

Shradha Devi vs Krishna Chandra Pant & Others on 26 October, 1982

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Author: D.A. Desai

Bench: D.A. Desai, A.P. Sen

PETITIONER:

SHRADHA DEVI

Vs.

RESPONDENT:

KRISHNA CHANDRA PANT & OTHERS

DATE OF JUDGMENT 26/10/1982

BENCH:

DESAI, D.A.

BENCH:

DESAI, D.A.

SEN, A.P. (J)

CITATION:

1982 AIR 1569 1983 SCR (1) 681

1982 SCC (3) 389 1982 SCALE (2) 964

CITATOR INFO :

F 1983 SC1311 (16)

R 1984 SC 382 (2)

ACT:

Representation of the People Act, 1951 -Election
Petition-Elector's duty-Nature of proof-Required for a
relief of scrutiny and recount on the allegation of miscount
in an election petition.

HEADNOTE:

The appellant was one of the 19 candidates for the 11 members to be elected at the biennial election for electing members to Council of States from the constituency of elected members of the Uttar Pradesh Legislative Assembly, at the election held on 28th March, 1979.

The election was to be in accordance with the system of proportional representation by means of single transferable vote. In all 421 members exercised their franchise. Eleven ballot papers were rejected by the returning officer as invalid and the 1st Respondent was declared elected in the 14th count.

The appellant, thereupon, filed an election petition under section 81 of the 1951 Act before the Lucknow Bench of the Allahabad High Court for scrutiny and recount on the allegation of miscount. The appellant alleged that (i) the result of the election in so far as it concerns the returned candidate (i.e.) 1st respondent-has been materially affected by the improper rejection of valid votes by wrongly declaring them invalid as well as by improper reception of what otherwise would have been the invalid votes if the Returning Officer had been consistent in his approach, and, therefore, the election of the returned candidate not only should be declared void but in his place by a proper computation of votes, the petitioner should be declared elected to the 11th vacancy, (ii) there had been an improper rejection of the valid votes cast in her favour and that has materially affected the result of the election; and (iii) even though it was obligatory upon the Returning Officer to show all the ballot papers which he rejected as invalid, to the candidates and/or their counting agents, he only showed four out of the eleven ballot papers held invalid by him and did not show the rest of them. Even these four were wrongly rejected and cannot be said to be covered by Rule 73(2)(d) of the Election Rules. The High Court dismissed the election petition and hence the appeal by special leave.

The appellant contended that (i) where the election is to be held in accordance with the system of proportional representation by means of the single transferable vote, if the first preference is properly and ascertainably cast any

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error in setting out the remaining preferences would not enable the Returning Officer to reject the whole ballot paper; and (ii) every unrequired mark, cutting, erasure cannot tantamount to any indication which would enable the voter to be identified but the writing or mark must be such that the voter can be and not merely might be identified and there is no such cutting mark or erasure within the meaning of Rule 73(2)(d) of the Conduct of Election Rules; 1961.

Allowing the appeal, the Court

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HELD: 1:1. When a petition is for relief of scrutiny and recount on the allegation of miscount, the petitioner has to offer prima facie proof of errors in counting and if errors in counting are prima facie established, a recount can be ordered. 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 10,000 or more votes are rejected as invalid. [690 A-C]

1:2. 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 inquiry in a petition for relief of recount on the ground of miscount. True it is that 'a recount is not granted as of right, but on evidence of good grounds for believing that there has been a mistake on the part of Returning Officer. Prima facie proof of error complained of must be given by the election petitioner and it must further be shown that the errors are of such magnitude that the result of the election so far as it affects the returned candidate is materially affected, then recount is directed. [690 C-E]

1:3. It is not the requirement of law that in respect of each ballot paper rejected as invalid a specific averment must be so made as to identify the ballot paper and the only those that can be correlated to the allegations in the petition specifically and not generally shall be recounted. That is contrary to the requirement of the Act and the Rules. [691 B-C]

