



GAHC010052922021

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1845/2021

SHIBANI BARMAN
W/O. SHRI PRADIP BARMAN, R/O. VILL. SATBOINIRTUP, P.O.
KALAHBHANGA, P.S. BARPETA ROAD, DIST. BARPETA, ASSAM, PIN-
781315.

VERSUS

ARCHANA PATHAK AND 3 ORS
W/O. MRIDUL NATH, VILL. HOWLY GAON, MOUZA HOWLY, P.O. AND P.S.
HOWLY, DIST. BARPETA, ASSAM, PIN-781316.

2:THE STATE OF ASSAM

REP. BY THE PRINCIPAL SECRETARY TO THE GOVT. OF ASSAM
PANCHAYAT AND RURAL DEVELOPMENT DEPTT.
JANATA BHAWAN
DISPUR
GUWAHATI-781006.

3:THE DY. COMMISSIONER

BARPETA DISTRICT BARPETA
P.O. AND P.S. BARPETA
ASSAM
PIN-781352.

4:THE SUB DIVISIONAL OFFICER (CIVIL) CUM RETURNING OFFICER

PANCHAYAT ELECTION 2017-18
BARPETA SUB DIVISION
BARPETA
DISTRICT BARPETA



ASSAM
PIN-781352

Advocate for the Petitioner : Mr.P.D. Nair
Mr. H. Rohman

Advocate for the Respondents :Mr. B. Islam (R-1)
Mr. N.K. Debnath

Date of hearing & Judgment : **14.08.2023**

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH
JUDGMENT AND ORDER(ORAL)

The instant writ petition has been filed assailing the order dated 03.03.2021 passed in Misc. (Election) Case No.5/2019 whereby the election of the Petitioner as a Member of Anchalik Panchayat of No. 8 Gobardhana Anchalik Panchayat was set aside and the Respondent No. 1 herein was declared elected as the Member of the No. 8 Gobardhana Anchalik Panchayat from the area of 96 No. Pachim Howly Gaon Panchayat.

2. The facts in brief is that the Petitioner herein contested the Panchayat Election 2017-18 for Anchalik Panchayat Member of No. 8 Gobardhana Anchalik Panchayat from No. 96 Pachim Howly Gaon Panchayat constituency in Barpeta District as a nominated candidate of the Asom Gana Parishad (for short 'AGP'). The Respondent No. 1



herein had also contested the said election as the nominated candidate of Bharatiya Janata Party (for short 'BJP'). There was no other candidate other than the Petitioner and the Respondent No. 1 to the said election for Anchalik Panchayat Member of No. 8 Gobardhana Anchalik Panchayat. The polling for the said election was held on 09.12.2018. The votes were counted on 12.12.2018 and 13.12.2018 in the premises of M.C. College, Barpeta. During the said counting, it was found that the total votes polled were 6207 and out of which 1163 votes were rejected. The total valid votes were found to be 5044 and out of which the Petitioner secured 2547 votes whereas the Respondent No. 1 secured 2497 votes. On the basis of the said counting the Petitioner was declared to be elected as an Anchalik Panchayat Member of No. 8 Gobardhana Anchalik Panchayat from Panchim Howly Gaon Panchayat and an election certificate dated 13.12.2018 was issued by the Respondent No. 3 i.e. the Deputy Commissioner, Barpeta. It is also seen from the perusal of the writ petition that the Petitioner thereupon took oath as the member of the said Anchalik Panchayat and continued discharging her functions as the duly elected representative of her constituency.

