

**HIGH COURT OF JAMMU AND KASHMIR AND LADAKH  
AT JAMMU**

**CJ Court**

Reserved on 10.09.2021  
Pronounced on 06.10.2021

Case: LPA No. 259 of 2019

Farooq Ahmed

.....Appellant/Petitioner(s)

Through :- Sh. Ajay Singh Kotwal, Advocate in  
LPA No. 259 of 2019  
Sh. R. K. Jain, Sr. Advocate with  
Sh. Pankaj Jain, Advocate in  
OWP No. 312 of 2019  
Smt. Rozina Afzal, Advocate in  
WP(C) Nos. 2018 & 3777 of 2019  
Sh. Faheem Showkat Butt, Advocate in  
WP(C) Nos. 3144 and 3147 of 2019  
Sh. K. L. Pandita, Advocate in  
WP(C) No. 3522 of 2019 and WP(C)  
No. 2938 of 2019  
Sh. R. D. S. Bandral, Advocate in  
WP(C) No. 3309 of 2019

v/s

State of J&K and others

.....Respondent(s)

Through :- Sh. D. C. Raina, Advocate General with  
Sh. Ayjaz Lone, Dy. AG  
for respondent Nos. 1 to 4  
Sh. K. S. Johal, Sr. Advocate with  
Sh. Supreet Johal, Advocate  
Sh. Ashish Singh Kotwal, Advocate  
Sh. M. A. Bhat, Advocate  
Sh. A. P. Malik, Advocate  
Sh. Intikhab H. Shah, Advocate  
Sh. B. S. Jamwal, Advocate

**Coram: CORAM:  
HON'BLE THE CHIEF JUSTICE  
HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE**

**JUDGMENT**

**Per Rajnesh Oswal J**

1. This *intra* court appeal has been preferred against the judgment/order dated 26.07.2019 passed by the learned Single Judge by virtue of which, the writ petition filed by the appellant has been dismissed and

order of recounting of ballots for ward No. 10, Panchayat Halqa Kundan, Azmabad, Tehsil Mandi, District, Poonch passed by the Additional Deputy Commissioner Poonch, respondent No. 4 herein vide order dated 15.07.2019, has been upheld.

2. The present Appeal has been filed on the grounds that as per sub rule 4 of the Rule 36 of the Jammu and Kashmir Panchayati Raj Rules, 1996 (for short the Rules), the decision of the Returning Officer vis-a-vis acceptance or rejection of the ballots is final and cannot be questioned. Further that the learned Single Judge did not appreciate the fact that the order of recounting was passed by the respondent No. 4 in a mechanical and routine manner without asking the parties to substantiate their respective claims by adducing cogent evidence in this regard.
3. It is further averred that after passing of the judgment by the learned Single Judge, recounting was done and the appellant was ousted and respondent No. 5 was declared as elected. The appellant again approached the Court and challenged the order of recounting and subsequent proceedings by way of writ petition bearing WP(C) No. 3634 of 2019, titled, Farooq Ahmed vs State of J&K and others, however, the said writ petition was dismissed as not maintainable.
4. The brief facts which are necessary for disposal of the present appeal are that the election was held for the post of Panch in ward No. 10, Panchayat Halqa, Kundaan Azmabaad, Tehsil Mandi, District Poonch on 20.11.2018 under the supervision of respondent No. 6. The total votes polled were 100 out of which 02 votes were declared invalid as per rules. Farooq Ahmed, appellant herein received 49 votes, Mohd Younis-respondent No. 5 got 48 votes and Mushtaq Ahmed got one

vote only. Counting was repeated thrice before announcing the result and all the contesting candidates were present at the time of counting and whole counting process was undertaken under their observation. It is further stated that the respondent No. 5 was satisfied on the day of polling/counting of votes and the appellant was declared winner as Panch of that Ward and the certificate was issued by the Returning Officer in presence of aforesaid persons in favour of the appellant on the same day. The respondent No. 5 remained silent up to 10.12.2018 and filed appeal before the Additional Deputy Commissioner, Poonch, respondent No. 4 herein on 10.12.2018. The appellant filed his response to the appeal before the respondent No. 4 and denied all the allegations leveled by the respondent No. 5 in the appeal. The respondent No. 4 without hearing the appellant, passed order dated 15.07.2019 for recounting of the votes without assigning any reason and fixed the date for recounting of votes on 31.07.2019.

5. The appellant impugned the order dated 15.07.2019 being illegal and arbitrary contrary to the provisions of section 43 of the Jammu and Kashmir Panchayati Raj Act, 1989 (for short the Act) but the learned Single Judge vide order dated 26.07.2019 dismissed the writ petition filed by the writ petitioner-appellant. Hence the appeal.
6. A perusal of the order dated 15.07.2019 passed by the respondent No. 4 reveals that the Additional Deputy Commissioner, Poonch, ordered recounting of the votes just to clear the doubt of the appellant because of the narrow margin of the winning candidate i.e. appellant herein.
7. Heard Sh. Ajay Singh Kotwal, learned counsel for the appellant and Sh. D. C. Raina, learned Advocate General assisted by Sh. Ayjaz Lone,

learned Dy. A. G. appearing for the official respondents. Perused the record as well.