2:1. A combined reading of Rules 37A(1), 73(2)(a) and 73(2)(b) of the conduct of Election Rules 1961, makes clear that when voting is in accordance with the proportional representation by means of the single transferable vote it is obligatory to cast the first preference vote for ensuring the validity of the ballot paper and the first preference vote must be so cast as not to leave any one in doubt about it. The remaining preferences are optional with the elector. He may or may not exercise his franchise for the remaining preferences. Rule 73(2) is exhaustive of the grounds on which a ballot paper at a voting at election by Assembly members shall be rejected as invalid and on a true and in depth reading of it, it does not transpire that the

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failure to cast the remaining preferences would invalidate the ballot papers. This is so because under rule 37A(1) every elector has only one vote at an election irrespective of the number of seats to be filled. The vote is only one and even if there is more than one seat to be filled in, subsequent preferences may be indicated by the elector and it is optional with him not to exercise preferences outside his only one vote which he must cast by indicating unambiguously his first preference. [695 D-G]

2:2. If there is only one vote at such an election and

the preferences are as many as there are seats chronologically to be indicated and failure to exercise preferences subsequent to first preference would not invalidate the ballot paper, it must follow as a corollary that if the elector has committed some error in exercising his preferences lower down the ladder the whole of the ballot paper cannot be rejected as invalid. Therefore, it must follow that not only such a ballot paper has to be held as valid ballot paper but its validity shall continue upto the stage in preferences where an error or confusion transpires which would not permit computation of subsequent preferences below the level of error. To illustrate the point if as in the present case the voter had option to exercise 11 preferences and if he has exercised his preferences 1 to 5 correctly and unambiguously and has committed an error in exercising sixth preference and it cannot be said with certainty for whom the sixth preferences vote was cast, the ballot paper has to be held valid in computation of votes upto and inclusive of the fifth preference and rejected for the preferences down below as if the elector has not exercised his further preferences which was optional with him. The ballot paper can thus be partially valid and this is the logical outcome of the system of voting. [695 F-H, 696 A-C-E]

3:1. Free and fair election being the fountain source of Parliamentary democracy attempt of the Returning Officer and the Court should be not to chart the easy course of rejecting ballot papers as invalid under the slightest pretext but serious attempt should be made before rejecting ballot papers as invalid to ascertain, if possible, whether the elector has cast his vote with sufficient clarity revealing his intendment. In this case, the Returning Officer has charted an easy course unsupportable by evidence and the High Court failed to exercise its jurisdiction of scrutiny of all ballot papers once a serious error has been pointed out in respect of two ballot papers out of a total of 11 invalid ballot papers. [700 E-G]

3:2 Rule 73(2)(d), provides that a ballot paper shall be invalid on which, there is any mark or writing by which the elector can be identified. Section 94 of the Representation of People Act, 1951 ensures secrecy of ballot and it cannot be infringed because no witness or other person shall be required to state for whom he has voted at an election. To ensure free and fair election which is pivotal for setting up a parliamentary democracy, this vital principle was enacted in s. 94 to ensure that a voter would be able to vote uninhibited by any fear or any undesirable consequence of disclosure of how he voted. As a corollary it is provided that if there is any mark or writing on the ballot paper which enables the elector to be identified the ballot paper would be

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rejected as invalid. But the mark or writing must be such as

would unerringly lead to the identity of the voter. Any mark or writing of an innocuous nature or meaningless import cannot be raised to the level of such suggestive mark or writing as to reveal the identity of the voter. There must be some causal connection between the mark and the identity of the voter that looking at one the other becomes revealed. Therefore the mark or a writing itself must reasonably give indication of the voter's identity. It may be that there may be extrinsic evidence from which it can be inferred that the mark was placed by the voter by some arrangement. [697 F-H, 698 A-D]

Raghubir Singh Gill v. Gurcharan Singh Tohra & Others, [1980] 3 S.C.R. 1302; followed.

