IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.3732 of 2023

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Madhu Devi Wife of Sri Rajesh Rai Resident of Village/P.O.- Latarahiya, P.S.- Parsa, District- Saran.

... ... Petitioner/s

Versus

1. The Bihar State Election Commission through the Election Commissioner, 3rd Floor, Sone Bhawan, R Block, Patna.
2. Mala Devi, Wife of Raj Kishore Rai Resident of Village- Baligoan, P.O.- Latarahiya, P.S.- Parsa, District- Saran.
3. Rekha Devi, Wife of Sri Handal Rai Resident of Village- Latarhiya, P.S.- Parsa, District- Saran.
4. Seema Devi, Wife of Sri Manoj Singh alias Munna Singh Resident of Village- Bandi Chapra, P.O.- Latarahiya, P.S.- Parsa, District- Saran.
5. Pratima Devi, Wife of Sri Niranjan Singh Resident of Village- Bandi Chapra, P.O.- Latarahiya, P.S.- Parsa, District- Saran.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. P. K. Verma, Sr. Advocate. Mr. Sanjay Kumar Ghosarvey, Advocate.
For the SEC	:	Mr. Ravi Ranjan, Advocate.
For respondent no.2	:	Mr. Sanjay Kumar Sinha, Advocate. Mr. Shivjee Singh, Advocate. Mr. Mukesh Kumar, Advocate.

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CORAM: HONOURABLE MR. JUSTICE PURNENDU SINGH

ORAL JUDGMENT

Date : 22-01-2024

Heard Mr. P. K. Verma, learned senior counsel along with Mr. Sanjay Kumar Ghosarvey, learned counsel for the petitioner; Mr. Ravi Ranjan, learned counsel for the State Election Commission and Mr. Sanjay Kumar Sinha, learned counsel along with Mr. Shivjee Singh, learned counsel and Mr. Mukesh Kumar, learned counsel for the respondent no. 2.

2. The writ application has been filed assailing the order dated 12.01.2023 passed in Election Suit No. 01/2022 by the learned Munsif-II Saran at Chapra, whereby all the Electronic Voting Machines (“EVMs” for short) used in the

elections of Mukhiya Gram Panchayat Baligaun under Parsa block in Saran district held on 12.12.2021 and the result prepared after counting have been summoned for production/inspection under under Order XVI, Rule 14 C.P.C.

FACTUAL MATRIX

3. Brief facts of the case are that the election for the post of Mukhiya in Panchayat Election 2020-21 of Gram Panchayat Raj Baligaon, Block - Parsa, District – Saran, was held on 12.12.12021. The petitioner and Respondent No. 2, were contesting candidates out of total 5 contesting candidates. According to the public notice issued by the Returning Officer, the detailed schedule for holding the Panchayat Election, 2021 in Gram Panchayat Raj Baligaon, Parsa was announced which is as follows:

Date of Filing of Nomination:	24/11/2021
Date of Scrutiny of Nomination:	26/11/2021
Date of Withdrawal of Candidature:	28/11/2021
Date of Allotment of Symbol:	30/11/2021
Date of Election:	12/12/2021
Date of Counting:	15/12/2021

4. Records with respect to the petitioner reveals that no discrepancies were found in the information furnished by the petitioner in the nomination papers, petitioner was found eligible to contest the election. As per the schedule the election was held on 12.12.2021 and the counting was held on

15.12.2021 and concluded as per the schedule, without any objection. The Counting of votes took place in presence of the Returning Officer, the contesting candidates, who and their agents did not raise any objection at that point of time. After recording the particulars of the election result, the petitioner was declared elected, after having secured the largest number of votes i.e 1564, whereas, the respondent no. 2 received the second highest votes i.e 1546.