3. The Respondent No. 1 being aggrieved with the result, filed an election petition under Sections 127/129 of the Assam Panchayat Act, 1994 (for short 'the Act of 1994'). The said election petition was filed before the learned District Judge-cum-Panchayat Election Tribunal,



Barpeta on 03.01.2019. The records shows that the said election petition was registered and numbered as Misc. (Election) Case No.5/2019. In the said election petition, it was stated that after counting of the votes, the Respondent No. 1 herein (the Election Petitioner) was informed that she had obtained 2547 votes whereas the Petitioner herein (the Respondent No. 3 in the said election petition) obtained 2497 votes and the Respondent Nos.1 & 2 i.e. Deputy Commissioner, Barpeta District as well as the SDO(Civil)-cum-Returning Officer, Barpeta Sub-Division verbally declared the Respondent No. 1 herein as the winner. However, later on the Respondent Nos. 1 & 2 to the election petition i.e. the Deputy Commissioner, Barpeta as well as the SDO(Civil) –cum- Returning Officer, Barpeta Sub-Division declared the Petitioner herein as the winner. As the Petitioner obtained 2547 votes whereas the Respondent No. 1 herein obtained 2497 votes, it is under such circumstances, the election petition was filed alleging that the vote counting process conducted by the Deputy Commissioner, Barpeta as well as the SDO(Civil) –cum- Returning Officer, Barpeta Sub-Division were found doubtful.

4. There were five grounds taken in the said election petition. Taking into account its relevance for the purpose of the instant dispute, the same are reproduced hereinunder :-

1. *For that the petitioner should have been declared elected formally of 8*

No. Gobardhana A.P. from the area of 96 No. Paschim Howly, G.P.;

2. For that the returning officer erred in his attitude by not showing the doubtful and rejected votes to the counting agent of the petitioner and not adding votes out of the doubtful and rejected votes in favour of the petitioner ;

3. For that the counting of votes was illegal, irregular and bias in favour of the respondent No. 3;

4. For that a proper counting of votes will disclose that the petitioner got more votes than the respondent No. 3 ;

5. For that in any view of the matter the counting of votes and the election of the respondent No. 3 is liable to be declared as illegal.

5. It further reveals that in the said election petition the reliefs which have been sought for were as under :-

a) call for the ballot papers and connected documents from the respondent No. 1 & 2 and order re-counting of votes for the post of A.P. Member of 8 No. Gobardhana A.P. from the area of 96 No. Paschim Howly, G.P.;

b) set aside the election of the respondent No. 3 as the A.P. Member of 8 No. Gobardhana A.P. from the area of 96 No. Paschim Howly, G.P.;

c) declare the petitioner as elected A.P. Member of 8 No. Gobardhana A.P. from the area of 96 No. Paschim Howly, G.P.;

d) to direct the respondent No. 1 to issue the winner certificate to the petitioner as the elected A.P. Member of 8 No. Gobardhana A.P. from the area of 96 No. Paschim Howly, G.P.;

e) pass any such order or orders as your honour deem fit and proper.

6. The said election petition was verified by way of a verification which was supported by an affidavit in the manner as provided under Order VI Rule 15 of the Code of Civil Procedure, 1908 for short 'the Code').

7. The records further show that the Petitioner herein had filed a written statement on 10.04.2019 and on 18.07.2019, the SDO (Civil)-



cum- Returning Officer had submitted the written statement. The learned District Judge/Election Tribunal vide the order dated 18.07.2019 fixed 27.09.2019 for objection hearing.

8. On 27.09.2019, an application was filed on behalf of the Respondent No. 1 herein (the Petitioner before the Election Tribunal) under Order XI Rule 14 of the Code with a prayer for calling of the ballot papers and connected documents from the Office of the Deputy Commissioner, Barpeta as well as the SDO(Civil)- cum- Returning Officer. The said application was kept for filing objection and hearing on 30.11.2019. It further reveals that in the meantime, on account of the COVID restrictions, the hearing could not take place on 24.03.2020. However, on 30.05.2020 the application under Order XI Rule 14 of the Code was heard and the learned District Judge fixed 16.06.2020 for necessary order on the said application. The learned District Judge vide an order dated 16.06.2020 allowed the said application filed by the Respondent No. 1 herein (the Election Petitioner) thereby directing that the ballot papers and connected documents be called from the Office of the Deputy Commissioner as well as the SDO(Civil) cum Returning Officer and fixed 10.07.2020. It further reveals that on 10.12.2020 an application was filed for setting aside the order to proceed ex parte against the Deputy Commissioner, Barpeta and the said application was allowed thereby fixing 05.01.2021 for written statement and documents.



