

Jaswant Singh vs Virender Singh And Ors on 9 November, 1994

Equivalent citations: AIR 1995 SUPREME COURT 520, 1994 AIR SCW 4777, 1994 AIR SCW 4770, (1995) 2 SCJ 54, (1995) 1 RENTLR 114, (1994) 7 JT 512 (SC), (1995) 1 RENCJR 67, (1996) 1 RENCJ 381

CASE NO.:

Appeal (civil) 5332 of 1993

PETITIONER:

JASWANT SINGH

RESPONDENT:

VIRENDER SINGH AND ORS

DATE OF JUDGMENT: 09/11/1994

BENCH:

A.S. ANAND & FAIZAN-UDDIN

JUDGMENT:

JUDGMENT 1994 SUPPL. (5) SCR 336 The Judgment of the Court was delivered by DR. ANAND, J. The appellant through this appeal under Section 116A of the Representation of People Act, 1951 (hereinafter the Act) has challenged the order of the Punjab and Haryana High Court dismissing his Election Petition No. 16/91.

The elections to the Haryana Legislative Assembly were held along with the elections to the Parliament in respect of the seats falling within the State of Haryana on 20.5.1991. The appellant and respondent Nos. 1 to 16 were the candidates from 71 Narnaul Assembly Constituency. Respondent No. 1, a candidate sponsored by the Janta Dal was declared elected by polling 20011 votes. The appellant, a nominee of the Indian National Congress secured 19973 votes i.e. 38 less votes than the returned candidate. Since, the real contest was between the appellant and the returned candidate respondent No. 1, and the challenge in the Election Petition is also limited, it is not necessary to notice the votes polled by or the party affiliations of the other respondents. The polling in the Constituency took place in 132 polling stations. The counting of ballot papers took place in the town of Hansi in PCSD High School. Dr, Avtar Singh, IAS, SDM, Hansi was the Returning Officer, who declared respondent No. 1 as duly elected.

The appellant filed an election petition under Section 81/83 of the Act calling in question the election of respondent No. 1. The challenge, in the election petition, was based mainly on the ground of commission of irregularities and illegalities during the counting. The appellant alleged that the Returning Officer was biased in favour of respondent No. 1 and that he had appointed various members of the counting staff of the choice of respondent No. 1 and those members improperly rejected the valid votes of the appellant and illegally inflated the number of votes polled by respondent No. 1 by accepting and counting invalid votes in favour of respondent No. 1. The facts

and particulars in this behalf are mainly contained in paras 11 to 24 of the election petition.

Referring to the manner of counting, the appellant complained that the manner of the fixing of tables for counting and the fixing of a barbed wire to keep the counting agents of the candidates outside that barbed wire, resulted in the non-participation of the candidates and their counting agents in the counting process and was contrary to the guidelines contained in the Handbook for Returning Officers issued by the Election Commission of India. It was alleged that 20 tables had been placed for being used for the purposes of counting in a small hall and that had led to a lot of congestion and in spite of the protests of the appellant and other candidates, the counting continued in the same fashion and therefore it was not possible for the counting agents appointed by the candidates, including his counting agents, to properly watch the process of counting of votes and it also disabled them to raise objections or even note down the particulars of the votes improperly received in favour of the returned candidate as also the votes improperly rejected in so far as the appellant is concerned. That even at the instance of the Returning Officer, the candidates and their election agents could not see the proceeding being carried out by the officer sitting on the dais. With reference to Form XVI in respect of certain booths, it was alleged that there had been erasures, cuttings, over-writings and tampering with the figures of various votes polled by different candidates and also in respect of the rejected ballot papers and those cuttings had not been certified by any officer or the Returning Officer. It was asserted that the Returning Officer did not announce the number of votes polled by each of the candidates as incorporated in Form XX. It was further alleged that after declaring the result and preparing Form XX (Ex. P. 405), the Returning Officer had ordered another Form XX to be prepared in violation of the Rules and Orders with a view to help the returned candidate. That the new Form XX was prepared on 1.7.1991 and during the entire period of 13 days, between the declaration of the result and the preparation of new Form XX, all the Forms XVI had remained in the custody of the Returning Officer contrary to the instructions and orders issued under the Act. The appellant after the counting was over but before the result was declared, applied to the Returning Officer for a recount but his application was wrongly rejected. According to the appellant the result prepared by the Returning Officer was inaccurate and the irregularities committed during the counting of votes and preparing of Forms XVI and XX had materially effected the result of the election in so far as the returned candidate is concerned. The appellant prayed for the election of respondent No. 1 to be declared void and set aside. He prayed for a recount and for a declaration that he be declared as duly elected.

The respondent No. 1 contested the election petition and denied all the allegations made by the appellant. He also raised some preliminary Objections to the maintainability of the election petition. It was stated that some of the allegations contained in the election petition were scandalous while others were vague and the same did not disclose any cause of action. It was also asserted that the allegations regarding the commission of illegalities or irregularities during counting were an after thought since during the counting no such complaint had been made either to the Returning Officer or to the observer appointed by the Election Commission. The following preliminary issues were framed by the Court

1) Whether the allegations in paragraphs 6 and 9 of the election petition are scandalous, irrelevant and liable to be struck off?

2} Whether the averments made in paragraphs 7 to 9, 26 to 40 are irrelevant and do not disclose any cause of action? If so, to what effect?

3) Whether the allegations made in paragraphs 11 (a) to 24 lack in material facts and do not disclose a cause of action? If so, to what effect?

Issue No. 1 was decided against respondent No. 1 and it was found that the allegations contained in paras 6 and 9 were by no means scandalous. Issues 2 and 3 were dealt with together and by reference to a number of judgments delivered by this Court it was held that the election petition did not suffer from vagueness or want of material facts and particulars in support of the pleas raised in the specified paras of the election petition. Both the issues were also decided in favour of the appellant and against the returned candidate, The order of the learned single Judge deciding the preliminary issues against the respondent No. 1 on 6.12.91 Was challenged by the returned candidate respondent No. 1 in this Court through SLP (Civil) NO. 1239/92. Learned counsel for the respondent, however, sought to withdraw the special leave petition stating that the appellant wished to urge the questions covered by the impugned judgment in an appeal from this final judgment in the election case, if necessary. The special leave petition was accordingly dismissed as withdrawn on 6.2.92.

