Arun Kumar Bose vs Mohd. Furkan Ansari & Others on 28 September, 1983

Equivalent citations: 1983 AIR 1311, 1984 SCR (1) 118, AIR 1983 SUPREME COURT 1311, 1984 (1) SCC 91

Author: Misra Rangnath

Bench: Misra Rangnath, Amarendra Nath Sen

PETITIONER:
ARUN KUMAR BOSE

Vs.

RESPONDENT:
MOHD. FURKAN ANSARI & OTHERS

DATE OF JUDGMENT28/09/1983

BENCH:
MISRA RANGNATH
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SEN, AMARENDRA NATH (J)

CITATION:
1983 AIR 1311 1984 SCR (1) 118
1984 SCC (1) 91 1983 SCALE (2)483
CITATOR INFO :
R 1984 SC 135 (8)
F 1985 SC 150 (26,28)
D 1986 SC1534 (11)
RF 1987 SC 831 (7)

ACT:
Representation of the People Act . 1951-Sec. 81 read with sec. 83(1)(a)-Election Petition to contain concise statement of facts-Scope of. Sec. 97-When applicable-Recrimination proceedings-Necessity of making recrimination when additional relief under sec. 101 claimed.
Conduct of Election Rules, 1961-Rule 38(1) read with rule 56(2)-Interpretation of-Proviso to rule 56(2) when applicable. Presiding officer absent from place of poll-Did not sign ballot papers-Whether constitutes failure to sign ballot papers.

HEADNOTE:

The first respondent who lost to the appellant by 24 votes in the Assembly Elections filed an election petition in the High Court under s. 81 of the Representation of the People Act, 1951 asking for the appellant's election to be set aside and for declaration that he should be declared as the successful candidate. In para 9(i) of the petition the respondent pleaded that 74 ballot papers cast in his favour were wrongly rejected on the ground that they did not contain the signature of the Presiding Officer. The High Court ordered inspection of these ballot papers. The High Court held that the rejection of these 74 ballot papers for want of the Presiding Officer's signature was not justified and gave the respondent No. 1 credit of all those votes and on that basis while setting aside the election of the appellant, declared the first respondent to have been duly elected. Hence this appeal. The appellant urged that the pleading in para 9(i) of the Election petition did not amount to a concise statement of the material facts as required by law; the High Court went wrong in allowing inspection of the ballot papers; the 74 ballot papers in dispute did not contain the signature of the presiding officer and were rightly rejected at the counting in view of the mandatory provision in rule 56(2) of the Conduct of Elections Rules, 1961 and the High Court's view that in the absence of a prayer for recrimination under s. 97 of the Act, the appellant was precluded from asking for a recount of the other rejected ballot papers is not tenable in law.

Dismissing the appeal,

HELD: An election petition is presented in terms of s. 81 of the Act. Section 83 prescribed as to what the petition should contain. Clause (a) of sub-s. (1) of s. 83 states that an election petition shall contain a concise statement of the material facts on which the petitioner relies. In the instant

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case the number of ballot papers alleged to have been wrongly rejected has been furnished, the counting table number has been given, the booth number has also been disclosed and the ground for rejection has even been pleaded. The only specific detail which was wanting was the serial number of the ballot papers. This particular was not available to the election petitioner in spite of attempts made on his behalf. The Court, therefore, agrees with the High Court that in the facts and circumstances of the case the pleading in paragraph 9(i) set out the material facts in a proper way and no defect can be found with it. The High Court had rightly ordered the inspection of the ballot papers. [126 B-C; H; 127 A; 128 F-G; 127 F]

Samant N. Balakrishan etc., v. George Fernandez and Ors, etc., [1969] 3 S.C.R. 603 explained and distinguished,

Bhabhi v. Sheo Govind and Ors., [1975] Suppl. S.C.R.

202, referred to.

Rule 38(1) of the Conduct of Election Rules, 1961 provides inter alia that every ballot paper before it is issued to an elector shall be stamped on the back with a distinguishing mark and shall be signed in full on its back by the presiding officer. The distinguishing mark can be put by anyone but the signature has got to be of the presiding officer and obviously he has to personally do that job. Rule 56(2)(h) provides that the returning officer shall reject a ballot paper if it does not bear both the distinguishing mark and the signature as mentioned in sub-rule (1) of rule 38. There is a proviso to sub-rule (2) of rule 56 which says that where the returning officer is satisfied that any such defect as is mentioned in clause (h) has been caused by any mistake or failure on the part of a presiding officer or polling officer, the ballot paper shall not be rejected merely on the ground of such defect. The proviso, once it is applicable is a mandate that the ballot paper is not to be rejected. [129 F-G; 130 G; 129 E-F; 130 E; 131 H]

