

COUNTING AND RECOUNT OF VOTES IN ELECTION

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Abstract

A poll taken at an election is followed by the counting of votes. The counting must be done meticulously in accordance with the procedure prescribed under the election law. As the law provides for the polling of votes by post, through ballot boxes, and the Electronic Voting Machines, accordingly a detailed procedure is laid down separately for the counting of votes by postal ballot, through ballot boxes and Electronic Voting Machines, though the Electronic Voting Machines have in a phased manner replaced the ballot boxes. The present paper discusses this procedure which finally culminates into the declaration of the result of the election. Counting in case of fresh poll, in case of booth capturing and in case of destruction, loss, etc of votes/ EVMs as well as recount of votes are also discussed in this paper.

1. Introduction

The counting of votes is one of the most crucial steps of the election process. After the poll is over, the votes polled are to be counted and the result of election to be declared. The votes polled at any election are counted by or under the supervision and direction of the returning officer. Who are the other persons entitled to participate in the counting, what is the date, time and place of counting, how the counting agents are to be appointed, what procedure is followed for counting, etc have been discussed in the present paper. Two kinds of votes are to be counted – first the postal ballot and second those polled at the polling station. In the latter case, the Electronic Voting Machines (EVMs) have now come to substitute the ballot boxes gradually in a phased manner. A great caution is necessary at counting. There are numerous reasons due to which a vote polled through postal ballot or through ballot boxes may be rendered invalid and are thus excluded. The present paper throws light on these reasons. The paper also discusses how the counting gets affected by a fresh poll, booth capturing and destruction/ loss of votes or EVMs. If necessary, a recount may be allowed by the returning officer, if claimed by the candidate.

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2. Appointment of Counting Agents

Each contesting candidate, his election agent and his counting agents have the right to be present at the time of counting.¹ A contesting candidate or his election agent may appoint one or more persons as his counting agent(s) and the number of such counting agents, subject to general or special direction issued by the Election Commission, shall not exceed sixteen at each place fixed for counting.² The appointment of counting agents is made in the prescribed Form.³ One copy of appointment is sent to the returning officer and the other is given to the counting agent for production before the returning officer not later than one hour before the time fixed for counting. A counting agent is admitted into the place of counting only after delivery of the second copy of his appointment, signing of the declaration therein and being authorized for entry by the returning officer.⁴ The appointment of a counting agent may be revoked by a candidate or his election agent.⁵ Such revocation shall be made in the prescribed Form⁶ and lodged with the returning officer. It shall operate from the date on which it is lodged with the returning officer. In the event of a revocation before the commencement of the counting of votes, the candidate or his election agent may make a fresh appointment in the aforesaid manner.⁷ A counting agent has to perform all functions connected with the counting of votes. He may be assisted by the contesting candidate or his election agent or they may themselves perform the functions of a counting agent. Non-attendance of counting agent at time and place of any act or thing to be done in their presence shall not invalidate the act or thing done, if it is otherwise duly done.⁸

Before commencing the counting, all persons performing any duty in connection with the counting of votes shall take an oath of 'maintenance of secrecy'.⁹

¹ Section 64, the Representation of the People Act, 1951.

² Section 47, the Representation of the People Act, 1951 read with Rule 52, the Conduct of Elections Rules, 1961.

³ Form 18, the Conduct of Elections Rules, 1961.

⁴ Rule 52, *Ibid.*

⁵ Section 48, the Representation of the People Act, 1951, read with Rule 52, *Ibid.*

⁶ Form 19, the Conduct of Elections Rules, 1961.

⁷ *Supra* note 5.

⁸ Sections 49, 50 & 51 the Representation of the People Act, 1951.

⁹ Section 128, *Ibid.* read with Rule 54, the Conduct of Elections Rules, 1961.