5. Aggrieved with the result of the election, the respondent no. 2 filed Election Petition No. 01/2022 before the learned Munsiff- II, Saran, Chapra under Section 137 of The Bihar Panchayat Raj Act, 2006. As per the pleadings, allegations have been made of conducting irregularity during the counting of votes and indulging in corrupt practices to influence the election results and the plaintiff – respondent no.2 has sought for declaring the election void. After the election petition was registered before the Election Tribunal, the Respondent No. 2 submitted a petition under Rule 14 of Order XVI, CPC on 12.12.2022 (Annexure-3) for production of the EVMs, result sheet, voter list and CCTV footage for inspection by the Election Tribunal. The learned Munsiff- II, Saran at Chapra vide impugned order dated 12.01.2023, which is annexed as

Annexure-5 to the writ petition, while allowing the prayer of respondent no. 2, in exercise of jurisdiction under Rule 14 of Order XVI, CPC. The provision Rule 14 is reproduced hereunder:

> *" **Rule 14. Court may of its own accord summon as witnesses strangers to suit***
> *Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary [9] [to examine any person, including a party to the suit], and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession on a day to be appointed, and may examine him as a witness or require him to produce such document."*

6. The petitioner, has filed the present application against the order dated 12.01.2023 passed by the learned Munsiff- II, Saran at Chapra, on the ground that the same has been passed in the absence of any material facts to maintain the election petition and without applying the guidelines laid down by the Apex Court in **Bhabhi (supra)** in gross disregard to the settled principles of law.

SUBMISSION ON BEHALF OF THE PETITIONER

7. Mr. P. K. Verma, learned senior counsel appearing on behalf of the petitioner submitted that the learned Munsif-II, Saran at Chapra summoned the Block Development Officer who is not a party to the Suit under Order XVI, Rule 14 of the Code of Civil Procedure (hereinafter referred to as

"CPC") on his own motion, to appear as a witness, to give evidence or to produce documents in his possession such as voter list, EVM machines, result sheet prepared on voting place and C.C.T.V. footage as well as video recordings of the election. Learned counsel submitted that the jurisdiction to make order is dependent on finding of facts, unless, the objection which have been made in the plaint and the application dated 12.12.2022 calling for the above material is dependent on existence of any objection made by the plaintiff at the time of counting. He submitted that if such facts don't exist, the Tribunal wrongly assumed jurisdiction. He submitted that the exercise of discretion by the Court in calling for the records of the election to arrive at its satisfaction is against the principle of the law and guidelines as laid in the case of ***Bhabhi Vs. Sheo Govind reported in (1976) 1 SCC 687.*** In support, he has emphatically relied on Para-15 of the judgment, which is reproduced hereinafter:

> *"15. Thus on a close and careful consideration of the various authorities of this Court from time to time it is manifest that the following conditions are imperative before a court can grant inspection, or for that matter sample inspection, of the ballot papers:*
>
> *(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;*
>
> *(2) That before inspection is allowed, the allegations made*

against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;

(3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;

(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;

(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and

(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials."

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

8. Learned counsel contended that the order passed by learned Munsif-II, Saran at Chapra, directing the Block Development Officer, Parsa, Saran for producing documents such as voter list, EVM machines, result sheet prepared on voting place and C.C.T.V. footage as well as video recordings of the election held for the post of Baligaun Panchayat Mukhiya, will amount to a fishing and roving inquiry, which is expressly barred in view of the above guidelines of the the Apex Court and in catena of judgments in this regard. Learned counsel further submitted that the trial court has failed to take into

account the statements made in Para-13 and 17 of the written statement, wherein the petitioner has specifically stated that no objection at any point of time was made by the respondent no.2 during the entire process of election, including the process of counting or by any candidate, any voter in respect of any illegality or irregularity committed or mal-practice adopted by the petitioner in any manner. On these grounds, learned senior counsel proceeded to submit that the order dated 12.01.2023 is required to be called for by this Court and is fit to be set aside and quashed in light of the law laid down in case of **Bhabhi (supra).**

SUBMISSION ON BEHALF OF THE RESPONDENTS

9. Respondent nos. 3, 4 and 5 have remained unrepresented.

10. *Per contra*, Mr. Sanjay Kumar Sinha, learned counsel appearing on behalf of the private respondent no.2 -the plaintiff submitted that the Munsif can only arrive at a definite satisfaction when the required evidences, such as, the EVM machine, CCTV footage, result sheets, as well as, Video Recording are produced before him and in absence of these evidences, it will not be possible for Munsif to arrive at a satisfaction to proceed to decide the Suit in accordance with law.