9. This Court further takes note of that although 05.01.2021 was fixed for written statement and documents vide the order dated 10.12.2020 by the learned District Judge, Barpeta but in the order dated 05.01.2021, it was recorded that the parties were present and the ballot papers and connected documents so called for were not received and thereupon fixed 19.02.2021 for documents.

10. It further reveals from the records that vide the Communication dated 06.01.2021 issued by the Deputy Commissioner, Barpeta the sealed box containing counted ballot papers in original and the result sheets in respect to the Anchalik Panchayat Member of 96 No. Pachim Howly GP under 8 No. Gobardhana Anchalik Panchayat of Panchayat Election 2017-18 held on 09.12.2019 was submitted. It is further relevant herein to mention that there was no specific application filed seeking recounting of votes during the pendency of the proceedings, although the prayer for recounting of the votes were there in the main election petition as already noted hereinabove. However, surprisingly on 19.02.2021, the learned District Judge, Barpeta assumed that the case was fixed for passing necessary orders for recounting of ballot papers which is completely otherwise perverse as could be seen from the records.

11. Be that as it may be, the learned District Judge, Barpeta vide the order dated 19.02.2021 directed recounting of the ballot papers with a further direction that the same shall be done in the Office of the



District Judge, Barpeta from 2 PM on the next following date. It was further directed that the recounting would be done by one Shri Kamaleswar Basumatary, Head Assistant and Shri Rajiv Jaisawal, Civil Assistant-cum- Statement Assistant of the Office of the District Judge, Barpeta. The Civil Judge, Barpeta and the Munsiff No. 1, Barpeta were appointed as Observers. The learned Government Pleader as well as the learned counsels appearing for both the parties i.e. the Petitioner herein as well as the Respondent No.1 herein were directed to remain present at the time of recounting of ballot papers and fixed 25.02.2021 for recounting of the ballot papers.

12. It further reveals from the records that the said recounting was held on 03.03.2021 at 2 PM in the Office of the District Judge, Barpeta. On such recounting being carried out, the total ballots found were 6192 out of which, the ballots rejected were 1196. It was further found during the recounting process that the Petitioner herein secured 2477 votes whereas the Respondent No. 1 herein secured 2519 votes. The said report was duly submitted to the learned District Judge on 03.03.2021 and on the basis of the said report the election of the of the Petitioner herein was set aside and quashed and the Respondent No. 1 herein was declared elected as Member of No. 8 Gobardhana Anchalik Panchayat from the area of 96 No. Pachim Howly Gaon Panchayat. There was a further direction to the Returning Officer to cancel the election of the Petitioner as a Member of No. 8



Gobardhana Anchallik Panchayat from the area of 96 No. Pachim Howly Gaon Panchayat and declare the Respondent No. 1 herein as the elected member of No. 8 Gobardhana Anchallik Panchayat from the area of 96 No. Pachim Howly Gaon Panchayat and on the basis of the said order so passed the election petition was disposed of.

13. Being aggrieved and dissatisfied the instant writ petition was filed.

14. Mr. P.D. Nair, the learned counsel appearing on behalf of the Petitioner submitted that the learned Election Tribunal could not have passed the order dated 19.02.2021 directing recounting of the votes just on the basis of the pleadings contained in the election petition. He submitted that were written statements so filed by the Petitioner as well as by the Returning Officer. In the said election petition, no issue was framed, no evidence was tendered as well as there was no application filed seeking recounting of the votes at that stage. The learned counsel for the Petitioner further submitted that it is not known on what basis the learned District Judge, Barpeta had assumed that 19.02.2021 was fixed for passing orders on recounting of votes whereas as per the order passed earlier on 05.01.2021, the date was fixed for documents. The learned counsel for the Petitioner further submitted that an Election Petition under Sections 127/129 of the Act of 1994 has to be adjudicated in terms with the provisions of the Assam Panchayat (Constitution) Rules, 1995 (for short the 'Rules of