Woodward v. Sarsons & Another, [1874-75] 10 L.R. (CP) 733, quoted with approval.

3:3. The words "can be identified" in Rule 73(2)(d) cannot be interpreted to mean "might possibly be identified". The mark or writing which would invalidate the ballot paper must be such as to unerringly point in the direction of identity of the voter. In the absence of suggested mark or writing the ballot paper cannot be rejected merely because there is some mark or writing on the ground that by the mark or writing the voter may be identified. [698 D-F]

Sohan Lal v. Abinash Chander & Others, [1953] 4 Election Law Reports, 55 approved.

3:4. In the instant case, (i) there was specific averment in para 18 of the petition that the marks were not such as to lead to identity of the elector and that the ballot papers could not be rejected as invalid under rule 73(2)(d). This allegation is wholly substantiated by a casual look at the remaining nine ballot papers. The error is apparent; Once the error has been established the scrutiny and recount had to be ordered as a prima facie case of miscount is made out and, therefore, the decision of the High Court is liable to be set aside, (ii) As the High Court has not undertaken to examine the validity of each ballot paper it would not be proper for the Supreme Court to undertake the same for the first time here; (iii) the position of law having been made very clear, namely, that once an error is established it is not necessary that the pleadings must show error in respect of each individual invalid ballot paper, and a prima facie proof of error resulting in miscount having been established a scrutiny and recount has to be ordered. And the scrutiny of invalid ballot papers must precede the recount; and (iv) there is no evidence of any prior arrangement between candidate and the voter regarding identity and (v) the ballot papers could not have been rejected on the ground mentioned in rule 73(2)(d), such marks, being in this case, some erasures or a bracket.

[699 F-H; 700 A-A]

JUDGMENT :

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 277 of 1980.

(From the Judgment and Order dated the 11th December, 1979 of the Allahabad High Court in Election Petition No. 2 of 1978.) A.P.S. Chauhan, C.K. Ratnaparkhi and D.P.S. Chauhan for the Appellant.

A.N. Sen and C.P. Lal for Respondent No. 1.

S.S. Khanduja for RR. 4 & 5.

Miss Kamlesh Bansal for Respondent No. 16.

The Judgment of the Court was delivered by DESAI, J. An unsuccessful candidate for election to council of States (Rajya Sabha) at the election held on March 28, 1979, is the appellant. At the biennial election for electing members to Council of States from the constituency of elected members of the Uttar Pradesh Legislative Assembly, 19 candidates including the appellant and the 1st respondent were duly nominated as candidates. 11 members were to be elected. Election was to be held as mandated by clause (4) of Article 80 of the Constitution in accordance with the system of proportional representation by means of the single transferable vote. After the poll was closed according to the time prescribed by the Election Commission under s. 56 of the Representation of the People Act, 1951 ('1951 Act' for short), the Returning Officer, PW. 4 Satya Priya Singh commenced counting of votes. As the election was to be in accordance with the system of proportional representation by means of the single transferable vote, the Returning Officer as required by rule 76 of the Conduct of Election Rules, 1961 ('Rules' for short), proceeded to ascertain the quota. In all 421 members exercised the franchise. Eleven ballot papers were rejected by the Returning Officer as invalid. Accordingly the quota was worked out at the value of 3417. Respondents 2 to 11 were declared elected as each of them secured the value of ballot papers greater than the quota in the course of counting. As the counting proceeded further, the contest was between the election petitioner (appellant) and the 1st respondent and the 1st respondent was declared elected in the 14th count. Once all the 11 vacancies were filled in, counting was closed.

Petitioner filed an election petition under s. 81 of the 1951 Act in the High Court of Judicature (Lucknow Bench), Lucknow. The petition was for scrutiny and recount on the allegation of miscount and directed against the 1st respondent because he was declared elected to the last vacancy.