On 1.12.1991, the following issues were framed on merits:

"1) Whether the result of the election in respect of respondent No. 1 has been materially affected on the grounds described in paragraphs 1 to 39 Of the election petition, and as a result thereof the election of the respondent No. 1 deserves to be set aside/declared void and the petition, deserves to be declared as duly elected? OPP.

2) What is the effect of not raising objection regarding irregularities in counting before the observer appointed by the Election Commission and the District Election Officer? OPP."

Both parties led their evidence. The learned Trial Judge after an appraisal of the evidence observed:

"The evidence of the petitioner led in the court that the counting agents could not participate in the counting is thus not credible. I also see force in the arguments of the learned counsel for the respondent that the silence of the petitioner and his counting agents at the time when other officers visited should be sufficient to silence their protest made now."

"I, however, find that the record prepared with respect to the result has been over-written in some of the Forms XVI and also in Form XX and the same raise some suspicion about the correctness of that record. Though, the fixing of the seat of the supervisor on the other end of the table will not be deemed to be a breach of the Rules but in the present case, it has acquired significance. According to the lay out given in Annexure XXV, the counting supervisor had to sit on one side of the table

close to the side on which the counting agents are provided the sitting place. It was obviously for the purpose that the counting agents should be able to observe not only the actual counting process, but also the preparation of Form XVI, or any other writing work done by the supervisor. The counting supervisors have been careless and the result of Assembly Constituency had been prepared on the back of Form XVI, which was meant for the Parliament. The same are EXs. P. 306, 311, 347, 349, 361, 378, 381, 383 and 338.

Since, the counting agents could not have seen the preparation of Form XVI, this mistake has occurred- This, by itself may not be a ground for vitiating the counting process, but it does give support to one limb of the argument of the learned counsel that the participation of the counting agents was not that effective as the Rules expect."

After considering the evidence of Dewan K.S. Puri, hand-writing expert and his report Ex, P.409 and some of the Forms XVI for certain booths, the Trial Court opined that the over-writings, cuttings and erasures had made those documents (Forms XVI and XX) suspicious and the correctness of the record doubtful. After a detailed discussion in respect of various booths in relation to Forms XVI, the learned Judge by his Order dated January 21, 1993 opined:

"To remove the suspicion created by over written figures in Forms XVI and XX the preparation of the result on simple paper in respect of one booth and an unsigned Form XVI and to do complete justice between the parties, a partial inspection of the ballot papers becomes necessary. It is a case to which the observations made in the above quoted authorities are attracted.

and directed:

I hereby order the opening of the ballot boxes relating to Booth Nos. 28, 31, 38, 41., 55, 65A, 75, 85, 86 and 98. The Registrar (Judicial) will appoint a senior officer and two assistants from the Election Branch to open these boxes and check the result with the relevant Form XVI relating to these booths and prepare a report. This inspection shall be carried out in the presence of the advocates of both petitioner and respondent I, The petitioner and respondent 1 shall also have the right to be present."

The order dated 21.1.1993 directing recount of votes relating to booth Nos. 28, 31, 38, 41, 55, 65A, 75, 85, 86 and 98 was challenged by respondent No. 1 in this Court through special leave petition No. 3230/93. It was inter alia pleaded in the special leave petition that no ground had been made out for ordering recount or inspection of the ballot papers because the petition was deficient in material facts and particulars and that the impugned order directing a recount/inspection violated the secrecy of the ballot papers. This Court on 26.3.1993, in presence of learned counsel for the parties, dismissed the special leave petition. The inspection/recount was, thereafter, carried out as directed and a report was submitted to the High Court on 31.3.1993, which inter alia recorded :

- 1 . Vote No. 0025695 was actually marked in favour of Shri Azad Singh, but was found in the bundle of Shri Jaswant Singh.
2. Vote bearing No, 0025862 was actually marked in favour of Shri Karam Singh, but was found in the bundle of Shri Jaswant Singh.
3. Vote No. 0025536 had been polled in favour of Shri Virinder Singh, but was found in the bundle of Shri Karam Singh.
4. Vote No. 0025730 had been polled in favour of Shri Jaswant Singh, but was found in the bundle of Shri Karam
5. Vote No. 0025882 was found in the bundle of rejected votes, however, it was claimed by Shri Virender Singh, respondent that the same had actually been polled in his favour. He further stated mat the marking has been on his symbol, however, it was smudged.

All these votes had been taken out and sealed separately as stated above, for the kind perusal of Hon' ble Court.

(The packet containing the votes of this booth was already open from the above side. However, it bore seals on its sides.) I. Vote No. 0027580 was found in the bundle of rejected votes but was claimed by Shri Jaswant Singh, that the same had been polled in his favour.

The said vote was also taken out and sealed separately as stated above.

(One bundle containing the votes of Shri Virender Singh, respondent was found containing 51 votes instead of 50 votes).

1. Vote No. 0034036 which has been marked at two places and is claimed to be an invalid vote by the petitioner was found in the bundle of Shri Virender Singh, respondent.
2. Vote No. 0033735 which is also an invalid vote being marked at two places was found in the bundle of Shri Virender Singh, respondent.
3. Vote No, 0033778 which had actually been polled in favour of Shri Virender Singh, respondent was found in the bundle of Shri Jaswant Singh, petitioner.
4. Vote No. 0033417 which is an invalid vote having been marked at two places was found in the bundle of Shri Jaswant Singh, petitioner.
5. Vote No. 0033828 which has actually been polled in favour of Shri Chander Bhan was found in me bundle of Shri Jaswant Singh, petitioner.

6. Vote No. 0033774 which had actually been polled in favour of Shri Virender Singh, respondent was found in the bundle of Shri Karam Singh.

All these votes had been taken out and Sealed separately for the kind perusal of Hon'ble Court.