1995') and more particularly Rule 54 of the Rules of 1995 whereby the relevant Rules framed under the Representation of People's Act, 1959 have to be applied in respect to all matters which are not provided in the Rules of 1995. The learned counsel for the Petitioner further drew the attention of this Court to various judgments of the Supreme Court as to under what circumstances, an order for recounting of votes should be passed. The said judgments are :-

(1) P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen & Ors. reported in (1989) 1 Supreme Court Cases 526

(2) M. Chinnasamy Vs. K.C. Palanisamy & Ors. reported in (2004) 6 Supreme Court Cases 341.

(3) Satyanarain Dudhani Vs. Uday Kumar Singh and Ors. reported in 1993 Supp. (2) Supreme Court Cases 82

(4) Udey Chand vs. Surat Singh & Anr. reported in (2009) 10 Supreme Court Cases 170.

15. Referring to the above mentioned judgments, the learned counsel for the Petitioner submitted that the justification for an order of re-count of votes should be provided by materials placed by an election petitioner on the threshold. The learned counsel submitted that reason for the salutary rule is that preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. He further



submitted that the Supreme Court in the case of **P.K.K. Shamsudeen(supra)** had categorically observed that the right of a defeated candidate to assail the validity of an election result and seek re-counting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and unless the affected candidate is able to allege and substantiate an acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for recount of the votes being ordered by the Election Tribunal in the interest of justice, a Tribunal or Court should not order for recount of votes. He submitted that in the instant case neither issues were framed nor evidence was adduced. Merely bald statements were made that the Respondent No. 1 (the Election Petitioner) got 2547 votes whereas the Petitioner herein (the Respondent No. 3 in the Election Petition) got 2497 votes on the basis of certain verbal information which could only have been proved by way of evidence whereas such statements have been denied in the Written Statements.

16. The learned counsel further drawing the attention of this Court to the judgment in the case of **Satyanarain Dudhani (supra)** submitted that in the said case also, it was observed that it would not be proper to order recount on the basis of bare allegations made in the election petition. It was further observed that the secrecy of the ballot papers cannot be permitted to be tinkered lightly and the order

of recounting of votes cannot be granted as a matter of course. In the said judgment, the Supreme Court further observed, as submitted by the learned counsel for the Petitioner, that only when the Court is satisfied on the basis of material facts pleaded in the petition and supported by contemporaneous evidence that a recount of votes could be ordered.

17. Referring to the judgment of the Supreme Court in the case of **M. Chinnasamy (supra)**, the learned counsel submitted that an order of recounting of votes can be passed when the four ingredients are satisfied viz. (1) if there is a prima facie case ; (2) material facts therefor are pleaded ; (3) The Court shall not direct re-counting by way of roving or fishing inquiry ; and (4) Such objection had been taken recourse to. Referring to para-graph 43 of the judgment in the case of **M. Chinnasamy (supra)**, the learned counsel submitted that a positive finding has to be arrived at by the Election Tribunal as to how a prima facie case has been made out for issuing a direction for re-counting. In the said judgment, it was also observed that, it is well settled that prima facie case must be made out for scrutiny and re-counting of ballot papers when an opinion is arrived at that the errors are of such magnitude as to materially affect the election.

18. The learned counsel for the Petitioner further referring to another judgment of the Supreme Court in the case of **Udey Chand (supra)** which was a case pertaining to election under the Panchayat

Act observed that it was trite that before an Election Tribunal can permit scrutiny of ballot papers and order recount, two basic requirements have to be fulfilled i.e. the election petition seeking recount of the ballot papers must contain an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded, and (ii) on the basis of evidence adduced in support of the allegations, the Tribunal must be prima facie satisfied that in order to decide the dispute and to do complete and effectual justice between the parties, making of such an order is imperatively necessary.