Petitioner alleged that the result of the election in so far as it concerns the returned candidate - 1st respondent has been materially affected by the improper rejection of valid votes by wrongly declaring them invalid as well as by improper reception of what otherwise would have been the invalid votes if the Returning Officer had been consistent in his approach and, therefore, the election of the returned candidate not only should be declared void but in his place by a proper computation of votes the petitioner should be declared elected to the 11th vacancy. The petition primarily being for relief of scrutiny and recount on the allegation of miscount it was necessary to allege and offer

prima facie proof of the possible errors in the counting which, if satisfactorily established, would enable the court to direct a recount. It may be stated that no prima facie proof has been offered of the improper reception of an otherwise invalid vote in favour of the 1st respondent and that allegation may be excluded from further consideration. Petitioner alleged that there has been an improper rejection of the valid votes cast in her favour and that has materially affected the result of the election. Petitioner states that even though it was obligatory upon the Returning Officer to show all the ballot papers which he rejected as invalid to the candidates and/or their counting agents, he only showed four out of the eleven ballot papers held invalid by him and did not show the rest of them. To the question as to why votes were rejected as invalid it is alleged that the Returning Officer informed the counting agents that there were marks and cuttings in the ballot papers which may possibly identify the voters and, therefore, such ballot papers have been rejected on the ground set out in rule 73 (2) (d) of the Rules. Four specific allegations of error, improper rejection of votes otherwise valid necessitating scrutiny and recount are set out in paras 14, 15, 17 and 18 of the election petition. It was also alleged that of the four ballot papers shown there was one in which first preference was indicated in favour of the petitioner but that was illegally rejected by the Returning Officer on the ground that it contained an overwriting in respect of the 10th preference vote marked by the voter. The second error alleged in the petition is that in one ballot paper the 4th preference figure was put in a bracket and this was illegally rejected on the ground that the voter can be identified. The third allegation is to the effect that the ballot paper containing a 1st preference vote cast in favour of the candidate Shri Surendra Mohan was illegally rejected by the Returning Officer on the ground that the voter had given his 1st preference vote at two places whereas in fact the voter had given his 1st preference vote only to Shri Surendra Mohan and had given 11th preference vote to another candidate which could be demonstrably established by scrutiny of the ballot paper. The fourth error alleged to have crept in the counting was that the Returning Officer invalidated two other ballot papers on the ground that there were overwritings in the 8th and 9th preference votes respectively and that even though these ballot papers did not contain any mark or writing by which the voters could be identified, they were rejected as invalid contrary to the relevant provision. It was urged that these prima facie errors when substantiated would clearly make out a case of miscount and the same can be corrected by scrutiny and recount. The scrutiny and recount was sought to be confined specifically to the decision of the Returning Officer rejecting 11 votes as invalid. The contentions were crystallised in the course of hearing of the appeal by urging that where the election is to be held in accordance with the system of proportional representation by means of the single transferable vote, if the first preference is properly and ascertainably cast any error in setting out the remaining preferences would not enable the Returning Officer to reject the whole ballot paper as invalid. The second specific contention is that every unrequired mark, cutting, erasure cannot tantamount to any indication which would enable the voter to be identified but the writing or mark must be such that the voter can be and not merely might be identified and there is no such cutting, mark or erasure.

The 1st respondent contested the petition, inter alia, contending that the quota was not 3417 as contended for on behalf of the petitioner but it was 3217 and that respondents 2 to 11 received more than quota hence they were declared elected and that the contest continued between him and the petitioner and in the 14th count the 1st respondent was declared elected as the value of his ballot papers exceeded the value of ballot papers of other continuing candidates together with the surplus

votes not transferred. He specifically denied though he was not present at the counting that all the ballot papers rejected at the counting were not shown to the counting agents and contended that no error in counting is shown and that it is not open to the court to direct recount by first examining the ballot papers rejected as invalid. Some technical contentions were taken by him with which we are not concerned in this appeal.