He submitted that the petitioner in a misconceived manner has placed reliance on the guidelines issued by the Apex Court in the case of **Bhabhi (supra),** which requires the satisfaction of the Court on the basis of specific materials available before it. Thus, the order of the learned Munsif-II directing the Block Development Officer cum Election Officer to produce the documents, such as, EVM Machines, etc. which are in his custody, cannot amount to making a roving and fishing inquiry.

11. He next submitted that the writ petition being pre-mature is fit to be dismissed.

12. Mr. Ravi Ranjan, learned counsel appearing on behalf of State Election Commission has supported the argument advanced by the learned senior counsel appearing on behalf of the petitioner. In support, he submitted that the Respondent No.2, at no point of time, raised objection during the entire election process in accordance with the provision of Rule 79 of the Bihar Panchayat Election Rules, 2006 and in absence of any objection so raised calling for EVM machine, etc. would amount for making a roving inquiry, which the law restricts.

13. In light of the guidelines laid down by the Apex Court in the case of **Bhabhi (supra),** the order passed by the

Munsif will lead to roving inquiry. He further submitted that the trial court cannot proceed to record its satisfaction after the election has concluded in a peaceful manner and without there being any material on record and no specific pleading there being in the election petition that any objection was made by anyone interested in the election during the election process and at the time of counting of votes. Accordingly, he submitted that the order dated 12.01.2023 passed in Election Suit No. 01 of 2022 wholly sans jurisdiction and is fit to be set aside and quashed.

14. The State Election Commission in their counter affidavit has informed that the State Election Commission is a performa party in the present writ petition in terms of Section 137(2) of the Bihar Panchayat Raj Act, 2006 and the Commission has not been impleaded as party – defendant by the plaintiff-respondent. The State Election Commission has, however, supported the statement made in Para-13 to 16 of the writ petition to the effect that the result of the election has been declared in presence of the candidates. A reliance has been made to the judgment of the Apex Court in the case of ***Ram Sewak Yadav Vs. Hussain Kamil Kidwai & Ors, reported in AIR 1964 SC 1249***.

ANALYSIS

15. Heard the parties.

16. A free and fair election is defined by political scientist Robert Dahl as an election in which "coercion is comparatively uncommon". A free and fair election involves political freedoms and fair processes leading up to the vote, a fair count of eligible voters who cast a ballot (including such aspects as electoral fraud or voter suppression), and acceptance of election results by all parties. Over the years, the Courts have laid emphasis on the importance of holding fair elections and the indispensable need to safeguard and uphold its sanctity.

17. In **D. Venkta Reddy v. R. Sultan and others** (A.I.R. 1976 SC 1599), the Hon'ble Supreme Court observed as follows:

> *"In a democracy such as ours, the purity and sanctity of elections, the sacrosanct and sacred nature of the electoral process must be preserved and maintained. The valuable verdict of the people at the polls must be given due respect and candour and should not be disregarded or set at naught on vague, indefinite, frivolous or fanciful allegations or on evidence which is of a shaky or prevaricating character. It is well settled that the onus lies heavily on the election petitioner to make out a strong case for setting aside an election.*
>
> *In our country, election is a fairly costly and expensive venture and the Representation of People Act has provided sufficient safeguards to make the elections fair and free. In these circumstances, therefore, election results cannot be lightly brushed aside in election disputes. At the same time, it is necessary to protect the purity and sobriety of the elections by ensuring that the candidates do not secure the valuable votes of the people by undue influence, fraud, communal propaganda, bribery or other corrupt practices as laid down in the*

Act.