In the instant case the 74 ballot papers in dispute were rejected because they did not contain the signature of the presiding officer as required under rule 38(1). To see whether the proviso to sub-rule (2) of rule 56 was applicable, it has to be found out whether the absence of the signature of the presiding officer on these ballot papers was on account of mistake or of his failure. On the submissions at the bar, the question of mistake does not arise. It was the obligation of the presiding officer to put his signature on the ballot papers before they were issued to the voters. Every voter has the right to vote and in the democratic set up prevailing in the country no person entitled to share the franchise can be denied the privilege. Nor can the candidate be made to suffer. Keeping this position in view the Court is of the definite view that the present case is one of the failure on the part of the presiding officer, who had been taken ill on the date of poll and was away from the place of polling for quite some time, to put his signature on those ballot papers so as to satisfy the requirement of law. The ballot papers therefore were not liable to be rejected as the proviso applied and the High Court came to the correct conclusion in counting these ballot papers and giving credit thereof to the respondent No. 1. [130 C; F-G; 131 F-H; 130 H; 131 E; H; 132 A]

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In a case in which the election petition claims that the election of the returned candidate is void, and also asks for a declaration that the petitioner himself or some other person has been duly elected, s. 100 as well as s. 101 of the Act would apply, and it is in respect of the additional claim for such declaration that s. 97 comes into play. Section 97(1) thus allows the returned candidate to recriminate and raise pleas in support of his case that the

other person in whose favour a declaration is claimed by the petition cannot be said to be validity elected, and these would be pleas of attack and it would be open to the returned candidate to take these pleas, because when he recriminates, he really becomes a counter-petitioner challenging the validity of the election of the alternative candidate. The result of s. 97(1) therefore is that in dealing with a composite election petition, the Tribunal enquires into not only the case made out by the petitioner, but also the counter-claim made by the returned candidate. That being the nature of the proceedings contemplated by s. 97(1), it is not surprising that the returned candidate is required to make his recrimination and serve notice in that behalf in the manner and within the time specified by s. 97(1) proviso and s. 97(2). If the returned candidate does not recriminate as required by s. 97, then he cannot make any attack against the alternative claim made by the petition. [135 A-F]

Kum. Shradha Devi v. Krishna Chandra Pant & Ors., [1982] 3 S.C.C. 389; Jabar Singh v. Genda Lal, [1964] 6 S.C.R. 54 and P. Malaichami v. M. Andi Ambalam & Ors. [1973] 3 S.C.R. 1016 referred to.

In the instant election petition two reliefs had been claimed, firstly, for setting aside the election of the returned candidate, i.e. the appellant, and secondly, for a declaration that the election petitioner (respondent No. 1) was the duly elected candidate. The relief claimed was in terms of s. 100(1)(d) (iii) and s. 101(a) of the Act. Admittedly no application for recrimination was filed by the appellant. In the absence of a recrimination petition conforming to the requirement of section 97 of the Act the appellant who happens to be an advocate and is presumed to know the law, was not entitled to combat the claim of the election petitioner on the ground that if the remaining rejected ballot papers had been counted the election petitioner would not have been found to have polled the majority of the valid votes. [132 D-E; 133 A; 138 C-D]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2618 of 1983.

From the Judgment and Order dated the 18th January, 1983 of the Patna High Court in Election Petition No. 15 of 1980.

S. Rangarajan, D. P. Mukherjee, G. S. Chatterjee and R. P. Singh for the Appellant.

S. S. Ray, M. P. Jha and Ms. Mridula Ray for the Respondents.

The Judgment of the Court was delivered by RANGANATH MISRA, J. This appeal under section 116A of the Representation of the People Act, 1951 ('Act' for short), is directed against the decision of the High Court at Patna setting aside the appellant's election to the Bihar Legislative Assembly from 115 Jamtara Assembly Constituency polling for which was held on May 31, 1980, and the result of which was declared on June 2,1980. Sixteen candidates being the appellant and the 15 respondents contested the election. The appellant was the candidate of the Communist Party of India and respondent No. 1 was of the Congress (I) Party. At the poll the appellant received 13336 votes while the respondent No. 1 polled 13312 votes. The appellant was, therefore, declared elected on the footing that he had received 24 more votes than the respondent no. 1. Respondent no, 2 had polled 13285 votes. As the election dispute has been confined to the appellant and respondent no. 1 it is not necessary to refer to the other candidates or indicate particulars of their performance at the election. Respondent No. 1 filed an election petition under s. 81 of the Act asking for the appellant's election to be set aside and for a declaration that he should be declared as the successful candidate. In paragraph 9 of the election petition he pleaded the details of the illegalities and irregularities committed in the course of counting of ballot papers. It is not necessary to refer to the other details excepting what was pleaded in paragraph 9(i) as respondent no. 1 did not press the election petition on those grounds. The pleading in the sub-paragraph was to the following effect.