No discrepancy was found while counting the votes of this booth.

(The seals of the packet containing the votes of this booth were intact but Were not decipherable).

In this booth also no discrepancy was found on checking.

BOOTH NO. 65-A (One seal on the packet containing votes of this booth was broken and the other seal was not decipherable.

Two bundles pertaining to the votes of Shri Jaswant Singh, Petitioner contained 51 votes each).

1. Vote No. 0058587 which was actually polled in favour of Shri Virender Singh, respondent was found in the bundle of Shri Jaswant Singh, Petitioner.

2. Vote No. 0058430 which was actually polled in favour of Shri Chander Bhan was found in the bundle of Shri Jaswant Singh, Petitioner.

3. Vote No. 0058546 which has been rejected by the Returning Officer was claimed by Shri Jaswant Singh, petitioner that the same had been polled in his favour.

All these votes were taken out and sealed separately for the kind perusal of the Hon'ble Court.

1. Vote No. 0066791 which was found in the bundle of Shri Jaswant Singh, petitioner was claimed to be an invalid vote by Shri Virender Singh, respondent.

2. Vote No. 0067048 which is marked at two places and as such an invalid vote, was found in the bundle of Shri Jaswant Singh, petitioner.

3. Vote No. 0066756 which was found in the bundle of votes rejected by the Returning Officer was claimed by Shri Virender Singh, respondent that the same had been polled in his favour.

(The seals of this bundle were already open.)

1. Vote No. 0076599 which was marked in favour Sh. Karam Singh, was found in the bundle of Sh. Jaswant Singh, petitioner.

2. Vote No. 0076615 which was found in the bundle of rejected votes had been claimed by Sh. Jaswant Singh, petitioner that the same had been polled in his favour.

3. Vote No. 0076726 which was found in the bundle of Sh. Jaswant Singh, petitioner is claimed to be an invalid vote by the respondent, having been marked at two places. However, Sh. Jaswant Singh, petitioner claims to be a valid vote and that the same had been rightly polled in his favour.

Seals of this booth were already open.

As per Form No. XVI ballot papers bearing serial No. 672869 to 673328 had been issued by the Presiding Officer for this booth i.e. Booth No. 86 of village Ugalan whereas the ballot papers bearing serial Nos. 672869 to 673200 are shown to have been actually used. However, the votes which had actually been polled at this booth bore serial Nos. 0077061 to 0077392 which found mention in Form No. XVI pertaining to Lok Sabha Seat.

On thorough checking it was found that in fact the Form Nos. XVI in respect of Lok Sabha as well as Vidhan Sabha seats pertaining to this booth were intermingled/exchanged due to some clerical mistake. However, the actual votes counted by the Returning Officer tallied with the names, symbols and the numbers of the votes polled by each candidate in his/her favour as per details given in Form No. XVI in respect of Vidhan Sabha Seat pertaining to this Booth. This position was also admitted to be correct by the petitioner as well as the respondent and also by their counsels at the time of counting.

1. Vote No. 0087654 which had actually been polled in favour of Sh. Chander Bhan was found in the bundle of Sh. Jaswant Singh, petitioner.

2. Vote No. 0087871 which was marked at two places and as such an invalid vote was found in the bundle of Sh. Jaswant Singh, petitioner.

Both these votes were also taken out and sealed separately for the kind perusal of the Hon'ble Court.

Accordingly Form No. XVI in respect of each of the booth Nos. 28, 31, 41, 55, 65-A, 78, 85, 86 and 98 having been prepared separately were placed in file No. 4 containing 1 to 10 pages which is enclosed with this Report for the kind perusal of the Hon'ble Court. The votes disputed/objected by the parties have not been included in the Form No. XVI in respect of all the Booths. However, the same been sealed separately.

As a resume of the above I may submit .that leaving aside the votes objected/disputed by either me Petitioner or the Respondent, the Petitioner has further lost 9 votes whereas .the Respondent has gained 3 more votes."

The partial recount, it is thus seen generally speaking, falsified the allegations made by me election petitioner in the petition.

After the report of the designated officer was submitted to the Trial Court, the election petition was listed for hearing. It appears that arguments were heard in part on 12m May, 1993, when learned counsel for the election petitioner (appellant herein) sought time to prepare the case and to examine

"if he can advance arguments beyond the pleadings and the prayer in the petition." The case was fixed for 13th May 1993. However, on 13th May 1993 an application came to be filed by the election petitioner himself before the learned Judge quoting some "observations" of the learned Judge made during the hearing the previous day and objecting to the manner in which two sealed envelopes containing ballot papers, on which objections had been raised by both sides during the recount were handled by the Court and sought stay of further arguments to enable the election petitioner to approach the Supreme court. The learned Trial Judge made the following order and adjourned the case:

"Counsel for the petitioner has not appeared and the petitioner himself has made a request that he wants to move the Hon'ble Supreme Court for transfer of the Election Petition from this Court in view of this statement the petition is being adjourned. The petitioner wants to place an application for transfer on record. He may file it in the Registry, if so advised.

During the course of arguments yesterday, two sealed envelopes relating to polling Booth Nos. 28 and 31 had been opened in the presence of the parties and their counsel at the time when the report of the Commissioner who carried out test checking was being considered. These open envelopes had remained in my custody in my Almira under lock and key, Since, the case is now being adjourned, these open envelopes be resealed and the same be handed over to the Additional Registrar (Judl.) along with other sealed envelopes,"

It transpires from the record, that thereafter a transfer Petition No, 740/93 was filed in this Court and the same was dismissed on 30th August 1993.

A scrutiny of the record reveals that neither the petitioner nor his counsel thereafter appeared in the High Court when the case was taken up for remaining arguments. The learned Judge while dismissing the election petition observed:

"As a result of the sample checking it has been found that though figures given in Form XVI appeared to be doubtful by over-writing but in fact they carried almost the correct record. After sample checking of ten booths, it has been found that nine votes had been wrongly counted in favour of the petitioner. The petitioner cannot claim that wrong record had been prepared to his disadvantage affecting his election. The petitioner has thus no cause to challenge the election of the respondent." (Emphasis ours) In this appeal, learned counsel for the appellant has again referred to the suspicious nature of the election record, particularly various Form XVI and Form XX and reiterated the submissions made in the High Court, on the acceptance of which recount had been ordered and urged that the High Court should have ordered a partial repoll and not merely a recount. Learned counsel, however, did not question the correctness of the report of the designated officer based on recount/inspection.