Another principle that is equally well settled is that the election petitioner in order to succeed must plead all material particulars and prove them by clear and cogent evidence. The allegations of corrupt practices being in the nature of a quasi criminal charge the same must be proved beyond any shadow of doubt. Where the election petitioner seeks to prove charge by purely partisan evidence consisting of his workers, agents, supporters and friends, the Court would have to approach the evidence with great care and caution, scrutiny and circumspection and would, as a matter of prudence though not as a rule of law, require corroboration of such evidence from independent quarters, unless the Court is fully satisfied that the evidence is so credit-worthy and true, spotless and blemishless, cogent and consistent, that no corroboration to land further assurance is necessary."(Emphasis supplied)

18. With the aforesaid preface, it is first required to consider the writ petition, both on maintainability, as well as, on merits purely from a legal perspective.

19. Section 138 bars the interference by Courts in electoral matters. The same is reproduced hereinafter:-

"138. Bar to interference by Courts in electoral matters. *- Not withstanding 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."

20. Section 139 specifies the grounds for declaring election to be void.

*"**139. Grounds for declaring election to be void.** - (1) Subject to the provisions of sub-section (2) if the prescribed authority is of opinion-*

(a) that on the date of his election, a returned candidate was not qualified or was disqualified, to be chosen as a member under this Act; or

(b) that any corrupt practice has been committed by a returned candidate or his agent or by any other person with the consent of a returned candidate or his agent; or

(c) that any nomination paper has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-

(i) by the improper acceptance of any nomination; or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent; or

(iii) by the improper reception, refusal or rejection of any vote or reception of any vote which is void; or

(iv) by any non-compliance with the provisions of this Act or of any Rules or orders made thereunder; the prescribed authority shall declare the election of the returned candidate to be void.

(2) If in the opinion of the Prescribed Authority, any agent of a returned candidate has been guilty of any corrupt practice, but the prescribed authority is satisfied-

(a) that no such corrupt practice was committed at the election by the candidate and every such corrupt practice was committed contrary to the orders and without the consent of the candidate;

(b) that the candidate took all reasonable measures for preventing the commission of corrupt practices at the election; and

(c) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agent; then the Prescribed Authority may decide that the election of the returned candidate is not void."

21. From the scheme of the Act an election dispute can be raised only by election petition before the Election Tribunal.

22. In ***Nanhoo Mal and others v. Hira Mal and others, AIR 1975 SC 2140***, a three-Judge Bench of the Apex Court referred to the law laid down in ***N.P. Punnuswami v.***

Returning Officer, Namakkal and others, AIR 1952 SC 64 has observed in Paragraph No.5 that :

> *"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."*

23. It is settled principle of law that right to elect, right to be elected and right to remove an elected representative is neither fundamental nor common law right but, only a special right created by a statute. An election petition is statutory proceedings which is regulated by those Rules which statute makes and applies. Therefore, election of an elected representative must be challenged only in the manner provided in the relevant statute. In this context we may fruitfully refer to the decision in ***Jyoti Basu v. Debi Ghosal, (1982) 1 SCC 691***

wherein it has been held as under:

> *"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. ……."*

24. It is to be noticed that the Article 243-O(b) 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, 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.

25. 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.

26. The present writ petition does not seek to question the validity of the election or the maintainability of election petition pending before the learned Munsif-II, rather the challenge has been made with respect to jurisdiction of the learned Munsif-II to exercise power under Rule 14 of Order XVI, CPC and the prevalent factual matrix as stated above makes the present case as an exception, which calls for judicial review under Article 226 , in the interest of the parties and of the voters in the election concerned, whether the Tribunal has exercised its jurisdiction to pass order dated 12.11.2023 can be sustained in absence of any jurisdictional facts.