> "On table No. 10 booth No. 10 (Fukbandi Primary School) 74 ballot papers of the petitioner were wrongly rejected on the ground that they did not contain the signature of the Presiding Officer. Similarly 31 ballot papers of the petitioner were rejected on different tables on the ground that they do not contain the signature of the Presiding Officer. The aforesaid ballot papers were rejected by the Assistant Returning Officer inspite of the objections raised by the petitioner and his counting agents."

It is appropriate to indicate here that the High Court did not take into account the plea in regard to 31 ballot papers in the absence of particulars. The appellant in his written statement before the High Court pleaded that the statements contained in paragraph 9 and its sub-paragraphs were vague and incorrect. In paragraph 16 of the written statement it was stated:

> "During course of counting no illegality or irregularity of any kind was committed; rather the same was held in proper, legal and orderly manner, nor any such imaginary illegality was pointed out or any objection was raised on behalf of the petitioner."

In paragraph 17 it was further pleaded that "the statement contained in paragraph No. 9(i) of the election petition is wrong. It is false to say that the ballot papers were rejected only on the ground of want of signature of the Presiding Officer. The fact is that the Assistant Returning Officer, who was duly appointed, after fully applying his mind and finding nearly 95 ballot papers of booth no. 10 to be spurious and not genuine and after giving cogent, legal and satisfactory reasons, rejected the ballot papers. The petitioner has suppressed the fact that besides his 74, 31 ballot papers of other contesting candidates including 3 of the respondent no. 1 were also rejected for not bearing signature of the Presiding Officer and the distinguishing mark of the polling station No. 10."

In paragraph 18 of the written statement the appellant pleaded that:

> "With reference to the contents of paragraph no. 9(i) of the Election Petition, the respondent no.1 further begs to submit that counting of ballot papers of booth no. 10 was completed before 12 noon in the very first round and the petitioner secured 3160 votes in that round while the respondent no. 1 could get only 484 and one Parmanand Mishra got 1172 votes. Neither the petitioner nor his election agents nor counting agents, all of whom were present in the counting hall, did raise any objection at the time of rejection of the ballot papers or for the whole day rather they accepted the position that those ballot papers were rightly rejected being spurious and not genuine. However, after announcement of the votes of last round and conclusion of counting of the votes and completion and submission of result sheet in Form 20 by the Assistant Returning Officer to the Re-
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> turning Officer, the petitioner having lost the election by a small margin lost all his senses and like a drowning man catching the last straw, made out a false case of illegality in counting and thus on

2.6.1980 at 1.50 a.m. for the first time raised an objection by filing a petition which was frivolous in nature to count the rejected ballot papers in his favour".

After the evidence of both parties had been recorded, on February 19, 1982, the learned trial Judge made the following order:-

> "Having considered the arguments of learned counsel for the parties and the materials on the record and in view of the decisions referred to above, I am satisfied that the petitioner in his election petition has given adequate statements of material facts on which he relies in support of his case and has made out prima facie case for inspection of the ballot papers which have been cast in his favour and rejected. Without expressing any opinion regarding the merit of the claim of the parties, I am of the view that in order to decide the dispute and to do justice between the parties inspection of ballot papers is necessary. I, therefore, direct that all those ballot papers which have been cast in favour of the petitioner and rejected by the Returning Officer at the time of counting, i.e. 74 of Fukbandi Booth No. 10 and 31 of other booths, should be inspected by learned counsel for the parties in presence of a responsible officer of the Court."

The appellant sought to challenge this order by moving an application under Article 136 of the Constitution before this Court but that was rejected. On April 14, 1982, the learned trial Judge on a petition of the appellant for clarification of the order dated February 19, 1982, made the following direction:

> "In my opinion, there is no ambiguity in the order passed by this Court on 19.2.82, yet objection has been raised for which there is no basis. However, learned counsel

> for the petitioner has submitted that he would be quite satisfied if only 74 rejected ballot papers from booth No. 10 Fukbandi booth are inspected. Let inspection of only 74 rejected ballot papers from Booth No. 10 Fukbandi booth be made."