19. The learned counsel therefore submitted that the order of recounting dated 19.02.2021, apart from being illegal as the same was passed on a pervasive assumption that the case was fixed for passing orders of recount also do not fulfill the mandate of the well settled principles of law laid down by the Supreme Court in the above noted judgments for which the consequential order impugned in the instant proceedings i.e. the order dated 03.03.2021 is required to be set aside and quashed.

20. On the other hand Mr. B. Islam, the learned counsel appearing on behalf of the Respondent No. 1 submitted that a perusal of the election petition would clearly go to show that there are material facts stated to the effect that during the recounting process, it was informed that the Respondent No. 1 herein (the Election Petitioner)



received 2547 votes whereas the Petitioner herein (the Respondent No. 3 in the election proceedings) received 2497 votes; but at the time when the results were declared it was the other way round and as such the Election Petitioner (the Respondent No. 1 herein) had serious doubts as regards the conduct of the Respondent Authorities and these material facts would be sufficient for the purpose of directing a recount. The learned counsel however admitted that from the records it would however show that no evidence was tendered and the case was not fixed on 19.02.2021 for the purpose of passing orders for recounting. The learned counsel for the Respondent No. 1 submitted that as the issue involved could have been easily settled by recounting the votes, the learned District Judge was justified in passing the order dated 19.02.2021 and thereupon after recounting, it was found that the Respondent No. 1 herein secured 2519 votes whereas the Petitioner herein secured 2477 votes. He further submitted that all the parties participated in the said election counting and as such the Petitioner now cannot say that the order of recounting was not permissible.

21. Mr. N.K. Debnath, the learned counsel appearing on behalf of the Panchayat & Rural Development Department submitted that the said Department have been unnecessarily drawn into the instant dispute as the said Department was not a party before the Election Tribunal.



22. I have heard the learned counsel for the Petitioner and have also perused the records which were called for by this Court vide the order dated 16.03.2021.

23. The issue involved in the instant proceedings is as to whether the learned District Judge, Barpeta was justified in passing the order of recounting on 09.02.2021 that too at a stage when issues were yet to be framed and no evidence was tendered by either of the parties. The learned counsel for the Petitioner has drawn the attention of this Court to various judgments as referred to hereinabove. Taking into account the issue involved in the instant proceedings, this Court finds it relevant to take note of the said judgments which would throw light as to whether the learned District Judge, Barpeta was justified in passing the said order dated 19.2.2021 and thereafter the consequential impugned order dated 3.3.2021.

24. In the case of **P.K.K. Shamsudeen(supra)**, the Supreme Court at paragraph No. 13 after taking note that preservation of the secrecy of the ballot papers is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it, had observed that unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for recount of the votes being ordered by the Election Tribunal in the interest of justice, a Tribunal or Court should not order for recount of votes. This

Court also finds it relevant to take note of paragraph 15 of the said judgment wherein the Supreme Court had also observed that even after recounting it is found that the affected candidate had secured more votes, then also the election should not be interfered with, if the order of recounting of votes is not in accordance with the said principles. Paragraph Nos. 13 & 15 of the said judgment is quoted hereinunder :-

“13. Thus the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from hindsight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election petitioner on the threshold before an order for recount of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or court should not order the recount of votes.

15. Mr Padamanabhan also contended that the purpose and object of the election law is to ensure that only that person should represent the constituency who is chosen by the majority of the electors and that is the essence of democratic process, and this position has been observed by a Bench of this Court in their order of reference of the case of N. Gopal Reddy v. Bonala Krishnamurty and hence it would be a travesty of justice and opposed to all democratic canons to allow Respondent 1 to continue to hold the

post of the President of the Panchayat when the recount disclosed that he had secured 28 votes less than the petitioner. We are unable to sustain this contention because as we have stated earlier an order of recount of votes must stand or fall on the nature of the averments made and the evidence adduced before the order of recount is made and not from the results emanating from the recount of votes.”