3. Counting of Votes

i. Notice of Counting

The returning officer shall give notice in writing at least one week before the date of poll, of the date, time and place of counting to each candidate or his election agent. Any alteration in date, time or place can be made after serving a notice in the similar manner.¹⁰

ii. Counting of Postal Ballot

The postal ballot papers are counted by the returning officer. Postal ballot papers received after the expiry of the time shall not be opened for counting. Rest of the covers shall be opened. A postal ballot paper is kept under two covers, the outer cover containing a declaration in the prescribed form regarding the identity of the voter and the inner cover contains the ballot paper. The returning officer shall first scrutinize the declaration. If the said declaration is not found inside the cover, or if it has not been duly signed and attested, or is otherwise substantially defective, or if the serial number of the ballot paper as entered in it does not match with the serial number endorsed on the inner cover, then such inner cover shall be rejected. All the declarations which are found in order are then placed in a separate sealed packet before the inner covers containing the ballot papers are opened. Thereafter the inner covers are opened one after another. The returning officer shall scrutinize each ballot paper and decide upon the validity of the vote recorded thereon.¹¹ A postal ballot paper is rejected:

- (i) if no vote is recorded thereon; or
- (ii) if vote is given in favour of more candidates than one; or
- (iii) if it is a spurious ballot paper; or
- (iv) if it is so damaged or mutilated as to render it ingenuine ; or
- (v) if it is not returned in the cover sent along with it to the elector; or
- (vi) if it bears any mark (other than the mark to record the vote) or writing by which the elector can be identified; or

¹⁰ Rule 51, the Conduct of Election Rules, 1961.

¹¹ Rule 54 A (1) to (7), the Conduct of Elections Rules, 1961.

- (vii) if the mark indicating the vote is placed on the ballot paper in such manner as to make it doubtful to which candidate the vote has been given.¹²

However, a vote recorded on a ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote shall be for a particular candidate is clearly apparent from the way the ballot paper is marked.¹³

Then, the returning officer shall count all valid votes given by postal ballot, record the total in the result sheet in the prescribed form and announce the same. Thereafter, separate bundles of valid and rejected ballot papers shall be kept together in a packet which shall be sealed.¹⁴

iii. Counting of Votes Polled at Polling Stations

(A) *Where ballot boxes have been used*

To initiate the counting of votes polled at polling stations, the counting agents present are allowed to satisfy themselves that the seal on the ballot box (es) is intact. The returning officer satisfies himself that none of the ballot boxes has been tampered with. then the ballot boxes are opened and their counting starts.¹⁵

The ballot papers shall be arranged in convenient bundles and scrutinized. A ballot paper will be rejected-

- (i) if it bears any mark or writing by which the elector can be identified; or
- (ii) if it bears no mark at all or, to indicate the vote, it bears a mark elsewhere than on or near the symbol of one of the candidates on the face of the ballot paper or, it bears a mark made otherwise than with the instrument supplied for the purpose, or
- (iii) if votes are given on it in favour of more than one candidate, or
- (iv) if the mark indicating the vote thereon is placed in such manner as to make it doubtful to which candidate the vote has been given, or

¹² Rules 54 A (8) & (9), *Ibid.*

¹³ Rule 54 A (10), *Ibid.*

¹⁴ Rule 54 A (11) & (12), *Ibid.*

¹⁵ Rule 55, *Ibid.*

- (v) if it is a spurious ballot paper, or
- (vi) if it is so damaged or mutilated as to render it ingenuine, or
- (vii) if it bears a serial number, or is of a design, different from the serial numbers or, as the case may be, design, of the ballot authorized for use at the particular polling station, or
- (vii) if it does not bear the distinguishing mark prescribed by the Election Commission and the signature of the presiding officer required under Rule 38.¹⁶ However, a ballot paper shall not be rejected.
- (a) merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote shall be for a particular candidate is clearly apparent from the way the paper is marked; or
- (b) Merely on the ground of the defect mentioned above in clauses (vii) & (viii) if the returning officer is satisfied that such defect has been caused by any mistake or failure on the part of a presiding officer or polling officer.¹⁷

The duty of the returning officer to reject a ballot paper, if it is covered by any of the above said grounds and does not fall in any of the above said exceptions, is mandatory in nature. He then has no other option than to reject it.¹⁸