8. Learned counsel for the appellant has vehemently argued that the learned Single Judge has not considered that the appeal of respondent No. 5 before the respondent No. 4 was misconceived, particularly in view of section 43 of the Act and further that the narrow margin of the victory could never have been a ground for upholding the order of recounting passed by the appellate authority-respondent No. 4.
9. Sh. D. C. Raina, learned Advocate General appearing for the official respondents has vehemently submitted that the appellate authority has the power to pass all the orders as per Rule 43 of the Panchayati Raj Rules and also that it includes order with regard to the recounting of the votes as well.
10. Before considering the contentions of the parties, it will be apt to take note of the section 43 of the Act and rules 36 and 43 of the Rules respectively, which read:

**“43. Disputes regarding elections.**—The election of a person as Sarpanch, Panch of Halqa Panchayat or as a Chairman of the Block Development Council shall not be called in question except by an application presented to such authority within such time and in such manner as may be prescribed on the grounds that :—

- (a) the election has not been a free election by reason that the corrupt practice of bribery or undue influence has extensively prevailed at the election; or
- (b) that the result of the election has been materially affected.—
  - (i) by the improper acceptance or rejection of any nomination; or
  - (ii) by gross failure to comply with the provisions of this Act or the rules framed thereunder.”

**“36. Rejection of ballot papers.**—(1) A ballot paper shall be liable to rejection,—

- (i) if no vote is recorded thereon; or

- (ii) if the ballot paper or the vote recorded thereon is void for uncertainty; or
- (iii) if it is otherwise not in conformity with rules.
- (2) No ballot paper shall be rejected otherwise than on any of the grounds enumerated in sub-rule (1).
- (3) The Returning Officer shall record on every ballot paper which he rejects a brief statement or reasons for such rejection.
- (4) The decision of the Returning Officer as to the validity or otherwise of the ballot paper shall be final.”

“**43. Appellate Authority.**—(1) An appeal against the election of a candidate as Sarpanch or Panch shall lie to the authority as may be notified by the Government within a period of 30 days from the date of declaration of result.

- (2) On receipt of the appeal under sub-rule (1), the appellate authority shall fix the time, place and date of hearing of the appeal, such date not being more than seven days after the date of receipt of the appeal
- (3) At the fixed date and place the Appellate Authority shall hear the appeal and pass such orders as it may deem fit.
- (4) The orders passed under sub-rule (3) shall be final.”

11. Thus, a perusal of the section 43 of the Act reveals that the election can be questioned only on the ground that the election has not been free election by reason that corrupt practice or bribery or undue influence has extensively prevailed in that election and that the result of the election has been materially affected by the improper acceptance or rejection of any nomination or by gross failure to comply with the provision of this Act or the Rules framed there under.

12. The Supreme Court in **Udey Chand v Surat Singh and another, (2009) 10 SCC 170** has held in paras 12 as under:

**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.

13. In **Vadivelu v. Sundaram, (2000) 8 SCC 355**, the Apex Court in para 16 has held as under:

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

14. During the course of arguments, the learned counsel for the appellant did not dispute the power lying with the Appellate Authority to order recounting of the votes. But the fact remains that the recounting of votes cannot be ordered on the vague and indefinite allegations made against the elected candidate and there must be clear and specific allegations with regard to grounds/conditions mentioned above and

their consequential effect upon the result. It is clear that the election can be challenged only on the grounds mentioned in section 43 of the Act and while challenging the election, the appeal must contain all the material facts with regard to the grounds/conditions mentioned above.

15. A perusal of the order of the learned Single Judge reveals that the learned Single Judge in view of the narrow margin of the victory has upheld the order of recounting.
16. Hon'ble Apex Court in **Bhabhi v Sheo Govind and others, AIR 1975 SC 2117**, has held as under:

“17.....We are, however, unable to agree with this broad statement of the law by the learned Judge because if a person is duly elected even by a narrow margin of votes there is no presumption that there has been illegality or irregularity in the election. This is fact which has to be proved by a person who challenges the election of the duly elected of the duly elected candidate. After all in a large democracy such as our's where we have a multiparty system, where the number of voters is huge and dissevers, where the voting is free and fair and where in quite a few cases the contest is close and neck to neck, a marginal victory by successful candidate voter his rival can sometimes be treated as a tremendous triumph so as to give a feeling of satisfaction to the victorious candidate. The Court cannot lightly brush aside the success of the duly elected candidate on an election petition based on vague and indefinite allegations or frivolous and flimsy grounds.”

17. Thus, the victory margin being narrow could not have been a ground for issuing order of recounting of votes in absence of any finding with regard to existence of any of the grounds prescribed by section 43 of the Act.
18. We find that the reason furnished by the respondent No. 4 while passing the order dated 15.07.2019 for recounting of the votes, that the same

was passed to clear the doubt of the respondent No. 5, is not in accordance with the provisions of section 43 of the Act and as such the order dated 15.07.2019 is not sustainable in the eyes of law. Also, we have not been able to convince ourselves with the reasoning recorded by the learned Single Judge, while deciding the writ petition filed by the appellant and as such, the order impugned is also not sustainable. We could have remanded the matter back to writ court for fresh consideration but as appellant has himself admitted that after the dismissal of the writ petition by virtue of impugned judgment dated 26.07.2019, the respondent No. 5 has been declared elected after recounting of votes and the appellant had challenged his election along with the order of recounting but the said writ petition was dismissed too and the dismissal of the said petition has not been challenged by the appellant till date. As such, we do not deem it appropriate to remand the matter back and rather we dismiss the present Letters Patent Appeal with liberty to the appellant to avail the appropriate remedy as available under law. The connected matters are segregated and be listed before the appropriate Bench.

**(RAJNESH OSWAL)**  
**JUDGE**

**(PANKAJ MITHAL)**  
**CHIEF JUSTICE**

**JAMMU:**  
06.10.2021  
Rakesh

Whether the order is speaking:	Yes/No
Whether the order is reportable:	Yes/No