27. Taking into consideration the facts leading up to the passing of the impugned order dated 12.01.2023, and contentions of both the parties, the issue which needs to be determined in the present writ petition is the maintainability of the impugned order directing production of EVMs, result sheet, voter list and CCTV footage, of a Panchayat Election, in light of the established prerequisite conditions as have been prescribed by the Hon'ble Apex Court particularly Bhabhi (supra) and this Hon'ble Court. On mere allegation of the respondent no.2 who suspects or believes that there has been an improper reception, refusal or rejection of votes, call for inspection of the same to arrive at a satisfaction by the learned Tribunal. will not be sufficient to support an order for inspection.

28. The provisos of Chapter 10 of The Bihar Panchayat Election Rules, 2006, prescribes the procedure to be followed during the counting of votes. Rule 72 provides that the selection of place for counting of votes shall be made by the District Election Officer under the directions of the Commission and Rule 73 bestows the right of direction, supervision and control of Counting of votes on the Commission. Rule 74 ensures security, safety and fairness in the counting process by restricting entry into the place fixed for counting. Rule 74 is

reproduced hereinbelow:

> ***" 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."*

29. Another safeguard to ensure impartiality and transparency, is 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."

30. The Rules, 2006 also afford opportunity to any aggrieved candidate to make an application for recounting of votes as per the provision of Rule 79 , which is reproduced hereinbelow:

"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."

31. The above provisions were subject matter before this Court, in the case of ***Punita Vaishkiyar vs. State of***

Bihar, 2019 (5) BLJ 209. In paragraph No.11 the Division Bench passed, *inter alia,* following directions:

> *"11. Having regard to the facts and circumstances of the case, I find no error in the impugned findings recorded by the learned Munsif while dismissing the election petition. He has rightly held that*
> *a recount can not be ordered merely for the asking*
> *or merely because the court is inclined to hold a recount.*
> *12. 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, it is well settled position in law that the success of a returned candidate should not be lightly set aside and the secrecy of ballot must be zealously guarded.*
> *13. In absence of any evidence disclosing the details of the names of polling stations, counting center, tables, particulars of round of the counting of votes in relation whereto the alleged irregularities had taken place, an order of recount of votes could not have been passed."*

32. There can, therefore, be no doubt that at every stage in the process of scrutiny and counting of votes the candidate or his agents have an opportunity of remaining present at the counting of votes, watching the proceedings of the Returning Officer, inspecting any rejected votes, and to demand a recount. Therefore a candidate who seeks to challenge an election on the ground that there has been improper reception, refusal or rejection of votes at the time of counting, has ample opportunity of acquainting himself with the manner in which the EVMs/ballot boxes were scrutinized and opened, and the votes were counted. In this regard, Respondent No. 2 has failed to bring on record any material evidence to show that he diligently followed the procedure under the Act for ensuring transparency

during counting of votes available to the candidates or their counting agents or election agents under the provisions of Rule 74 and 77 and took due recourse of the statutory remedy available under Rule 79 .

33. The Election Petition, filed by respondent no. 02, is based on grounds of alleged irregularities during the counting of votes. However, the petition itself is marred by unsubstantiated claims and contradictory statements as to whether the plaintiff had raised any objection at the time of counting. On perusal of the plaint, it is alleged in para 20(e) that the petitioner and her counting agent, in collusion with the returning officer, hindered the counting work and the Returning Officer intentionally added votes of the respondent no. 2 in the vote of petitioner, with a view to defeat the petitioner. In para 10, it is alleged that the counting of votes was done completely behind the back of the candidates and their counting agents. In para 22, the respondent no.2 mentions that his claim to see the CCTV footage was rejected and in para 17 he alleges that due to less number of counting agents compared to counting tables, there was difficulty for agents to see counting process to their satisfaction.