25. This Court further finds it relevant to observe that in the case of **Satyanarain Dudhani (supra)**, the Supreme Court observed at paragraph No. 10 that the secrecy of the ballot papers cannot be permitted to be tinkered lightly and the order of recount cannot be granted as a matter of course and it is only when the Court is satisfied on the basis of material facts pleaded in the petition and supported by contemporaneous evidence that a recount can be ordered. Paragraph No. 10 of the said judgment is reproduced *hereinbelow* :-

“10. It is thus obvious that neither during the counting nor on the completion of the counting there was any valid ground available for the recount of the ballot papers. A cryptic application claiming recount was made by the petitioner-respondent before the Returning Officer. No details of any kind were given in the said application. Not even a single instance showing any irregularity or illegality in the counting was brought to the notice of the Returning Officer. We are of the view when there was no contemporaneous evidence to show any irregularity or illegality in the counting ordinarily, it would not be proper to order recount on the basis of bare allegations in the election petition. We have been taken through the pleadings in the election petition. We are satisfied that the grounds urged in the election petition do not justify for ordering recount and allowing inspection of the ballot papers. It is settled proposition of law that the secrecy of the ballot papers cannot be permitted to be tinkered lightly. An order of recount cannot be granted as a matter of course. The secrecy of the ballot papers has to be maintained and only when the High Court is satisfied on the basis of material facts pleaded in the petition and supported by the contemporaneous evidence that the recount can be

ordered.”

26. In the case of **M. Chinnasamy (supra)**, the Supreme Court observed at paragraph No. 15 as to what are the requirements for passing an order of recounting of votes. It was further observed at paragraph No. 16 that a direction for recounting shall not be issued only because the margin of votes between the returned candidate and the election petitioner is narrow. Furthermore in the said judgment at paragraph No. 43, it was also observed that the Court/the Tribunal has to arrive at a positive finding as to how a prima facie case has been made out for issuing a direction for recounting. In the said paragraph, it was also observed what would constitute a prima facie case meaning thereby the Court has to form an opinion that the errors are of such magnitude as to materially affect the election. Paragraph Nos. 15, 16 and 43 being relevant are reproduced hereinunder :

”15. It is not in dispute that in relation to an election petition, the provisions of the Code of Civil Procedure apply. In terms of Order 6 Rule 2 of the Code of Civil Procedure which is in pari materia with clause (a) of sub-section (1) of Section 83 an election petition must contain concise statement of material facts. It is true as contended by Mr Mani that full particulars are required to be set forth in terms of clause (b) of sub-section (1) of Section 83 of the Act which relates to corrupt practice. The question as to what would constitute material facts would, however, depend upon the facts and circumstances of each case. It is trite that an order of re-counting of votes can be passed when the following ingredients are satisfied: (1) if there is a prima facie case; (2) material facts therefor are pleaded; (3) the court shall not direct re-counting by way of roving or

fishing inquiry; and (4) such an objection had been taken recourse to.

16. *The necessity of "maintaining the secrecy of ballot papers" should be kept in view before a re-counting is directed to be made. A direction for re-counting shall not be issued only because the margin of votes between the returned candidate and the election petitioner is narrow.*

4 *Furthermore, the High Court has not arrived at a positive finding as to how a prima facie case has been made out for issuing a direction for re-counting. It is well settled that prima facie case must be made out for scrutiny and re-counting of ballot papers where it is of the opinion that the errors are of such magnitude as to materially affect the election."*