Mr. Harish Salve, learned senior counsel appearing for the respondent submitted that the pleadings of the election petitioner were hopelessly vague and since a judicial recount is not a matter of right and convincing evidence is the touch stone, the learned Trial Judge could not have ordered a recount in this case. Referring to the pleas raised in the election petition it was submitted that the allegations contained in para 11 to para 24 of the election petition detailing the alleged irregularities committed during the process of counting were hopelessly vague and devoid of factual foundations and did, not justify an order of recount and that the petition should have been dismissed as not disclosing any cause of action. It is stated that the allegations were hopelessly vague and no supporting material had been placed on the record. It was also pointed out that no objection had been raised during the counting by the appellant or his agents to RW8 Gulshan Rai, RW9 J.K. Grover and RW10 A.N. Mathur Home Secretary, who had been appointed as observers by the Election Commission and had visited the counting hall and therefore the allegations made in the election petition were an after thought aimed at a fishing enquiry through recount. Learned counsel argued that even though as a result of the recount, the returned candidate and not the appellant was the winner, the direction for recount had been erroneously given and was not at all justified and that this Court, to keep the record straight, may hold that in the nature of pleadings which were vague and indefinite and in the absence of any supporting material, the order of recount was not justified.

Mr. Salve men submitted that since learned counsel for the election petitioner had not disputed that the total number of votes polled by each of the candidate as reflected in original Form XX, were the same as shown in the revised Form XX, and that the aggregate figures in both the forms, candidate-wise, of the valid votes polled by them were the same, no grievance could be made about the erasures etc. in Form XX or in some of Form XVI, on the basis of which Form XX had been prepared. Learned counsel argued that the appellant was trying to make a capital out of the erasures and over-writings etc. on some of the Forms XVI, which were bonafide corrections, and the hollowness of the grievance of the appellant stood totally exposed by the report of the recount/inspection. Learned counsel vehemently complained about the order directing recount and described it as totally unjustified and violative of the secrecy of the ballot papers.

The submission of Mr. Salve that on account of the lack of material facts and particulars in paras 11 to 24 of the election petition no case had been made out for ordering a recount and therefore the learned Trial Judge could not have ordered recount does appear to us to be justified, keeping in view the nature of the pleadings, but this need not detain us because a challenge to the order of recount was made by respondent No. 1, the returned candidate, through SLP No. 3230/93 which was dismissed by this Court. It is, therefore, not permissible again for the returned candidate to raise an argument challenging the correctness of the order of recount, as the earlier order of dismissal of the SLP, in the presence of learned counsel for the

parties, would operate as constructive resjudicata. In a somewhat similar situation in JVC. Horo v. Leander Tint and Ors., [1989] 4 SCG 364, an argument similar to the one raised by Mr. Salve was repelled by this Court, the Bench observed :

"Counsel next relied upon the decision of this Court in P.K.K. Shamsudeen v. KAM Mappilloi Mohindeen and argued that there was no factual foundation established by the respondent have an inspection of ballot papers. In our opinion, the said decision had apparently no relevance to the present case. Herein, the High Court by the order dated November 17, 1987 has reached the conclusion and recorded a finding as to the prima facie case calling for inspection of ballot papers. That conclusion as to the prima facie case was based on consideration of relevant evidence produced by the parties. That order of the High Court has been upheld by this Court by dismissing the appellant's special leave petition. The appellant was bound by that order and he cannot again contend that there was no factual foundation established by the respondent for inspection. The earlier order of the High Court which has been affirmed by this Court cannot be reopened in this appeal." (Emphasis supplied) The view expressed above in Horo's case (supra) is in consonance with the opinion of the majority in Bhag Mai v. Ch. Parbhu Ram and Ors., [1985] I SCC 61, wherein it was held:

"We may also observe that the appellant filed a special leave petition against the High Court's order dated March 15, 1983, directing recount of the rejected ballot papers of the appellant and respondent I and that it was dismissed after the issue of notice and hearing both the parties. We agree with Mr. Sibal that the order directing recount of the rejected ballot papers insofar as it is not in excess of the jurisdiction of the Tribunal has become final arid that it is not open to the appellant to reagitate that question in this appeal which is no doubt under Section 116 of the Act, as the principle of constructive res judicata applies. We do not agree with Mr. Shanti Bhushan that it can be reagitated in this appeal."

We are in respectful agreement with the above view of law and hold that the returned candidate is bound by the earlier order of this court dismissing his special leave petition against the order of recount and he cannot now be permitted to reagitate the issue again.

The recount ordered by the learned single Judge has, however, confirmed the correctness of the result of the election as well as generally the correctness of the votes polled by the appellant and the returned candidate, as reflected in various Forms XVI and Form XX. As a matter of fact, as a result of the recount the appellant has lost 9 votes whereas the returned candidate has gained 3 votes. The grievance of the appellant that on account of the so-called illegalities and irregularities committed during the counting and for non-compliance with the provisions of the Act, Rules and the orders framed thereunder or in the guidelines contained in the Hand Book during the counting, the result of the election in so far as the returned candidate is concerned has been materially effected, has been relied during the recount and none of the allegations has been substantiated or established as rightly held by the learned Trial Judge.