34. On bare perusal of the grounds as stated in the

election petition, for declaring the election void as per Section 139 of the Bihar Panchayat Raj Act, 2006, it seems to be devoid of any cogent grounds as enumerated under Section 139. No specific contravention, irregularity and the same was objected by the petitioner. The petitioner never found it proper to inform the District Magistrate or the Election Commission and making the general and omnibus allegations by the respondent no. 02. The learned Munsif has acted beyond his jurisdiction in calling for the EVMs, etc. after the election having finally concluded without any objection from any corner having been discussed while exercising the jurisdiction to pass order dated 12.01.2023.

35. 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.

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

37. The view of the Apex Court in Bhabhi (supra) also finds resonance in the judgment of this Hon'ble Court in a reported case of ***Beauty Patel v. Indira Devi & Ors. (LPA No. 1611 of 2018 in CWJC No. 11385 of 2017)***. The relevant paragraphs of the judgment is reproduced hereinbelow:-

"8. The question that we had posed yesterday in our order dated 11th March, 2019 relating to the findings

recorded by the learned Munsif, we find that the learned Munsif did not record the specific material on the basis whereof he was satisfied about the material available for carrying out a recounting. Secondly, the statements of facts in the election petition were not specific and the deposition of the four witnesses in support of the election petition also does not contain any such material specifying the nature of the alleged irregularity or illegality in the counting of the votes. The allegations are general to the effect that 438 votes had been wrongly rejected. As to in what manner were the votes wrongly excluded, the election petition itself recites that since there were 16 counting tables and there were only two counting Agents of the appellant, therefore, it was not possible to manage the supervision of all the tables. Thus, on this very disclosure in the election petition and in the absence of any material indicating the specifics regarding the illegality in the counting of the votes or the rejection thereof, a mere bald allegation that 438 votes were wrongly rejected would not be a sufficient ground for interference. The learned Munsif appears to have overlooked the proposition of law as held in several cases, including the indication given in paragraph 15 of the judgment in the case of ***Bhabhi Vs. Sheo Govind [(1976) 1 SCC 687]****, that has been followed later on in a large number of decisions. The said paragraph is extracted herein under:*

> *"15. Thus on a close and careful consideration of the various authorities of this Court from time to time it is manifest that the following conditions are imperative before a court can grant inspection, or for that matter sample inspection, of the ballot papers:*
> *(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;*
> *(2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;*
> *(3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;*
> *(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;*
> *(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and*
> *(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the*

> *Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials." If all these circumstances enter into the mind of the Judge and he is satisfied that these conditions are fulfilled in a given case, the exercise of the discretion would undoubtedly be proper."*

38. 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.

39. It has been consistently laid down by the Supreme Court in a number of cases that burden of proof resting on a person seeking a declaration of voidness of election is very heavy in the sense that he is required to prove every charge of corrupt practice beyond reasonable doubt. In other words, the burden to be discharged by the petitioner in a case is the same as the burden on the prosecution to prove a criminal charge.

40. In ***Amolak Chand Chhazad v. Bhagwandas Arya & Anr, (A.I.R. 1977 S.C. 813),*** it has been laid down that election petition alleging corrupt practice are proceedings of

quasi-criminal nature and burden is on the person alleging corrupt practice to prove allegations beyond reasonable doubt.

41. Burden of proof is always upon election petitioner to establish that illegality committed in counting of votes has materially affected result of election whereby defeated candidate has been seriously prejudiced. Petitioner has neither made such averments in election petition nor adduced substantial evidence which could have made the learned Munsif-II, Saran at Chapra, to reach a *prima facie* satisfaction to direct the Block Development Officer cum Election Officer for production/inspection of the EVMs, results prepared etc.

42. From a reading of Rule 14 of Order XVI, it is evidently clear that the power to summon strangers to the suit, as a witness is to be exercised by the Court "on its own accord". The same is fortified by the usage of phrases "where the Court at any time thinks" and "the Court may, of its own motion". It is no doubt true that under Order XVI Rule 14 of C.P.C., the Court has got the power to summon a person as Court witness. The purport of the provision appears to be that the Court must feel that notwithstanding the fact that the parties have adduced evidence, there are certain aspects which become necessary for effective adjudication of the dispute.