The learned trial Judge after inspection of the ballot papers and upon hearing counsel for the parties, came to hold that the rejection of these 74 ballot papers for want of the Presiding Officer's signature was not justified and gave the election petitioner credit of all those votes. On that basis he came to hold that the respondent no. 1 had received the majority of the valid votes polled at the election (the excess being 50) and while setting aside the election of the appellant, declared the respondent no. 1 to have been duly elected. This decision is assailed in appeal.

Mr. Rangarajan in support of the appeal has taken the stand that: (i) the particulars furnished in paragraph 9 of the election petition were inadequate and fall short of the requirements of the law; (ii) inspection of the ballot papers should not have been granted and even on inspection, the 74 ballot papers were not available to be counted in favour of respondent no. 1; (iii) if inspection was to be granted and credit was to be given of rejected ballot papers, all the 954 ballot papers should have been scrutinised and the examination for recount should not have been confined to 74 only; and (iv) the view taken by the learned trial Judge of the High Court that in the absence of a prayer for recrimination under s. 97 of the Act, the appellant was precluded from asking for a recount of the other rejected ballot papers is not tenable in law.

Before entering into an examination of the tenability of these contentions, it would be proper to take note of the decision in the case of Jagan Nath v. Jaswant Singh & Ors., of a five Judge Bench of this Court. Mahajan, C.J. spoke for the Court thus:

> "The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the Court possesses no common law power."

What was said in Jagan Nath's case continues to be the law binding this Court and in the recent case of Jyoti Basu & Ors. v. Debi Ghosal & Ors, this Court reiterated the position by saying:

> "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 straight jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act, 1951, and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self-contained code within which must be found any right claimed in relation to an election or an election dispute."

We are bound by the decision of the larger Bench and we are in agreement with what has been said in Jyoti Basu's case.

The first question to consider is, whether the pleading in paragraph 9(i) of the election petition was adequate in view of the provisions of the Act. Section 94 of the Act provides for secrecy of voting. Detailed provisions have been made in the Conduct of Election Rules, 1961, to give effect to this wholesome provision contained in s. 94. An election petition is presented in terms of s. 81 of the Act. Section 83 prescribes as to what the petition should contain. Sub-section (1) (a) of s. 83 states that an election petition shall contain a concise statement of the material facts on which the petitioner relies. Since there is no allegation of any corrupt practice in this case there is no necessity to refer to clause (b) of sub-s. (1) of s.

83. Though initially Mr. Rangarajan had contended that the verification was not in accordance with law, he has abandoned this contention during the hearing in view of the statutory form of verification prescribed and the verification in the instant case conforms to it. According to Mr. Rangarajan the pleading in paragraph 9(i) does not amount to a concise statement of the material facts. Appellant's learned counsel has placed reliance on the observation in Samant N. Balakrishna etc. v. George Fernandez & Ors. etc., where, with reference to s. 83 of the Act it has been said that the petition must contain a concise statement of the material facts on which the petitioner relies and the fullest possible particulars should be given. Material facts and material particulars may overlap. Balakrishna's case where Hidayatullah, C.J. made these observations was one where allegations of corrupt practice had been made and the case came under s. 83(1) (b) of the Act. Obviously, allegations of corrupt practice being in the nature of a criminal charge, the Act requires full particulars to be given. The scheme in s. 83(1) of the Act makes the position very clear. Clause (a) refers to general allegations and requires a concise statement of material facts to be furnished while clause (b) referring to corrupt practice requires all details to be given. Appellant's counsel, therefore, was not entitled to rely upon the proposition in Balakrishna's case for the present purpose. So far as averment in paragraph 9(1) of the election petition is concerned, we find that the number of ballot papers alleged to have been wrongly rejected has been furnished, the counting table number has been given, the booth number has also been disclosed and the ground for rejection has even been

pleaded. Respondent No. 1 pleaded that the particulars of the ballot papers could not be obtained as during counting they were not shown. His counting agent at table no. 10 has been examined as his witness No. 3. He has stated:

> "The ballot box of Fukbandi booth No. 10 was brought on my table and it was intact. That ballot box contained some ballot papers which were not bearing signature of the Presiding Officer. I raised objection in respect of those ballot papers that they should not be treated as doubtful ballot papers to be sent to the Returning Officer. Counting Supervisor did not listen to my protest and sent them to the Returning Officer as doubtful ballot papers. There were 74 such ballot papers."