¹⁶ Rule 56 (1) & (2), the Conduct of Elections Rules, 1961. In *Manni Lal v. Parmai Lal*, AIR 1971 SC 330 ballot papers were rejected for bearing marks made otherwise than with the instrument supplied for the purpose. The Court ruled that for rejection under Rule 52 (2) (b), there must be a definite finding that they bore marks made otherwise than with the seal supplied for the purpose. The burden lies on the petitioner to establish that the ballot paper has been wrongly rejected; in *Era Sezhiyan v. T. R. Balu*, AIR 1990 SC 838, the voter used the pen with green ink, other than one made available for voting. His vote was rejected. The Court held the ejection legal; in *Shiva Swami v. Malai Kamman*, AIR 1983 SC 1293, the Apex Court held that the validity of a ballot paper will have to be seen keeping in mind the fact that major portion of our electorate is still illiterate and when the mark is indicative of the identity of the candidate from whom the vote is cast, such ballot paper should not be rejected.

¹⁷ First Proviso to Rule 56 (2), *Ibid.* In *T.H. Musthafa v. M.P. Varghese*, AIR 2000 SC, answering the question about the situation in which the polling officer himself supplies a wrong marking instrument, the Constitution bench of Supreme court held that the petitioner should not be allowed to take advantage of a mistake on the part of the polling officer and demand rejection of such ballot papers for no fault of the voters. A voter has no control over the instrument supplied for him, and when a wrong instrument is handed over to him by the polling officer, he will naturally exercise his preference with the aid of that instrument, and in such cases he cannot be found fault with. Same was the view of the Apex court in *Hari Shankar Prasad v. Shahid Ali Khan*, AIR 2003 SC 1302 (per R.C. Lahoti and Brijesh Kumar, JJ.)

¹⁸ *Hari Vishnu Kamath v. Syed Ahmad Ishaque*, AIR 1955 SC 233.

Before rejecting any ballot paper, the counting agents shall be allowed a reasonable opportunity to inspect the ballot paper. The returning officer shall endorse on every rejected ballot paper the word 'Rejected' and the grounds of rejection in abbreviated form in his own hand/by rubber stamp and initial such endorsement. The rejected ballot papers shall be kept in a separate bundle. A ballot paper not rejected is counted as a valid vote. Tendered ballot papers are not opened for counting. After counting of all ballot papers at a polling station has been completed, the counting supervisor shall fill in and sign the prescribed 16 for result of counting which shall then make the entries in a result sheet in form 20 and announce the particulars.¹⁹ Thereafter the valid ballot papers of each candidate and the rejected ballot papers are bundled separately, made up into a separate packet and sealed in the prescribed manner.²⁰

Same procedure for counting shall be followed in case where ballot papers and votes have been transferred from ballot boxes to cloth bags or cloth-lined covers under Rule 44(5).²¹

Almost similar but separate provisions exist for counting at notified polling stations and in specified constituencies.²²

(B) *Where Voting Machines have been used*

The returning officer may have the control units of the voting machines used at more than one polling station taken up for scrutiny and inspection and votes recorded in such units counted simultaneously. Before the counting of votes recorded in any control unit begins, the candidate or his election agent or his counting agent present at the counting table shall be allowed to inspect all vital seals and to satisfy themselves that the seals are intact. The returning officer shall also satisfy himself that none of the voting machines has been tampered with.²³

After the returning officer is so satisfied, he shall have the votes recorded in the voting machine counted. For the purpose, he shall press the appropriate button marked 'Result' provided in the control

¹⁹ Rule 56 (3) to (7), the Conduct of Election Rules, 1961.

²⁰ Rule 57, *Ibid.*

²¹ Rule 58, *Ibid.*

²² Rule 59 and 59 A, *Ibid.* Notified polling station is defined under Rule 50 (d) as a polling station notified under Rule 49. A specified constituency is defined under Rule 59A as the one notified by the Election Commission in the Official Gazette, where the Commission apprehends intimidation and victimization of electors and is of the opinion that it is absolutely necessary that the ballot papers taken out of all boxes in that constituency should be mixed before counting.