27. This Court further takes note of the judgment of the Supreme Court in the case of **Udey Chand** (supra) which was a case pertaining to recounting of votes by the Election Tribunal/the Court in terms with the Haryana Panchayati Raj Act, 1994. The Supreme Court at paragraph Nos. 11 & 12 observed that since an order for inspection and re-count of the ballot papers affects the secrecy of ballot, such an order cannot be made as a matter of course unless a strong prima facie circumstances is shown to suspect the purity, propriety and legality in the counting so made. In paragraph No. 12 of the said judgment, the Supreme Court observed the fulfillment of two basic requirements before passing an order for recount of the ballot papers which includes not only material facts as well as evidence adduced in support of the allegations. Paragraph Nos. 11 and 12 of the said judgment being relevant are reproduced hereinunder :

“11. Before advertng to the merits of the issue raised by the parties with reference to the statutory provisions, it would be appropriate to bear in mind the salutary principle laid down in the election law that since an order for inspection and re-count of the ballot papers affects the secrecy of ballot, such an order cannot be made as a matter of course. Undoubtedly, in the entire election process, the secrecy of ballot is sacrosanct and inviolable except where strong prima facie circumstances to suspect the purity, propriety and legality in the counting are made out.

12. The importance of maintenance of secrecy of ballot papers and the circumstances under which that secrecy can be breached, has been considered by this Court in several cases. It would be trite to state that before an Election Tribunal can permit scrutiny of ballot papers and order re-count, two basic requirements viz.:

(i) the election petition seeking re-count of the ballot papers must contain an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded, and

(ii) on the basis of evidence adduced in support of the allegations, the Tribunal must be prima facie satisfied that in order to decide the dispute and to do complete and effectual justice between the parties, making of such an order is imperatively necessary, are satisfied.”

28. From the above principles so laid down by the Supreme Court, it is clear that the preservation of the secrecy of the ballot papers is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The said prima facie genuine need has to be established by the Election Petitioner who seeks recount of the ballot papers by making adequate statements in the election petition of the material facts on which the allegations of illegality or irregularity in counting are founded and those material facts have also to be substantiated by way of an evidence so that the Election Tribunal/the Court is of the opinion that the errors of such magnitude had materially affected the election. It is also seen from

the above judgments that the Election Tribunal/the Court has to give a positive finding as to how a prima facie case has been made out for issuing a direction for recounting.

29. Now coming to the facts involved, the details of which this Court have already referred to, it would be seen that the Respondent No. 1 being the Election Petitioner had filed the election petition alleging that he doubts the vote counting process conducted by the Deputy Commissioner, Barpeta as well as the SDO (Civil) cum Returning Officer. Such allegations have been denied by the Petitioner by filing a detailed Written Statement on 10.04.2019. It is also seen that in the Written Objection so filed by the Respondent Nos. 3 & 4 herein on 18.07.2019 that the election petitioner's allegations have been denied and it was further stated in the Written Objection that during the process of counting the votes/ballots, there was neither any anomaly nor discrepancy as at the end of every round of counting, signatures of the candidates/counting agents were obtained to the effect that they were satisfied on the counting process of the votes.

30. It further reveals from the records that no issues were framed in the said proceedings. The reason must have been the order dated 10.12.2020 wherein the learned District Judge, Barpeta had fixed 05.01.2021 for Written Statement by the Deputy Commissioner, Barpeta and for documents. It further reveals that on 27.09.2019



Petition No. 796/2019 was filed under Order XI Rule 14 of the Code with a prayer for calling the ballot papers and connected documents from the Office of the Deputy Commissioner as well as the Returning Officer. This Court also finds it relevant that in the said Petition under Order XI rule 14 of the Code, it was only prayed for calling the ballot papers and connected documents from the Office of the Deputy Commissioner as well as the Returning Officer and nothing more. The said application under Order XI Rule 14 was allowed vide order dated 16.06.2020 thereby the ballot papers and connected documents from the Office of the Deputy Commissioner as well as the Returning Officer was called. The said ballot papers as well as the connected documents were not received by the Court till 05.01.2021 and the said aspect of the matter could be seen from the order dated 05.01.2021 itself. Taking into account its relevance, the same is quoted hereinunder :

“05.01.2021

The learned counsel for the parties are present.

The ballot papers and the connected documents as called for has not yet been received.