The Assistant Returning Officer was examined as RW. 4 on behalf of the appellant. In his evidence he stated that he had rejected some ballot papers of booth no. 10. He again stated that "counting agents of candidates were not allowed to note down the serial numbers of the ballot papers. In view of the statement of the counting agent of respondent no.1 and the evidence of the Assistant Returning Officer there can be no scope to doubt, and in our view the High Court was right in taking the view, that the particulars of the rejected ballot papers were not available to the counting agents and, therefore, particulars of the numbers of the ballot papers had not been given in the election petition. We agree with the High Court that in the facts and circumstances of the case the pleading in paragraph 9(1) set out the material facts in a proper way and no defect can be found with it.

Mr. Rangarajan next canvassed that the High Court went wrong in allowing inspection of the ballot papers. Reliance was placed on the decision of this Court in the case of Bhabhi v. Sheo Govind & Ors., where it has been held that the following conditions were imperative before the Court could grant inspection or sample inspection of 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;
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> (2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statement of material facts;
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> (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 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 (5) 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."

We have already pointed out that the allegations made in paragraph 9(i) of the election petition were clear and definite. On the facts of the case the plea was confined to one aspect, viz., for want of the

Presiding Officer's signature with reference to 74 ballot papers cast at a particular booth and counted on a particular table the same had been rejected. The only specific detail which was wanting was the serial number of the 74 ballot papers. We have, on the evidence recorded in the case, come to the conclusion that this particular was not available to the election petitioner in spite of attempts made on his behalf. While we agree with the view expressed in Bhabi's case, on the facts before us we are inclined to think that inspection had rightly been ordered. Mr. Ray for respondent no.1 pressed before us the fact that the order of the High Court allowing inspection had been questioned before the Court and no interference was made. Appellant's counsel on the other hand contended that as the application under Article 136 of the Constitution had not been disposed of on merits, this aspect was open to challenge in regular appeal under s. 116A of the Act. It is unnecessary to refer further to the consequences of non- interference by this Court on the earlier occasion as on the facts we are satisfied that the action of the High Court in allowing inspection is not open to dispute. A number of authorities were cited by Mr. Rangarajan in support of his contention that inspection should not have been granted. Since Bhabhi's case has considered most of the cases relied upon by Mr. Rangarajan and tests have been laid down to which reference has been made by us, we see no necessity to independently refer to and deal with the other cases.

The 74 ballot papers which had been rejected were placed before us during the hearing. In the election petition it has been contended that the rejection was only on one ground, viz., absence of the signature of the Presiding Officer. The appellant in his written statement had taken the stand that the identifying mark was also wanting. The ballot papers have been scrutinised by us as also by learned counsel for both the parties. Mr. Rangarajan has conceded on seeing the ballot papers that each of them bears the mark. Admittedly none of them contains the signature of the Presiding officer. Rule 56 of the Conduct of Election Rules; 1961, makes detailed provision for counting of votes. Sub-rule (2) requires the Returning Officer to reject a ballot paper when any of the seven infirmities indicated therein is found. In view of the contentions advanced before us the relevant infirmities would be as provided in sub-clause (e), i.e. the ballot paper is a spurious one and (h), i.e. it does not bear both the mark and the signature which it should have borne under the provisions of sub-rule (1) of rule 38. Rule 38(1) provides:

> "Every ballot paper before it is issued to an elector, and the counterfoil attached thereto shall be stamped on the back with such distinguishing mark as the Election Commission may direct, and every ballot paper, before it is issued, shall be signed in full on its back by the Presiding Officer."

There 74 ballot papers cast in favour of the respondent No. 1 which have been rejected were in two series, 24 in one and 50 in the other. Though the Assistant Returning Officer had stated that according to him these were spurious, he has in his cross-examination clarified the position that by spurious' he meant that the ballot papers did not contain the signature of the Presiding Officer. That these ballot papers were used at the election in booth no. 10 is not open to doubt in view of the ballot paper account for this booth. That shows that 810 ballot papers in all had been received being from serial nos. 006851 to 007660. 424 ballot papers were used and ballot papers of the same number had been found in the ballot box and duly accounted for. The numbers of the ballot papers including the 74 in dispute are covered by the particulars of used ballot papers given in the ballot paper

account which is Ext. 2 in the case. The Presiding Officer himself has proved this document. The report made by the Returning Officer to the Election Commission Ext. A also shows that the ballot papers were not spurious. There is sufficient evidence on record from which it can be concluded that the rejection of these 74 ballot papers was on account of the fact that they did not contain the signature of the Presiding Officer as required under rule 38(1). Mr. Rangarajan is right in his submission that if a ballot paper does not contain the signature of the Presiding Officer it has got to be rejected at the counting in view of the mandatory provision in rule 56(2) of the Conduct of Election Rules. The point for consideration now is whether the proviso which reads as follows was applicable:

> "Provided that where the returning officer is satisfied that any such defect as is mentioned in clause (g) or clause (h) has been caused by any mistake or failure on the part of a presiding officer or polling officer, the ballot paper shall not be rejected merely on the ground of such defect".