Faced with the result of the recount, the report of the Designated Officer and the findings of the learned Trial Judge, learned counsel for the appellant then argued that the manner in which the Returning Officer had dealt with the election material, after the declaration of the result, coupled with the fact that at the time of recount by the designated officer, seals of some of the packets containing ballot papers, as detailed in the report itself, had been found either broken or missing, the entire election process had been vitiated. It was submitted that the Returning Officer had retained the ballot papers in his illegal and unlawful custody for a period of about two days "after the declaration of the result" and had also kept back the secret special seal of the Election Commission, besides all XVI forms, contrary to the rules and the instructions and the state in which some of the packets of the ballot papers were found at the time of recount in the High Court Was indicative of the manner in which the election record had been tampered with after the declaration of the result. It was asserted that the trunks containing the election material had not been deposited for safe custody in the Treasury forthwith as required by the Rules, orders and instruction on the subject and instead had been deposited in the Treasury only on 19th June 1991. According to the appellant, the Returning Officer had acted in Violation of Rules 57 and 93 and Instruction No. 23 (7) and 23 (9) of the Hand Book containing the instructions to the Returning Officers. Learned counsel Urged that in the case of all such booths in respect of which ballot papers had been found to be in packets with broken seals as well as the packets on which the seals were found to be missing, a repoll and not merely a recount should have been ordered by the High Court and since, repoll had not been ordered, this Court may in order to do complete justice between the parties and to maintain purity of the elections, order a partial repoll in respect of all those booths. Learned counsel submitted that repoll can be ordered by the court while deciding an election petition and in support of this submission relied upon the judgment in *A.C. Jose v. Sivan Pillai and Ors*, [1984] 2 SCC 656 According to the learned counsel, this Court can in exercise of its jurisdiction under Article 142 of the Constitution of India, with a view to do complete justice between the parties, direct partial repoll in respect to the booths whereof the seals on the packets containing the ballot papers had either been found broken or missing during the recount by the designated officer.

In response Mr. Salve submitted that since the outer seals of all the trunks containing the sealed packets of the ballot papers were admittedly found to be in tact, the broken or missing seals of some of the packets containing ballot papers was of no consequence, because the seals could have got broken or opened while packing the packets in the trunks or during the handling or packing of the packets. It was argued that since the designated officer had not found any discrepancy in the ballot papers contained in-all those packets after tallying the same with the entries in Form XVI and Form XX, the grievance made by the appellant had no basis or relevance and the appellant was not trying to build up a new case at the stage of the appeal in the Supreme Court, which was not pleaded either initially in the election petition or even through an amendment after the so-called irregularities came to the notice of the appellant during the process of recount and therefore he cannot now be heard on that account. It was further submitted that the failure to comply strictly with the provisions of the Rules, orders of instructions as to the forwarding of the election documents, after close of the poll and declaration of the result could not in any event avoid the election of the returned candidate in the absence of any allegation and proof that post-declaration irregularities were committed, to Cover up pre-declaration illegalities, which could have materially effected the result of the election petition. It was asserted that Rule 63 applies to recount before the declaration, of result and the said

rule or even the principle of that rule has no application whatsoever to a recount ordered by the Court during the Trial of an election petition. Learned counsel went on to state that the partial repoll, as requested for by the learned counsel for the election petitioner, cannot be ordered by this court, as the direction to hold polls, including partial repoll, falls within the province of the Election Commission and is not a relief which can be granted by the courts in an election petition. It was argued that repoll and recount are two different situations and that the alleged Wrongful acceptance or rejection of votes or irregularities during counting of votes which alone was the main stake of the appellants claim could not justify a prayer for repoll.

On a critical analysis of the material on the record, we, find that the allegation regarding the alleged tampering with the election material after the declaration of the result, as raised during the arguments before us, has no factual foundations. As a matter of fact there is evidence on the record to show that sealing of the packets and trunks was undertaken by the Naib Tehsildar and the entire record had been sealed before the same was deposited in the Treasury. Dr. Avtar Singh, Returning Officer had directed PW13 to deposit the record with the Treasury and since there is no evidence available on the record to show that the trunks were not sent to the Treasury in a sealed condition, it would be futile to contend that the same had been tampered with after the declaration of the results and before their deposit in the Treasury.

PW4 Dr Avtar Singh, me Returning Officer stated that after Form XX had been prepared, all the Forms XVI were sealed; They were sealed on 17th June, 1991 in his presence when some of the candidates and their election agents were also present He asserted that "all the material that was to be sealed had been sealed on 17th June, 1991. The sealed material was put in steel cases." The Witness went on to emphasise that the entire record had been placed in steel boxes and the boxes were left in me custody of the Assistant Returning Officer who had deposited the same in the Treasury. The witness added that "I had seen this record in the Treasury Office on 18th June 1991. At that time the record was in the strong room of the Treasury. On 18th June 1991 I had gone to the Treasury to see if the record had been deposited with the Treasury properly or not."

PW5 Avinash Chandra Ashri, who was posted as Assistant Treasury Officer, Hansi, during me relevant period proved the entries in the Register Ex. P408 with respect to the pad locks and the election material. He stated that there were two entries in the register and that they both relate to 19th June 1991. The witness then went on to add:

"These entries relate to the deposit of the election material and as per these entries, 27 boxes were got deposited which related to Hansi constituency and 11 boxes with respect to Vidhan Sabha Narnaund constituency. These entries are Ex P. 408/A and Ex.P408/B. When some material is taken out of strong room, an entry is recorded to that effect against the said deposit entry. However, with respect to these two entries, there is no further entry of taking out of the material from the strong room. The entries Ex. P.408/A and EX.P.408/B bear my signatures communication Ex,P,408/C is from the Returning Officer vide which the election material relating to Narnaund constituency was sent. This communication bears my signatures in token of receipt of election material on 19th June, 1991"

It is this statement, which has been strongly relied upon by the learned counsel for the appellant to urge that the record had not been sent for safe custody on 17th June and that it had remained with the returning officer till 19th June, and during that period tampering had been done. The inference which the appellant wishes to draw, as we shall presently see, is unreasonable and has no basis.

During the cross-examination, PW5 Ashrj was challenged on the question of making entries in the Register Ex.P.408 and the Witness stated:

"The entries are made by the Assistant Treasurer and the same are signed by the Assistant Treasury Officer, All these entries are not in my hand. The entry mark "B" on the same page is not in my hand."

