

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 6 of 2017

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THAKOR RASIKBHAI ARJANBHAI....Petitioner(s)

Versus

STATE OF GUJARAT & 3....Respondent(s)

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Appearance:

MR DHARMESH V SHAH, ADVOCATE for Petitioner(s) No.1

MS ROOPAL PATEL, ADVOCATE, for Respondents No.1-2

MR V.R. JANI, AGP for Respondent No.3

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CORAM: HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MR.JUSTICE A.S. SUPEHIA

Date : 11/01/2017

ORAL ORDER

**(PER : HONOURABLE MR.JUSTICE A.S. SUPEHIA)**

- (1) Learned advocate Mr.Dharmesh Shah appearing for the petitioner has tendered draft amendment. The same is allowed in terms of draft.
- (2) In the present petition, the petitioner has prayed issuance of writ of mandamus or any other writ, order or direction to set aside the communication dated 29.12.2016 issued by respondent No.2 authority and further direct the authority to allow recounting of votes for the post of Sarpanch of Randheja Village.
- (3) Mr.Dharmesh Shah, learned advocate for the petitioner, has placed reliance on the provisions of the rules as envisaged in Rule

60(7) of the Gujarat Panchayats Elections Rules, 1994 (hereinafter referred to as "the Rules" for short), in support of his case. He has also relied upon Rule 61 of the Rules for re-counting of votes. It is the case of the petitioner that, if recounting of votes for the post of Sarpanch of Radhanpur village is done, the same shall have bearing on the election result, therefore, it is necessary that the respondents authorities may be directed to recount the votes, so that the petitioner herein, who is adversely affected by the procedure carried out by the returning officer, succeeds by way of recounting. He has further submitted that, the communication dated 29.12.2016 *inter alia* stating that the application demanding recounting was given after completion of the counting and not during counting of the votes is in violation of the Rule 60(7) of Rules.

- (4) Per contra, learned advocate Ms.Roopal Patel has relied upon Rule 60, more particularly Rule 7 of the Rules. She has also relied upon Rule 61 of the Rules. She has submitted that the entire counting was done in presence of the petitioner and the result was recorded as per Form 27 of the Rules.

She has submitted that as per Rule 61(5) of the Rules, after the total number of votes of each candidate were announced the returning officer had signed the result sheet. In view of said Rule, thereafter, no application for re-counting is required to be entertained. She has emphatically stated that the petitioner in his application did not give any reasons/grounds for recounting as required under Rule 61 of the Rules. She has further submitted that the present writ petition is not maintainable in view of Article 2430 of the Constitution of India and Section 31 of the Gujarat Panchayats Act, 1993 as the petitioner has got an alternative remedy of filing an election petition.

- (5) In response to the aforesaid contention, Learned Advocate Mr. Dahrmesh Shah has submitted that as per Rule 31(4) of the Rules, the petitioner is precluded from challenging the aforesaid infirmity of counting the votes in election petition as the same cannot be examined by the concerned Court or Tribunal and only the High Court has the power to issue appropriate directions or writ for recounting of the votes. He has contended that as per

aforesaid Rule the election could not be set aside if the validity of the election is brought in question only on the ground of any error by the officer or officers charged with carrying out the rules made under section 274.

(6) Heard Learned Advocates appearing for the respective parties at length.

(7) Before embarking upon the necessary discussion, we would like to refer to the relevant provisions governing the present case. Rule 60(7) and 61 of the Rules reads as under:

60 (7) After the completion of counting the returning officer shall record in the result sheet in Form 27 the total number of votes polled by each candidate and the total number of votes cast in favour of "NOTA", and announce the same.

RULE 61 : Recount of votes

61 (1) After an announcement of the total number of votes polled by a candidate has been made under sub-rule (7) of [rule 60](#), a candidate, or, in his absence, his election agent or any of his counting agents may apply in writing to the returning officer to recount the votes either wholly or in part stating the grounds on which he demand such recount.

(2) On such an application being made the returning officer shall decide the matter and may allow the application in whole or in part or may reject it in to if it appears to him to be frivolous or unreasonable.

(3) Every decision of returning officer under sub-rule (2) shall be in writing and contain reasons therefore,

(4) If the returning officer decide under sub-rule (2) to allow a recount of the votes either wholly or in part, he shall-

(a) do the recounting in accordance with [rule 58](#) or, as the case may be, [60](#);

(b) amend the result sheet in Form 27 to the extent necessary after such recount; and

(c) announce the amendment so made by him.

(5) After the total number of votes polled by each candidate has been announced under sub-rule (7) of [rule 60](#) or sub-rule (4) the returning officer shall complete and sign the result sheet in Form 27 and on application for a recount shall be entertained thereafter:

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

What emanates from the bare reading of the aforesaid provisions is that the Returning Officer shall record in the result sheet in Form 27 the total number of votes polled by each candidate, and the total number of votes cast in favour of "NOTA", and announce the same. It is not disputed by the Learned Advocate for the petitioner that the said Rule is violated in any manner. However, he has emphasized that the petitioner can only ask for recounting after counting is over and not during the counting as envisaged in the impugned communication. After the compliance of Rule 60(7), the recount of votes is provided in Rule 61. Rule 61(1) envisages the recounting of votes by making an application in writing stating the grounds on which the same is demanded.