On the submissions at the Bar, the question of mistake does not arise. It has to be found out whether these 74 ballot papers in dispute did not contain the signature of the Presiding Officer on account of his failure. Rule 38 makes it clear that the distinguishing mark and the signature of the Presiding Officer have to be put on the ballot paper before the same is issued to the voter at the booth. The distinguishing mark can be put by any one but the signature has got to be of the Presiding Officer and obviously he has to personally do that job. There is evidence that the Presiding Officer had been taken ill on the date of poll. He has been examined as PW2. From his evidence it appears that this was his first experience as a Presiding officer of a booth. He has stated: "On the day of poll my bowls was upset and I had visited the pokhra (tank) once on the day of poll and during that period all the ballot papers were kept on the table. I had not put my signature on all the ballot papers. I had deputed one of the polling officers at the booth to watch the ballot papers when I had gone to the pokhra. For 5 to 10 minutes that I was absent from the polling booth on the day of poll, I cannot say what had happened during that period." The appellant had cross- examined this witness and suggested to him that he had gone to attend to the call of nature three or four times. The appellant's witness No. 2 who was also a candidate at the election (and is a respondent here) has stated:

> "I found the Presiding Officer at booth no. 10 sleeping under a Neem tree at some distance from the booth when I visited the booth in the noon."

Once it is held that the 74 ballot papers were not spurious, and had been issued to the voters at the booth in the course of the poll, it would be reasonable to presume that the ballot papers had been issued to the voters without signatures of the Presiding Officer though the distinguishing mark had been put. The absence of the Presiding Officer from the place of poll has clearly been established. Whether it was for 5 to 10 minutes as deposed by him or it was no three or four occasions as suggested to him in cross-examination or for a good length of time during which he was having a nap under a neem tree as deposed to by RW. 2, it is clear that he was away from the place of polling for quite some time. The polling process must have continued and voters who came during his absence had obviously been issued these unsigned ballot papers. If the facts be these, would it not be a case of failure of the Presiding Officer to put his signatures on the ballot papers is the question for

consideration. It was the obligation of the Presiding Officer to put his signature on the ballot papers before they were issued to the voters. Every voter has the right to vote and in the democratic set up prevailing in the country no person entitled to share the franchise can be denied the privilege. Nor can the candidate be made to suffer. Keeping this position in view, we are of the definite view that the present case is one of failure on the part of the Presiding Officer to put his signature on those ballot papers so as to satisfy the requirement of law. The proviso, once it is applicable, has also a mandate that the ballot paper is not to be rejected. We, therefore, hold that the ballot papers were not liable to be rejected as the proviso applied and the High Court, in our opinion, came to the correct conclusion in counting these ballot papers and giving credit thereof to the respondent no. 1.

The next question for consideration is as to whether all the ballot papers which were rejected in the constituency should have been allowed to be inspected and recounted on the basis of inspection or should the inspection have been confined to 74 ballot papers as done. This question is connected with the fourth contention of the appellant's counsel, i.e. whether in the absence of a recrimination the appellant who was the returned candidate, could claim that the election petitioner would not succeed for the additional relief as he had not received the majority of the votes polled at the election. We have already indicated that the appellant as the elected candidate in his written statement had pleaded that the counting was in accordance with law and not objectionable. The effect of such a plea is that the ballot papers which had been cast in his favour but credit had not been given thereof had been validly rejected. In the election petition two reliefs had been claimed, firstly, for setting aside the election of the returned candidate, i.e. the appellant, and secondly, for a declaration that the election petitioner (respondent no. 1) was the duly elected candidate. The relief claimed was in terms of s. 100(1) (d) (iii) and s. 101 (a) of the Act. The election petitioner had claimed that there was improper rejection of votes cast in his favour and that he had received a majority of the valid votes at the election. The Act makes in s. 97 provision for recrimination. Sub-section(1) of that section which is material reads thus:

> "When in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election:
>
> Provided that the returned candidate or such other party, as aforesaid shall not be entitled to give such evidence unless he has, within fourteen days from the date of commencement of the trial given notice to the High Court of his intention to do so and has also given the security and the further security referred to in sections 117 and 118 respectively."