A learned single Judge of the High Court to whom the election petition was assigned framed as many as 11 issues on which the parties were at variance. In the course of hearing of the petition the petitioner moved an application for a direction that an inspection of the 11 ballot papers rejected as invalid by the Returning Officer may be given to the petitioner. The Court directed inspection of four ballot papers to be given as per order dated May 2, 1979. The 1st respondent, the returned candidate questioned the correctness of this order in this Court in special leave petition filed by him. In the mean time all the disputed 11 ballot papers were summoned from the Returning Officer and the Court directed the Joint Registrar to open the sealed packet containing ballot papers and consistent with the allegations in paras 14, 15, 17 and 18 of the petition, try to correlate the ballot papers in respect of which the allegation of improper rejection may prima facie appear to be of substance and give inspection of those four ballot papers to both the parties. The learned counsel appearing for the petitioner was not inclined to take inspection in this truncated manner and disclosed his desire to move this Court against the order granting only inspection of four ballot papers. The learned Judge by his order dated May 16, 1979, directed that the sealed packet containing the ballot papers shall not be opened until further orders of the Court and the same shall be kept in safe custody with the Joint Registrar. It appears, thereafter the petitioner preferred the special leave petition but ultimately the same appears to have been withdrawn and sought direction of the Court for compliance with the order for showing four ballot papers as per the previous order. The Court accordingly directed that the Joint Registrar shall open the sealed packet of the rejected ballot papers and allow the returned candidate or his counsel and the petitioner or her counsel to have visual inspection of the ballot papers without allowing the parties or their counsel to handle the ballot papers. Time and date of the inspection was fixed by the Court. The Joint Registrar opened the sealed envelope but found some difficulty in complying with the order of the Court directing giving of inspection of four ballot papers out of 11 rejected ballot papers because there was no specification as to which four ballot papers were to be the subject-matter of inspection. Ultimately he took recourse to the averments in the petition, examined each allegation, attempted to correlate it to the ballot papers in his hand and found that only two ballot papers could be correlated to the allegations made in the petition and gave inspection of two ballot papers and kept other 9 ballot papers, of which he did not give inspection, in sealed envelope. On this report of the Joint Registrar the learned Judge called for the sealed envelope, opened up the envelope in the presence of the learned counsel for the parties to verify the correctness of the report of the Joint Registrar and being satisfied that it was correct, he made an order to that effect on December 5, 1979.

Thereafter the parties went to trial. Neither the unsuccessful candidate, the petitioner, nor the 1st respondent, the returned candidate, stepped into the witness box. On behalf of the petitioner PW. 1 Shri Shakir Ali Siddiqi, PW. 2 Udit Narain Sharma, election agent of candidate Shri Surendra Mohan, and PW. 3 Kalpnath Singh election agent of the petitioner were examined. RW. 1 Habibul Rahman Nomani, counting agent of Smt. Manohara, RW. 2 Deo Bahadur Singh, election agent of

the returned candidate 1st respondent, RW. 3 Prabhat Kumar Misra, observer deputed by the Election Commission and RW. 4 Satya Priya Singh, Returning Officer were examined on behalf of the returned candidate.

The learned Judge rejected the petition substantially holding that the petitioner has failed to prove that all eleven rejected ballot papers were not shown to the counting agents. It was held that petitioner failed to prove such error in counting which would enable her to seek relief of scrutiny and recount. In reaching this conclusion, with great respect, the learned judge has completely misdirected himself as to the nature of proof required for a relief of scrutiny and recount on the allegation of miscount. The learned Judge first took up the allegations of errors in counting, more particularly directed to the allegation of improper rejection of valid votes which would materially affect the result as set out in paras 14, 15, 17 and 18 of the petition, and then through the help of the Joint Registrar excluded the nine ballot papers without giving inspection and only took into consideration two ballot papers which answered the error as complained of and then proceeded to hold that even if these two ballot papers rejected as invalid are taken into account and the value of the votes computed, the result would not be materially affected and, therefore, rejected the election petition.