Learned Advocate Mr. Shah with reference to the irregularity has submitted that during the counting of votes two bundles fell down from the table, and 57 votes were misplaced during the counting. We have perused the original application filed by the petitioner demanding recounting. The same only states about some "kshati" (irregularity) committed while counting the votes. No specific grounds as canvassed by the learned Advocate are incorporated by the petitioner in his application while demanding recounting. A bare reference to an irregularity in counting cannot fulfill the rigors of Rule 61(1). The candidate demanding recounting has to come out with a specific ground or reason in his application indicating a serious irregularity or flaw in counting process. Rule 61(1) does not cast an obligation on the Returning officer to accede to the demand of recounting based upon a mundane irregularity. Though, we do not endorse the reason assigned in the impugned communication about non giving of an application by the petitioner for recounting of the votes during the counting process, we cannot ignore the cryptic application given by the petitioner demanding recounting. The aforesaid facts

are to be interpreted in the same sense as Latin Maxim *Iniuria non excusat iniuriam*, two wrongs cannot make a right. Thus, the petitioner cannot be made to gain on the application which does not meet with the requirement of law.

- (8) We shall now endeavor to examine the issue of non-maintainability of the present writ petition. Learned Advocate Mr. Shah has placed reliance on Section 31(4) of the Gujarat Panchayat Act, 1993 which reads as under:

"31(4) if the validity of the election is brought in question only on the ground of any error by the officer or officers charged with carrying out the rules made under section 274 or of an irregularity or informality not corruptly caused, the Judge shall not set aside the election.

Explanation-The expression "error" in this sub-section does not include any breach of or any omission to carry out or any non-compliance with the provisions of this Act or the rules made thereunder whereby the result of the election-has been materially affected.

Section 31(1) of the Act is reproduced as under:

SECTION 31 : Determination of validity of election, inquiry by Judge and procedure

(1) If the validity of any election of a member of a panchayat is brought in question by any person contesting the election or by any person qualified to vote at the election to which such question relates, such person may, at any time within fifteen days after the date of the declaration of the results of the election present an election petition to the Civil Judge (Junior Division) and, if there be no Civil Judge (Junior Division) then to the Civil Judge (Senior Division), (hereinafter referred to as "the Judge") having ordinary jurisdiction in the area within which the election has been or should have been held, for the determination of such question.

The conspectus of the aforesaid Sections inevitably indicates filing of election petition wherein any validity of election is in question. Sub-section(4) provides immunity only in cases where the validity of the election is brought in question only on the ground of any error by the officer or officers charged with carrying out the rules made under section 274 or of an irregularity or informality not corruptly caused. The explanation to sub-rule 4 of Section 31 defines "error" which excludes omission or breach or noncompliance of the provisions or the Rules whereby the result of election has been materially affected. In the present case the petitioner has specifically alleged the irregularity/infirmary committed by the Returning Officer in refusing recounting despite the fact the bundle of votes was misplaced and such an infirmity has materially affected the result of the petition. In wake of such allegations, we do not authenticate the view expressed by the learned Advocate that alleged infirmity cannot be examined in an election petition and only the High Court has the power and jurisdiction to give directions for recounting. The said infirmity or



irregularity can only be established by leading evidence. After the scrutiny and computation of votes the candidate in whose favour the greatest number of votes are found can always be declared as elected by the competent court under provision of Section 31 of the Act. Thus, the submission made by the learned Advocate for the petitioner is ill founded based upon the misreading of Section 31 sub-section(4) of the Act.

In the case of Boddula Krishnaiah Versus State Election Commissioner Government of Andhra Pradesh, reported in 1996 (3) SCC 416, the Hon'ble Supreme Court has observed as under:

*"Article 2430 of the Constitution envisages bar on interference by Courts in election matters. Notwithstanding anything contained in the Constitution, under sub-cl (b) no election to any Panchayat shall be called in question except by 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. Thus there is a constitutional bar on interference with the election process except by an election petition, presented to an Election Tribunal as may be made by or under law by the competent Legislature and in the manner provided thereunder. Power of the Court granting stay of the election process is no longer res integra"*

In N. P. Punnuswami V/s. Returning Officer, Namakkal Constituency, 1952 0 SCR 218, a

Constitution Bench of this Court had held that having regard to the important functions which the Legislatures have to perform in democratic countries, it has always been recognized 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 election should be postponed till after the elections are over so that the election proceedings may not be unduly retarded or protracted. In conformity with the principle, the scheme of the election law 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.

- (9) In a writ petition the various dispute questions which would arise in the process

of considering the validity of result of an election or the prayer for re-counting cannot be entertained. In view of the foregoing observations, in our opinion, the present petition deserves to be dismissed. Hence, the present petition is dismissed.

Sd/-  
[HARSHA DEVANI, J]

Sd/-  
[A. S. SUPEHIA, J]

*Bhavesh-[pps]\**