²³ Rule 66A, read with Rule 55C, *Ibid.*

unit. On pressing the said button, the total votes polled and votes polled by each candidate shall appear on the display panel. Then returning officer shall have the votes recorded separately for each candidate in Part-II of Form 17 C²⁴ which shall be completed and signed by the counting supervisors and also by the candidate or their election agents or their counting agents present. Corresponding entries shall be made in a result sheet in Form 20²⁵ and the particulars so entered be announced. The result of voting recorded in the unit is not obliterated and the unit retains the memory of such results. Then returning officer shall reseal the unit which shall be kept in specially prepared boxes.²⁶

iv. Counting to Proceed Continuously

The process of counting should proceed continuously. During any intervals when the counting has to be suspended, the returning officer shall keep the ballot papers / voting machines and other papers, packets, etc. relating to election properly sealed. Sufficient precaution shall be taken by him for their safe custody during such intervals.²⁷

v. Recording of result in the Result Sheet and Announcement of Result

After the completion of counting, the returning officer shall record the total number of votes polled by each candidate in the result sheet in the Form prescribed²⁸ and announce the same.²⁹

Equality of Votes

If, after the completion of counting, an equality of votes is found to exist between any contesting candidates, and the addition of one vote will entitle any of those candidates to be declared elected, the returning officer shall forthwith decide between those candidates by lot, and proceed as if the candidate on whom the lot falls had received an additional vote.³⁰

3. Counting in Particular Circumstances

There are some circumstances attending election for which special provision regarding counting has been made under the election law. These are:

²⁴ Provided in the Conduct of Elections Rules, 1961.

²⁵ Provided in the Conduct of Elections Rules, 1961.

²⁶ Rule 66A, read with Rules 56C and 57C, *Ibid.*

²⁷ Rule 60, *Ibid.*, read with Explanation appended to Section 61-A, the Representation of the People Act, 1951.

²⁸ Form 20, the Conduct of Elections Rules, 1961.

²⁹ Rule 63 (1), *Ibid.*

³⁰ Section 65, the Representation of the People Act, 1951.

(i.) Counting in case of Fresh Poll under Section 58

If a fresh poll is held under section 58,³¹ the returning officer shall, after completion of that poll, recommence the counting of votes on the date and at the time and place notified by him to the candidates and their election agents.³²

(ii.) Counting in case of Booth Capturing

If booth capturing takes place in any place for counting in such a manner that the result of the counting at that place cannot be ascertained, the returning officer shall forthwith report the matter to the Election Commission, who, on the receipt of the report and after taking all material circumstances into account, if satisfied that booth capturing had affected counting of votes in such a manner as to affect the result of the election, countermand such election.³³

(iii.) Destruction, Loss, etc. of Ballot Papers/ Voting Machines at the Time of Counting

If at any time before the counting is complete, any ballot papers/ voting machines are unlawfully taken out of the custody of the returning officer, or are accidentally or intentionally destroyed or lost or damaged or tampered with to such an extent that the result cannot be ascertained, the returning officer shall forthwith report the matter to the Election Commission who shall after taking all material circumstances into account, direct that the counting of votes be stopped, declare the poll as void and notify the date and hours for taking a fresh poll. However, if the Election Commission is satisfied that the result of a fresh poll will not affect the result of the election, it shall issue directions for the resumption and completion of the counting and for the further conduct and completion of election in relation to which the votes have been counted.³⁴

4. Recount of Votes

A candidate can also demand a recount of votes. For that, after the above said announcement is made, any candidate, or in his absence, his election agent or any of his counting agents can make an application in writing to the returning officer to recount the votes either wholly or in part. The

³¹ Section 58-A, the Representation of the People Act, 1951.

³² To such further counting, the provisions of rules 56 and 57 of the Conduct of Elections Rules, 1961 shall apply.