When a petition is for relief of scrutiny and recount on the allegation of miscount, the petitioner has to offer prima facie proof of errors in counting and if errors in counting are prima facie established a recount can be ordered. 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 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 inquiry in a petition for relief of recount on the ground of miscount. True it is that 'a recount is not granted as of right, but on evidence of good grounds for believing that there has been a mistake on the part of Returning Officer' (See Halsbury's Laws of England, 4th Edn., Vol. 15, para 940). This Court has in terms held that prima facie proof of error complained of must be given by the election petitioner and it must further be shown that the errors are of such magnitude that the result of the election so far as it affects the returned candidate is materially affected, then recount is directed. What was broadly alleged by the petitioner in the election petition was that where election is held in accordance with the proportional representation by the single transferable vote it would be illegal and erroneous for the Returning Officer to reject as invalid a ballot paper if after first preference vote is validly cast some error is committed in indicating the remaining preferences. Instances of error is committed in indicating the remaining preferences. Instances of error set out in paras 14, 15, 17 and 18 spelt out a ground that the ballot papers which were rejected under rule 73 (2) (d) did not contain or carry any mark or writing by which elector can be identified and that there has been thus improper rejection of a vote otherwise validly cast or which is partially valid. Without allowing inspection of all the disputed ballot papers

the learned judge has accepted that at least two ballot papers can be correlated to allegation in para 15 and 17 which would prove the allegations made in the petition. The learned Judge, however held that the rejection of these two ballot papers was correct. A further observation is that even if the rejection of these two ballot papers is held to be improper, the result of the election so far as returned candidate is concerned is not materially affected. And it would be succinctly pointed out that allegation in para 18 in respect of two other ballot papers is wholly substantiated. Even at the cost of repetition it must be said that it is not the requirement of law that in respect of each ballot paper rejected as invalid a specific averment must be so made as to identify the ballot paper and only those that can be correlated to the allegations in the petition specifically and not generally shall be recounted. That is contrary to the requirement of the Act and the Rules.

The impermissible approach of the learned Judge compelled us with the consent of learned counsel of the parties to call for the 11 ballot papers rejected as invalid. A direction to open sealed envelopes was given and at the request of learned counsel for the parties Xerox copy of each ballot paper was supplied to both the sides and the appeal was further set down for hearing.

We now proceed to examine the contentions in this petition. Let us first have a look at the relevant constitutional and statutory provisions. Clause (4) of Article 80 provides that the representatives of each State in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote. The fasciculous of Rules in Parts VI and VII of the Rules are relevant. Part VI is headed 'Voting at Elections by Assembly Members and Council Constituencies'. Rule 70 provides that the provisions of rules 28 to 35 and 36 to 48 shall apply : (a) to every election by assembly members in respect of which no direction has been issued under clause (a) of rule 68, subject to the modifications set out in the sub-rules of Rule 70. The important modification of which we must take notice is the introduction of rule 37A setting out the method of voting at such election. It may be extracted :

"37A. Method of voting-(1) Every elector has only one vote at an election irrespective of the number of seats to be filled.

(2) An elector in giving his vote-

(a) shall place on his ballot paper the figure 1 in the space opposite the name of the candidate for whom he wishes to vote in the first instance, and

(b) may, in addition, place on his ballot paper the figure 2, or, the figures 2 and 3, or the figures, 2, 3 and 4 and so on in the space opposite the names of the other candidates in the order of his preference.

Explanation-The figures referred to in clauses (a) and (b) of this sub-rule may be marked in the international form of Indian numerals or in the Roman form or in the form used in any Indian language but shall not be indicated in words".

