06.02.2024
Transmission Date	NA