Issue reminder.

Fixing 19.02.2021 for documents.”

31. From the above quoted order, it would reveal that 19.02.2021 was fixed for documents as the ballot papers and the connected documents were not received till then. From the records, it further



reveals that on 06.01.2021 the Deputy Commissioner, Barpeta submitted the ballot papers and the connected documents before the Court.

32. On 19.02.2021, most surprisingly the learned District Judge, Barpeta directed the recounting of the ballot papers on the basis of a pervasive assumption that the case was fixed for passing orders for recounting of ballot papers. This Court had also duly taken note of the order dated 19.02.2021 wherein there is not a single whisper that a prima facie case has been made out to the effect that the errors are of such magnitude as to materially affect the election on the basis of the material facts and contemporaneous evidence. The salutary principle of secrecy of ballot papers was given a complete go-bye by the learned District Judge, that too without the material facts being proved by contemporaneous evidence thereby justifying the bypassing of the salutary principles. The said order dated 19.02.2021 contains no legally recognizable reasons for issuance of a direction for recounting of the ballot papers. In fact the manner in which the order dated 19.02.2021 was passed shocks the judicial conscience of this Court.

33. On the basis of the said order dated 19.02.2021, the record shows that on 03.03.2021 at 2 PM recounting was held and on the very date the impugned order dated 3.3.2021 was passed whereby the election of the Petitioner was set aside and the Respondent No. 1

was declared elected as Member of No. 8 Gobardhana Anchalik Panchayat from the area of 96 No. Pachim Howly Gaon Panchayat.

34. This Court now finds it relevant to again refer back to the judgment of the Supreme court in the case of **P.K.K. Shamsudeen(supra)**, wherein at paragraph No. 15 as quoted hereinabove it was observed that if the order of recount of votes was not in accordance with law, the results of the said recounting would not affect the election of the returned candidate, although the result of the recounting would show that the returned candidate had secured less votes. In view of the said judgment of the Supreme Court in **P.K.K. Shamsudeen(supra)**, the principle which was followed also in the case of **M. Chinnasamy (supra)** as well as in **Udey Chand(supra)**, this Court cannot take countenance to the submissions of the Respondent No. 1 to the effect that the results of the recounting was in favour of the Respondent No. 1.

35. This Court further finds it relevant to observe that it was on account of the fault of the learned Court below who, on a pervasive assumption had assumed that the case was fixed for passing orders of recounting and accordingly passed the order dated 19.2.2021 that too without framing of issues and evidence being led. The order for recounting dated 19.2.2021 and consequentially the impugned order dated 3.3.2021 are on the face of it contrary to the well settled principles of law as well as suffers from perversity. The said orders



also glaringly reflects the total non application of mind. Under such circumstances, this Court sets aside the order dated 19.2.2021 as well as the consequential order dated 3.3.2021 and thereby restores the said election proceedings back to the file of the learned District Judge, Barpeta. This order of restoring the election proceedings back to the file of the learned District Judge, Barpeta is ordered in view of the fact that the learned District Judge did not exercise the jurisdiction conferred by law and culminated the Election Petition wrongfully.

36. The learned counsel for the parties have submitted that the tenure of the membership of the Anchalik Panchayat would come to an end in the month of December, 2023 and as such the matter be directed to be disposed of as expeditiously as possible. This Court have given an anxious consideration to the said aspect and taking into account that in the month of December, 2023 the tenure of the membership of the Anchalik Panchayat would come to an end, this Court requests the learned District Judge, Barpeta to expeditiously dispose of the proceedings and preferably within three months from the date of appearance of the parties. The parties herein are directed to appear on 30.08.2023 before the learned District Judge, Barpeta.

37. The Registry shall forthwith return the records through a Special Messenger, if necessary so that the matter can be taken up on 30.08.2023 by the learned District Judge, Barpeta.



38. With the above observations and directions, the instant writ petition stands disposed of.

JUDGE

Comparing Assistant