The Assistant Treasurer, however, was not examined to depose as to on what day he actually received the trunks and made the entries. We have ourselves perused the Register Ex. P.408, it contains an entry at "Mark B" opposite which Narnaund constituency is written and it relates to receipt of election record on 17th June 1991. Whereas Mr. Mishra submitted that the said entry does not reflect the receipt of the election material relating to Narnaund constituency in the sealed trunks on 17th June 1991, Mr. Salve contended that the said entry could only relate to the receipt of the election material and urged that this position was fortified by the fact that the Returning Officer Dr. Avtar Singh PW4 had found the record in the Treasury on 18th June 1991. It is not anybody's case that election material relating to Narnaund Constituency had been deposited in the Treasury on 17th June and 19th June i.e. on two different dates. None of the parties, it appears, made any effort to have the ambiguity regarding the entry marked "B" clarified during the examination of the witnesses. The entry at mark "B" therefore apparently relates to the receipt of election material of Narnaund Constituency in the Treasury on 17th June, 1991. In this connection a reference to the statement of PW13 Assistant Returning Officer would also be of advantage. He deposed:

"The record relating to election after counting Was sent to the Treasury. A list is sent along with the record indicating the detail of the record and there is also a forwarding letter addressed to the treasury officer for depositing the record. The record is deposited with the treasury by Election Kanungo. I had left for Hissar after the completion of the result and I had taken with me the result with respect to Narnaund segment of parliamentary constituency Hissar. There was an election Kanungo appointed by the Deputy Commissioner to perform the duties of Kanungo and he was present during the counting process. So far as I recollect it was the duty of Naib Tehsildar to take custody of the record and the sealing was being done under the supervision of Naib Tehsildar. The supervision of the work done by the Naib Tehsildar was with the Returning Officer. The seal of the Election Commissioner for the Assembly constituency was with the Returning Officer. I had no occasion to use that seal. The entire record relating to the election were sealed before depositing with the Treasury Officer."

During the cross-examination, he admitted that Dr. Avtar Singh had directed him to deposit the record with the Treasury and that he had deputed Election Kanungo to deposit the record with the

Treasury, who had so deposited it forthwith. Neither the Naib Tehsildar nor the Kanungo were examined by either of the parties to ascertain as to when the sealing was done and when they actually delivered the sealed trunks at the treasury. The matter was allowed to rest at that only. The evidence of the witnesses referred to above reveals that the appellant has failed to establish any breach of rule, order or guideline etc. in the matter of sealing of the election material and delivering it for safe custody in the Treasury. On the basis of the material on the record, it appears to us that the capital which the appellant now seeks to make out of the missing or broken seals on some of the ballot papers during the recount is without any foundation. The evidence and the other material on the record, including the result of recount, falsifies the allegation that the election material had not been properly sealed or that the Returning Officer had indulged in any tampering with the record after the declaration of the result, to further the prospects of the election of the returned candidate.

Moreover, it is nobody's case that the figures contained in Forms XVI, taken out of the minks, were different from the figures contained in the copies of the relevant Form XVI, which the appellant had obtained at the time of counting itself. Votes polled candidatewise as well as the total number of votes polled tallied with the Forms. Recount also established that the entries in the Forms, both, XVI and XX, were correct. The grievance of the appellant, therefore, is futile and the argument is one of despair. The fact situation which stands established after the recount shows that the apprehensions expressed by the appellant have been found to be fanciful and without any basis and his grievance untenable.

That apart, we find that even if the arguments raised at the Bar were to be accepted that there have been some violation of the instructions contained in the Hand Book and the rules and orders, in the matter of sealing of the election material, after the declaration of the election result, the same cannot avoid the result of the election. The alleged tampering with the seals of some of the packets containing the ballot papers, after the declaration of the result, is not a ground for avoiding an election through an election petition. The election of a returned candidate can only be avoided on any of the grounds contained in Section 100 of the Act. That Section reads:

"Sec. 100 Grounds for declaring election to be void - (1) Subject to the provisions of sub-section (2) if (the High Court) is of opinion -

a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution of this Act (or the Government of Union Territories Act, 1963 (20 of 1963);

or

b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of returned candidate or his election agent; or

c) that any nomination has been improperly rejected; or

d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected -

(i) by the improper acceptance or any nomination, or

(ii) by any corrupt practice committed in the interest of the returned candidate (by an agent other than his election agent), or

(iii) by the improper reception, refusal or rejection of any vote or the reception of; any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of the Act or of any rules or orders made under this Act, (the High Court) shall declare the election of the returned candidate to be void), (2) if in the opinion of (the High Court) a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice but (the High Court) is satisfied -

(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and (without the consent), of the candidate or his election agent;

xxx
xxx

xxx

(c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and

(d) that in all other respects the election was free from any corrupt practice On the part of the candidate or any of his agents, then (the High Court) may decide that the election of the returned candidate is not void."

From the plain language of the Section, it would be seen that post declaration non-compliance with the rules or orders or instructions for the proper custody of the election material by the election staff is not one of the grounds on which the election of a returned candidate can be set aside. A post electoral irregularities may in a given case be used in aid of the allegations relating to pre-declaration irregularities or illegalities but by themselves they do not afford any ground to avoid an election. In Halsbury's Laws of England Vol. 15 (4th Edn.) at paras 651, 652 and 658, while dealing with the sealing of the election material after the declaration of the election result and forwarding the same, as required by the Rules, and the effect of irregularities committed while forwarding the material, it has been stated:

"651. Sealing up of papers. On the completion of the counting at a contested election or at a poll consequent on a parish or community meeting, the returning officer must seal up in separate packets the counted and rejected ballot papers. The sealed packets of tendered ballot papers, or of counterfoils and certificates as to employment on

duty on the day of the poll, or of marked copies of the register of electors and lists of proxies, must not be opened by the returning officer.

.....