43. That fact that remains is that before invoking the provision of Order 16 Rule XIV, the fundamental jurisdictional facts that are a prerequisite for exercise of power under the aforementioned provision, must exist before the Court, in order to assume jurisdiction.

44. The Apex Court in the case of ***Arun Kumar and others v. Union of India and others*** reported in ***(2007) 1 SCC 732,*** has elaborately discussed the fundamental jurisdictional facts which much exist before a Court, a tribunal or an authority can assume jurisdiction. In this regard, it is proper to reproduce relevant paragraphs of ***Arun Kumar(supra)*** case, so as to appreciate the foundational requirements which the learned Munsif was required to take note of before assuming jurisdiction.

> *" **74.** A "jurisdictional fact" is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess.*
>
> ***75.** In Halsbury's Laws of England, it has been stated:*
>
> *"Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its*

jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive."

76. *The existence of jurisdictional fact is thus sine qua non or condition precedent for the exercise of power by a court of limited jurisdiction.*

77. *In Raja Anand Brahma Shah v. State of U.P. [(1967) 1 SCR 373 : AIR 1967 SC 1081] sub-section (1) of Section 17 of the Land Acquisition Act, 1894 enabled the State Government to empower the Collector to take possession of "any waste or arable land" needed for public purpose even in the absence of award. The possession of the land that belonged to the appellant had been taken away in the purported exercise of power under Section 17(1) of the Act. The appellant objected against the action inter alia contending that the land was mainly used for ploughing and for raising crops and was not "waste land", unfit for cultivation or habitation. It was urged that since the jurisdiction of the authority depended upon a preliminary finding of fact that the land was "waste land", the High Court was entitled in a proceeding for a certiorari to determine whether or not the finding of fact was correct.*

78. *Upholding the contention and declaring the direction of the State Government ultra vires, this Court stated: (SCR p. 380 D-F)*

"In our opinion, the condition imposed by Section 17(1) is a condition upon which the jurisdiction of the State Government depends and it is obvious that by wrongly deciding the question as to the character of the land the State Government cannot give itself jurisdiction to give a direction to the Collector to take possession of the land under Section 17(1) of the Act. It is well established that where the jurisdiction of an administrative authority depends upon a preliminary finding of fact the High Court is entitled, in a proceeding of writ of certiorari to determine, upon its independent judgment, whether or not that finding of fact is correct…."

(emphasis supplied

79. *In State of M.P. v. D.K. Jadav [(1968) 2 SCR 823 : AIR 1968 SC 1186] the relevant statute abolished all jagirs including lands, forests, trees, tanks, wells, etc., and vested them in the State. It, however, stated that all tanks, wells and buildings on occupied land were excluded from the provisions of the statute. This Court held that the question whether the tanks, wells, etc., were on "occupied land" or on "unoccupied land" was a jurisdictional fact and on ascertainment of that fact, the jurisdiction of the authority would depend.*

80. *The Court relied upon a decision in White & Collins v. Minister of Health [(1939) 2 KB 838 : 108 LJ KB 768 : (1939) 3 All ER 548 (CA) sub nom Ripon (Highfield)*

Housing Order, 1938, Re] wherein a question debated was whether the court had jurisdiction to review the finding of administrative authority on a question of fact. The relevant Act enabled the local authority to acquire land compulsorily for housing of working classes. But it was expressly provided that no land could be acquired which at the date of compulsory purchase formed part of park, garden or pleasure ground. An order of compulsory purchase was made which was challenged by the owner contending that the land was a part of park. The Minister directed public inquiry and on the basis of the report submitted, confirmed the order.