Admittedly no application for recrimination was filed. Mr. Rangarajan has strenuously contended that keeping the scheme and the purpose of the law in view, in a case of this type refusal to count the other rejected ballot papers on the plea of non-filing of a recrimination petition would lead to injustice. We have already indicated the pronounced view of this Court in Jagan Nath's case which has been followed throughout and the last in series is the case of Jyoti Basu to which also we have

adverted. There is no scope for equity since the entire gamut of the process of election is covered by statute. Reliefs as are available according to law can only be granted. It is true that in Kum. Shradha Devi v. Krishna Chandra Pant & Ors., it has been observed:

> "If the allegation is of improper rejection of valid votes which is covered by the broad spectrum of scrutiny and recount because of miscount, petitioner must furnish prima facie proof of such error. If proof is furnished of some errors in respect of some ballot papers, scrutiny and recount cannot be limited to those ballot papers only. If the recount is limited to those ballot papers in respect of which there is a specific allegation of error and the correlation is established, the approach would work havoc in a parliamentary constituency where more often we find 10,000 or more votes being rejected as invalid. Law does not require that while giving proof of prima facie error in counting each head of error must be tested by only sample examination of some of the ballot papers which answer the error and then take into consideration only those ballot papers and not others. This is not the area of enquiry in a petition for relief of recount on the ground of miscount."

These observations came not in a case to which s. 97 of the Act applied. This Court was considering a case of recount simpliciter. The position of law as to the imperative necessity of a recrimination in cases as before us is well settled. A Five Judge Bench in Jabar Singh v. Genda Lal, examined at length the provisions of s. 100 and s. 97 of the Act. That was a case where the difference was of two votes and as application had been made asking for reliefs both under s. 100(1) (d) (iii) as also s. 101. In that background the question for consideration was whether in the absence of a petition for recrimination relief could be granted. Gajendragadkar, J. (as the learned Judge then was), spoke for himself and three other learned Judges. In the majority judgment it was held:

> "Confining ourselves to clause (iii) of s. 100(1)
>
> (d), what the Tribunal has to consider is whether there has been an improper reception of votes in favour of the returned candidate. It may also enquire whether there has been a refusal or rejection of any vote in regard to any other candidate for whether there has been a reception of any vote which is void and this can only be the reception of a void vote in favour of the returned candidate. In other words, the scope of the enquiry in a case falling under s. 100(1) (d) (iii) is to determine whether any votes have been improperly cast in favour of the returned candidate or any votes have been improperly refused or rejected in regard to any other candidate. These are the only two matters which would be relevant in deciding whether the election of the returned candidate has been materially affected or not. At this enquiry, the onus is on the petitioner to show that by reason of the infirmities specified in s. 100(1) (d) (iii), the result of the returned candidate's election has been materially affected, and that, incidentally, helps to determine the scope of the enquiry. Therefore, it seems to us that in the case of a petition where the only claim made is that the election of the returned candidate is void, the scope of the enquiry is clearly limited by the requirement of s. 100(1) (d) itself. The enquiry is limited not because the returned

candidate has not recriminated under s. 97(1); in fact s. 97(1) has no application to the case falling under s. 100(1) (d)

(iii), the scope of the enquiry is limited for the simple reason that what the clause requires to be considered is whether the election of the returned candidate has been materially affected and nothing else. If the result of the enquiry is in favour of the petitioner who challenges the election of the returned candidate, the Tribunal has to make a declaration to that effect, and that declaration brings to an end the proceedings in the election petition.

There are, however, cases in which the election petition makes a double claim; it claims that the election of the returned candidate is void, and also asks for a declaration that the petitioner himself or some other person has been duly elected. It is in regard to such a composite case that s. 100 as well as s. 101 would apply, and it is in respect of the additional claim for a declaration that some other candidate has been duly elected s. 97 comes into play. Section 97(1) thus allows the returned candidate to recriminate and raise pleas in support of his case that the other person in whose favour a declaration is claimed by the petition cannot be said to be validly elected, and these would be pleas of attack and it would be open to the returned candidate to take these pleas, because when he recriminates, he really becomes a counter-petitioner challenging the validity of the election of the alternative candidate. The result of s. 97(1) therefore, is that in dealing with a composite election petition, the Tribunal enquires into not only the case made out by the petitioner, but also the counter-claim made by the returned candidate. That being the nature of the proceedings contemplated by s. 97(1), it is not surprising that the returned candidate is required to make his recrimination and serve notice in that behalf in the manner and within the time specified by s.97(1) proviso and s. 97(2). If the returned candidate does not recriminate as required by s. 97, then he cannot make any attack against the alternative claim made by the petition. In such a case, an enquiry would be held under s. 100 so far as the validity of the returned candidate's election is concerned, and if as a result of the said enquiry a declaration is made that the election of the returned candidate is void, then the Tribunal will proceed to deal with alternative claim, but in doing so, the returned candidate will not be allowed to lead any evidence because he is precluded from raising any pleas against the validity of the claim of the alternative candidate.