652. Forwarding of documents. The returning officer must then forward to the appropriate proper officer the packets of ballot papers in his possession, the ballot paper accounts, and the statements of rejected ballot papers and of the result of the verification of the ballot paper accounts, the tendered votes lists, the lists of blind voters assisted by companions, the lists of votes marked by the presiding officer and the statements relating to them, and the declarations made by the companions of blind voters, the packets of counterfoils and certificates as to employment on duty on the day of the poll, and the packets containing marked copies of registers and of lists of proxies, endorsing on each packet a description of its contents, the date of the election or poll to which they relate, and the name of the constituency, electoral area, parish or community, as the case may be, for which the election or poll was held.....

658. Irregularities..... ..failure to comply strictly with the provisions as to forwarding documents after the close of the poll, is not sufficient to avoid the election. " (Emphasis supplied) The above statement of law is fully applicable to the situation appearing in the present case. In *Jagannath Rao v. Raj Kishore and Others*, [1972] 4 SCC 795, a three Judge Bench of this Court was considering an allegation that the ballot papers had been tampered with, after the declaration of results, and its consequences, if any. The relevant and necessary facts in *Jagannath Rao's* case (*supra*) were:

The returned candidate had secured 69 votes more than his nearest rival, the election petitioner. After the counting was over, the election petitioner had asked for a recount which was not granted by the Returning Officer. The election petitioner thereafter applied to the Election Commission for inspection of the ballot papers. His request was allowed and the inspection asked for was granted and the ballot papers were inspected. Subsequent thereto, an election petition was filed in which it was contended that some invalid votes as well as some votes cast in his favour and some votes cast in favour of other candidates had been wrongly counted in favour of the returned candidate. Those allegations were denied by the returned candidate who had also filed a recrimination petition. During the pendency of the election petition both the returned candidate and the election petitioner applied for re-inspection of the ballot papers. During the inspection of the ballot papers under orders of the Trial Judge, the counsel for the returned candidate noticed certain facts from which he concluded that the ballot papers might have been tampered with. The returned candidate filed an application before me court alleging that there were reasons to suspect that the ballot papers had been tampered with during the process of the inspection of the same in the High Court, In fact, it was alleged that the tampering of ballot papers had been done by one Gopi Nath, a member of the staff of the High

Court while the election material had remained in the custody of the High Court. The Trial Judge on examination, found that the lock of trunk No. 3 was open. Some other irregularities were also found including that the missing seals on the envelopes containing ballot papers found in that box. The Court officer had sworn to the fact of the sealing of trunk No. 3 and keeping of the sealed packets in that trunk during the proceedings for recounting. Commenting adversely on the manner in which recount had been ordered in the face of vague pleadings and finding fault with the exercise undertaken by the Trial Judge, which led to the election of the returned candidate being set aside, this Court after scrutinising some of the ballot papers, but not all of them, found that some ballot papers had in fact been tampered with. After a detailed consideration, it was observed:

"12. From an examination of the material on record, we are of opinion that there are grounds to believe that there was large scale tampering of ballot papers and it is most likely that the tampering in question was done in the High Court during the time of the examination of the ballot papers. It is nobody's case that the tampering was done at the instance of or for the benefit of the appellant. That being so there was no point in the learned Judge trying to find out as to Which candidate had obtained more valid votes. In the circumstances the only proper course was to proceed on the basis that the decision of the Returning Officer should be presumed to be correct. As held by this Court in *Jabar Singh v. Genda Lal*, there is a prima facie presumption in favour of the validity of the acceptance or the rejection of the voting papers Which had been counted."

The appeal was allowed and reversing the judgment of the High Court, the election petition was set aside, thereby upholding the election of the returned candidate.

The facts in the present case stand at a much better footing. As already noticed, it is nobody's case that the irregularities were committed in the matter of sealing and the safe custody of the election material at the instance of or for the benefit of the returned candidate. As a matter of fact, we find that during the recount proceedings, the Designated Officer, did not generally find any discrepancy between the record of the votes polled by each of the candidate as reflected in Form XVI of the particular booth, with the number of votes found in the packets of which either the seals were broken or missing, When taken out of the trunks of which the seals were admittedly intact. The intact seals on the trunks containing the election material rules out the possibility of any tampering with the seals on the packets, contained in those trunks. The position may have been different if the seals of the trunks had been found broken or missing. The conditions in which some of the ballot papers were found in the sealed trunk rules out the possibility of any tampering, because had some tampering been done malafide, the packets could have been resealed and properly placed in the trunks before sealing the trunks. Even otherwise the result of the recount carried out under orders of the Trial Court established beyond any doubt that the figures of the votes polled as reflected in the record maintained during the counting actually tallied with the votes found during the recount in respect of each of the candidate in respect of each one of these booths. There is always a prima facie presumption in favour of the validity of the acceptance or the rejection of the ballot papers which

had been initially counted and instead of that presumption being rebutted by any cogent evidence, it has in this Case been reinforced by the result of the recount. We are, therefore, satisfied that the breaking of the seals or the missing seals on some of the packets containing the ballot papers, which were taken out of the boxes duly sealed, were the result of mishandling of the packets and were not the result of any tampering with the ballot papers, though, the election staff should have been more careful while packing the sealed packets, the missing Of the broken seals on some of the packets containing the ballot papers, cannot advance the case of the appellant. What action the authorities may take against the erring staff members under the law is a different matter and we leave it to them to set their house in order so that in future no challenge is made to the impartiality of me Election Commission, whose staff is deputed to seal the election material, on ground such as in this case - which if proved could have established that the election process had been fouled, giving a serious affront to the survival of democratic institutions and resulted in serious consequences.

In view of our findings that the appellant has failed to establish that the election material had not been sealed properly or kept in safe custody, as per the procedure prescribed by the guidelines and the Rules, we are relieved of the necessity of examining the submission of Mr. Misra that a repoll in some of the booths should be ordered by this Court In the High Court it was only a prayer for recount which was made. Even when the order of recount was out in issue through special leave petition in this Court by the returned candidate, the appellant did not come forward to seek an order of repoll. Besides, the allegations contained in the petition did not make out any case for ordering a partial repoll. We, therefore, refrain from expressing any opinion on the larger question i.e. whether it is within the province of this court to order a repoll under the Representation of Peoples Act, if the fact situation in a given case so warrants and for the situation under which it can be so ordered and leave it to be decided in an appropriate case at an appropriate time.