³³ Section 64-A, the Representation of the People Act, 1951

³⁴ *Ibid.* (Section 64 A, the Representation of the People Act, 1951), read with Explanation to Section 61-A, the Representation of the People Act, 1951.

application should state the grounds on which such re-count is demanded. The returning officer shall then decide the matter. He may allow the application in whole or in part or may reject it *in toto* if it appears to him to be frivolous or unreasonable. Every such decision of allowing or rejecting the application shall be in writing and reasoned. If a recount is allowed, in whole or in part, the returning officer shall do the re-counting in accordance with the procedure already discussed above and amend the result sheet to the extent necessary and announce the amendments.³⁵

The returning officer shall then complete and sign the result sheet in the prescribed Form³⁶ and no application for a recount shall be entertained thereafter. Provided that the candidates and election agents present at the completion of counting have been given a reasonable opportunity to exercise the right to apply for a re-count.³⁷

As discussed above, the written demand for a re-count may be rejected if it appears to the returning officer that the demand is frivolous or unreasonable. Suspicion of possible mischief in the process or likelihood of errors in counting always lingers in the mind of the defeated candidate when he is shocked by an unfavourable result. It is imperative upon the returning officer to be careful, objective and sensitive in assessing the legitimacy of the plea of recount. In *Chanda Singh v. Ch. Shiv Ram*,³⁸ the Supreme Court observed that when the challenger belongs to the party in power, a heavy strain is thrown on the strength of the moral fibre of the election staff.....The court should be reluctant to lend quick credence to the mud of partiality slung at counting officials by desperate and defeated candidates although what is more important is the survival of the very democratic institutions on which our way of life depends. In *Baldev Singh v. Teja Singh*,³⁹ the Supreme Court stated that the Court frowns upon frivolous and unreasonable demands or refusals of recount before the returning officer. The returning officer should not forget the mandate of rule 63 that allowance of re-count is not the exception and refusal is restricted to cases where the demand itself is groundless. Where the margin of difference is minimal, the claim for a fresh count cannot be thrust aside as futile or trumpery. If uniform view, founded in legal error, has led to wrong rejection of votes, rectification by re-count on the spot, when the demand was made, would have been reasonable. Sometimes, the

³⁵ Rules 63 (2) to (5), *Ibid.*

³⁶ *Supra* note 28.

³⁷ Rule 63 (6), the Conduct of Elections Rules, 1961.

³⁸ AIR 1973 SC 403. See also *Joshi Bhai Chunni Patel v. Anwar Beg A. Mirza*, AIR 1969 SC 386; *Beli Ram v. Jai Bihari Lal*, AIR, 1975 SC 283.

³⁹ AIR 1975 SC 693.

returning officer may order a partial re-count. In *Mohar Singh v. Mohan Lal*,⁴⁰ though the application was for the total re-count but the circumstances warranted only a partial re-count. The returning officer ordered re-count at ten percent of the booths only to verify the possibility of any mistake in counting. The Rajasthan High Court justified his action of ordering a partial re-count only.

5. Conclusion

The election law lays down elaborate procedure for counting of votes. The votes include the postal ballot and the votes polled at the polling stations. Votes polled through postal ballot are counted first. The counting agents may be appointed but the contesting candidate and his/her election agent may themselves perform the functions of counting agents. The contesting candidate and his election agent are empowered also to revoke the appointment of a counting agent. One week before the poll the schedule of counting is notified to the contesting candidate and his election agent, any change in which is also to be notified to them. The valid votes are to be sorted from the invalid votes in case of voting by ballot papers or postal ballot, and only the valid votes are to be counted. In case of EVMs, the returning officer presses the 'Result' button which shows the result on the display panel. The result is then recorded and declared by the returning officer. In case of fresh poll, counting is recommenced with proper notification. In case of destruction/ loss of votes or EVMs, if the loss is of a degree affecting the result of election, a fresh poll is ordered by the Election Commission; if not, counting is resumed and completed. In case of booth capturing affecting the result of election, the election is countermanded by the Election Commission. If a candidate or his election agent or counting agent apply for recount stating the grounds found tenable by the returning officer, he may allow a recount, amend the result sheet and declare the amendments. Recount allowed may be whole or partial. Demand for a recount if found frivolous or unreasonable is liable to be rejected. In *Chanda Singh*, the Supreme Court also affirmed this. However, in *Baldev Singh*, the Supreme Court opined that in case of small margin of difference, the demand for a recount cannot easily be brushed aside.

⁴⁰ AIR 1981 Raj 227.