81. *Interfering with the finding of the Minister and setting aside the order, the Court of Appeal stated: (All ER p. 559 G-H)*

"The first and the most important matter to bear in mind is that the jurisdiction to make the order is dependent on a finding of fact, for, unless the land can be held not to be part of a park, or not to be required for amenity or convenience, there is no jurisdiction in the borough council to make, or in the Minister to confirm, the order. In such a case it seems almost self-evident that the court which has to consider whether there is jurisdiction to make or confirm the order must be entitled to review the vital finding on which depends the existence of the jurisdiction relied upon. If this were not so, the right to apply to the court would be illusory."

(See also R. v. Shoreditch Assessment Committee [(1910) 2 KB 859 : 80 LJ KB 185 : (1908-10) All ER Rep 792] .)

82. *A question under the Income Tax Act, 1922 arose in Raza Textiles Ltd. v. ITO [(1973) 1 SCC 633 : 1973 SCC (Tax) 327 : AIR 1973 SC 1362] . In that case, the ITO directed X to pay certain amount of tax rejecting the contention of X that he was not a non-resident firm. The Tribunal confirmed the order. A Single Judge of the High Court of Allahabad held X as non-resident firm and not liable to deduct tax at source. The Division Bench, however, set aside the order observing that:*

"... [ITO] had jurisdiction to decide the question either way. It cannot be said that the officer assumed jurisdiction by a wrong decision on this question of residence." (SCC p. 634, para 3)

X approached this Court.

83. *Allowing the appeal and setting aside the order of the Division Bench, this Court stated: (SCC pp. 634-35, para 3)*

"The Appellate Bench appears to have been under the impression that the Income Tax Officer was the sole judge of the fact whether the firm in question was resident or non-resident. This conclusion, in our opinion, is wholly wrong. No authority, much less a quasi-judicial authority, can confer jurisdiction on itself by deciding a

> *jurisdictional fact wrongly. The question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for a writ of certiorari. If the High Court comes to the conclusion, as the learned Single Judge has done in this case, that the Income Tax Officer had clutched at the jurisdiction by deciding a jurisdictional fact erroneously, then the assessee was entitled for the writ of certiorari prayed for by him. It is incomprehensible to think that a quasi-judicial authority like the Income Tax Officer can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen."*
>
> *(emphasis supplied*
>
> ***84.** From the above decisions, it is clear that existence of "jurisdictional fact" is sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of "jurisdictional fact", it can decide the "fact in issue" or "adjudicatory fact". A wrong decision on "fact in issue" or on "adjudicatory fact" would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present."*

45. Rule 14 Order XVI of CPC, is discretionary in nature in as much as it provides that the Court 'may' of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession on a day to be appointed, and may examine him as a witness or require him to produce such document. Exercise of discretionary powers entails greater caution and care. Procedure is the hand maid of justice and exercise of discretion must be in light of the provisions of law.

46. So inspection, recounting of ballot papers etc. have to be considered only if there is really genuine ground

supported by assigning valid reasons for the same. Mere allegations devoid of any material evidence, particularly objection raised with regard to the tampering of votes in EVMs during the election process on 15.12.2021 to the Returning Officer or to the State Election Commission is against the law laid down by the Apex Court referred hereinabove.

47. It can be concluded since the respondent no. 2 had not made any objection of tampering of the votes in the ballot box or he was restrained during the counting of votes or to the EVMs in accordance with the statutory remedy available under Rules, 2006 within time, therefore, for the passivity of Respondent No. 2 and in want of her interventions as provided by the Act and Rules during the entire election process, the sanctity of the whole election process could not be brought under scrutiny.

48. From the discussion made hereinabove, I am of the opinion that the learned Tribunal wrongly assumed jurisdiction without discussing the existence of a particular state of affairs which he was required to describe as “preliminary to, or collateral to the merits of, the issue”.

49. In light of the observations made hereinabove and the law laid down by the Apex Court, the impugned order

dated 12.01.2023, passed by learned Munsiff- II, Saran at Chapra as contained in Annexure 5, is hereby set aside and quashed.

50. The writ petition is allowed.

51. There shall be no order as to costs.

(Purnendu Singh, J)

mantreshwar/-

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