In view of the above discussion, the order of the High Court calls for no interference. This appeal consequently fails and is dismissed with costs which are assessed at Rs. 10,000 (Rupees ten thousand).

Before parting with this judgment, there is however, one matter which has caused us considerable concern and we wish to advert to it After me recount had been ordered by the learned single Judge in the High Court and the Deputy Registrar had carried out the inspection of the ballot papers of the specified booths, the appellant filed an application in the High Court under Section 151 C.P.C. seeking stay of the further arguments to enable the appellant to move the Supreme Court. In the said application the appellant referred to certain "observations" made by the learned Judge during the course of arguments and also referred to the manner in which the two packets containing ballot papers which had been objected to by both the parties and had been kept for scrutiny of the learned single Judge, were handled by the learned Judge. The appellant went on to say that "by doing this the Hon'ble Court was pleased to make these ballot papers suspect and doubtful and these cannot be considered for any decision on them regarding their validity or otherwise as these remained in unsealed condition for uncertainable time without the petitioner or his counsel being present there." The learned Judge by his order dated May 13, 1993 recorded the following proceedings:

"Counsel for the petitioner has not appeared and the petitioner himself has made a request that he wants to move the Hon'ble Supreme Court for transfer of the Election Petition from this Court. In view of this statement, the petition is being adjourned. The petitioner wants to place an application for transfer on record. He may file it in the Registry, if so advised.

During the course of arguments yesterday, two sealed envelopes relating to polling booth nos. 28 and 31 had been opened in the presence of the parties and their counsel at the time when the report of the commissioner who carried out test checking was being considered. These open envelopes had remained in my custody in my Almirah under lock and key. Since the case is now being adjourned, these open envelopes be resealed and the same be banded-over to the Additional Registrar (Judicial) alongwith other sealed envelopes."

Thereafter, the appellant as already noticed, filed a transfer petition in this court which was dismissed on 30th August 1993. The transfer petition like the application (supra) cast aspersions on the learned Judge in the discharge of his judicial functions and had the tendency to scandalise the Court. It was an attempt to brow beat the learned Judge of the High Court and cause interference in the conduct of a fair trial. Not only are the aspersions derogatory, scandalous and uncalled for but they also tend to bring the authority and administration of law "into disrespect. The contents of the application seeking stay as also of the transfer petition, bring the court into disrepute and are an affront to the majesty of law and offend the dignity of the Court. The appellant is an Advocate and it is painful that by filing the application and the petition as a party in person, couched in an objectionable language, he permitted himself the liberty of indulging in an action, which ill behoves him and does little credit to the noble profession to which he belongs. An advocate has no wider protection than a layman when he commits an act which amounts to contempt of court. It is most unbecoming for an advocate to make imputations against the Judge only because he does not get the expected result, which according to him is the fair and reasonable result available to him. Judges cannot be intimidated to seek favourable orders. Only because a lawyer appears as a party in person, he does not get a licence thereby to commit contempt of the court by intimidating the Judges or scandalising the Courts. He cannot use language, either in the pleadings or during arguments, which is either intemperate or unparliamentary. These safeguards are put for the protection of any Judge individually but are essential for maintaining the dignity and decorum of the Courts and for upholding the majesty of law. Judges and courts are not unduly sensitive or touchy to fair and reasonable criticism of their judgments. Fair comments, even if, out-spoken, but made without any malice or attempting to impair the administration of justice and made in good faith in proper language do not attract any punishment for contempt of court. However, when from the criticism a deliberate, motivated and calculated attempt is discernible to bring down the image of judiciary in the estimation of the public or to impair the administration of justice or tend to bring the administration of justice into disrepute the courts must bister themselves to uphold their dignity and the majesty of law. The appellant, has, undoubtedly committed contempt of the Court by the use of the objectionable and intemperate language. No system of justice can tolerate such unbridled licence on the part of a person, be he a lawyer, to permit himself the liberty of scandalising a Court by casting unwarranted, uncalled for and unjustified aspersions on the integrity, ability, impartiality

of fairness of a Judge in the discharge of his judicial functions as it amounts to an interference with the due course of administration of justice.

On the attention of the learned counsel for the appellant being drawn to the pleadings in the application in the High Court and in the transfer petition in this Court, the counsel expressed his 'unqualified regret' on behalf of the appellant. The appellant who was present in court also expressed his apology and pleaded "lack of understanding". He has subsequently filed an affidavit on 26th August 1994. Paras 1 to 4 of the affidavit read thus:

"1. That during the course of hearing of the aforesaid election appeal, the application filed for staying the proceedings pending before the High Court of Punjab and Haryana in election petition No. 16 of 1991 as well as Transfer Petition No. 740 of 1993 were placed for the perusal of this Hon'ble Court.

2. That I respectfully submit that the allegations made in the said petition as well as in the transfer petition which in any manner cast aspersion on the Hon'ble Judge of the High Court or in any manner amounts to interference with due administration of justice may kindly be allowed to be deleted from the pleadings and this Hon'ble Court may kindly ignore the same.

3. That the appellant sincerely, tenders his unconditional apology for having made such statements in the stay application before the High Court as well as in the Transfer Petition before this Hon'ble Court.

4. That the appellant, respectfully and humbly submit that he has the highest respect for the judiciary in this country and also undertake that he will be careful and will not make such objectionable statements which either directly or indirectly scandalise the judicial system of this country. The appellant also sincerely express his regret for having made such statements in the stay application and as well as in the Transfer Petition. The appellant hereby again tenders his unconditional apology and this Hon'ble Court may kindly accept his unconditional apology and forgive him for the objectionable statements which he had made in the application before the High Court as well as in the Transfer Petition before this Hon'ble Court"

In view of the unqualified apology tendered by the appellant and reiterated in absolute terms by him and his learned counsel at the bar and being satisfied that the appellant is genuinely repentent, we accept his unqualified apology but issue a strong admonition and warning to him to be more careful in future and let the matters rest there.