It is true that s. 101(a) requires the Tribunal to find that the petitioner or such other candidate for the declaration of whose election a prayer is made in the election petition has in fact received a majority of the valid votes. It is urged by Mr. Kapoor that the Tribunal cannot make a finding that the alternative candidate has in fact received a majority of the valid votes unless all the votes cast at the election are scrutinised and counted. In our opinion, this contention is not well founded. We have already noticed that as a result of rule 57 (now rule 56(6) of Conduct of Election Rules), the Election Tribunal will have to assume that every ballot paper which had not been rejected under r. 56 constituted one valid vote and it is on that basis that the finding will have to be made under s. 101(a). Section 97(1) undoubtedly gives an opportunity to the returned candidate to dispute the validity of any of the votes cast in favour of the alternative candidate or to plead for the validity of any vote cast in his favour which has been rejected; but if by his failure to make recrimination within time as required by s. 97 the returned candidate is precluded from raising any such plea at the

hearing of the election petition, there would be nothing wrong if the Tribunal proceeds to deal with the dispute under s. 101(a) on the basis that the other votes counted by the returning officer were valid votes and that votes in favour of the returned, candidate, if any, which were rejected, were invalid. What we have said about the presumed validity of the votes in dealing with a petition under s. 101(a) is equally true in dealing with the matter under s. 100(1)(d)(iii). We are, therefore, satisfied that even in cases to which s. 97 applies, the enquiry necessary while dealing with the dispute under s. 101(a) will not be wider if the returned candidate has failed to recriminate." Ayanagar, J. did take a different view of the matter and it is on the minority view that strong reliance has been placed by Mr. Rangarajan. He has even contended that the proposition in minority view was more appealing and had reminded us that there have been instances where the minority view lays down the law correctly and in due course is accepted to be the law of the country. As we shall presently show, the ratio in the majority opinion is still holding the field and on the plea that the minority view may some day become the law, relief in the present case cannot be granted. We are bound by the decision of the larger Bench.

This Court in P. Malaichami v. Mr. Andi Ambalam and Ors., considered this question again. Alagiriswami, J. spoke for the Bench which heard the appeal. There it had been contended by counsel that in view of the facts of that case, recrimination and the requirement of s. 97 need not have been insisted upon. This is how that contention was answered:

"The question still remains whether the requirements of s. 97 have to be satisfied in this case. It is argued by Mr. Venugopal that the gravamen of the respondent's petition was breach of many of the election rules and that he asked for a total recount, a request to which the appellant had no objection and that there was, therefore, no rule or need for filing a recrimination petition under s. 97. This, we are afraid, is a complete misreading of the petition. No doubt the petitioner asked for a recount of votes. It may legitimately be presumed to mean a recount of all the votes, but such a recount is asked for the purpose of obtaining a declaration that the appellant's election was void and a further declaration that the respondent himself had been elected. This aspect of the matter should not be lost sight of. Now, when the respondent asked for a recount, it was not a mere mechanical process that he was asking for. The very grounds which he urged in support of his petition (to which we have referred at an earlier stage) as well as the application for recount and the various grounds on which the learned Judge felt that a recount should be ordered showed that many mistakes where likely to have arisen in the counting, and as revealed by the instances which the learned Judge himself looked into and decided....."

The ratio of the decision in Jabar Singh's case was followed and it was stated:

> "What we have pointed out just now shows that it is not a question of mere pleading, it is a question of jurisdiction. The Election Tribunal had no jurisdiction to go into the question whether any wrong votes had been counted in favour of the election petitioner, who had claimed the seat for himself unless the successful candidate had filed a petition under s. 97. The law reports are full of cases where parties have failed because of their failure strictly to conform to the letter of the law in regard to the procedure laid down under the Act and the Rules."

Several decisions were cited before us by Mr. Ray for respondent No. 1 which we think unnecessary to refer to in view of the clear pronouncements and the state of the law as indicated by these decisions. In the absence of a recrimination petition conforming to the requirements of s. 97 of the Act the appellant who happens to be an Advocate and is presumed to know the law, was not entitled to combat the claim of the election petitioner on the ground that if the remaining rejected ballot papers had been counted, the election petitioner would not have been found to have polled the majority of the valid votes.

For the reasons we have indicated, this appeal has to be dismissed. In the circumstances we direct the parties to bear their respective costs throughout.

H.S.K. Appeal dismissed.