Part VII is headed 'Counting of votes at Elections by Assembly Members or in Council Constituencies'. It defines expressions such as 'continuing candidate' 'count', 'exhausted paper' 'first preference', 'original vote', 'surplus' 'transferred vote' and 'unexhausted paper'. These are technical terms each having bearing on the question of counting of votes. 'First preference' vote has been defined to mean the figure 1 set opposite the name of a candidate; 'second preference' means the figure 2 set opposite the name of a candidate; 'third preference' means the figure 3 set opposite the name of a candidate, and so on. 'Original vote' is defined to mean in relation to any candidate, a vote derived from a ballot paper on which a first preference is recorded, for such candidate. Rule 73 provides for scrutiny and opening of ballot boxes and packets of postal ballot papers. Sub-rule (2) of rule 73 is material which may be extracted:

"73. Scrutiny and opening of ballot boxes and packets of postal ballot papers-

(2) A ballot paper shall be invalid on which-

(a) the figure 1 is not marked; or

(b) the figure 1 is set opposite the name of more than one candidate or is so placed as to render it doubtful to which candidate it is intended to apply; or

(c) the figure 1 and some other figures are set opposite the name of the same candidate; or

(d) there is any mark or writing by which the elector can be identified; or

(e) there is any figure marked otherwise than with the article supplied for the purpose
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Provided that this clause shall not apply to a postal ballot paper.

Provided further that where the returning officer is satisfied that any such defect as is mentioned in this clause 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.

Explanation-The figures referred to in clauses

(a), (b) and (c) of this sub-rule may be marked in the international form of Indian numerals or in the Roman form or in the form used in any Indian language, but shall not be indicated in words."

The Returning Officer while counting votes at election by Assembly members has to bear in mind the implication of voting in accordance with the proportional representation by means of the single transferable vote. What is obligatory in this system of voting is that every elector must exercise his

first preference vote. Rule 37A (1) specifies that every elector has one vote only irrespective of the number of seats to be filled in at such election. Rest are preferences. In order to exercise franchise at such election the elector is under a duty to give his 1st preference vote. Where the 1st preference vote is not exercised the ballot paper will have to be rejected as invalid as mandated by rule 73 (2) (a) which provides that the ballot paper shall be invalid on which figure 1 is not marked. By the combined reading of rule 37A (2) (a) with rule 73 (2) (a) it unquestionably transpires that in this system of voting as understood in contradistinction to single member constituency where a cross has to be placed against the name or the symbol of the candidate the first preference vote is a *sine qua non* for validity of the ballot paper. The provision contained in rule 37A (2) (b) read with rule 73 (2) (a) and (b) would manifestly show that the elector is not required to exercise all preference available to him at the election. To illustrate, if as in the present case there were 11 vacancies, the elector can go on exercising his preferences up to 11th number by putting figures 1 to 11 against the candidates whom the elector wants to accord his preferences according to his own choice. But while exercising the preferences it is obligatory in order to render the ballot paper valid to give first preference vote. It is optional for the elector to exercise or not to exercise his remaining preferences. This must be so in the very nature of things because this system of voting was devised to provide minority representation. If amongst 421 electors as in the present case a party has 220 members owing allegiance to the party and each one can exercise 11 votes with the reservation that not more than one vote can be given to one candidate and that a cross up to the totality of number 11 can be placed against 11 different candidates, no one else having 201 votes in his pocket can get elected. To avoid this monolithic political pocket borough of votes this more advanced system of proportional representation by means of the single transferable vote was devised. The very expression 'proportional representation' is onomatopoeic in the sense it shows that various interests especially the minority groups can secure representation by this more advanced method of franchise. True, where there are single member constituencies this system is not helpful. But where there are multi member constituencies this system has a distinct advantage and the advantage becomes discernible from the fact that rule 37A (2) (a) provides that an elector in giving his vote shall place on his ballot paper the figure 1 in the space opposite the name of the candidate for whom he wishes to vote in the first instance. The expression 'shall' demonstrates the mandate of the section and when compared with sub-clause (b) which provides that an elector in giving his vote may, in addition, place in his ballot paper the figure 2 or the figures 2, 3, 4 etc which would bring in sharp focus the mandatory and the directory part in clauses 2 (a) and 2 (b). The underlying thrust of the section becomes further manifest by referring to rule 73 (2) (a) and

(b) which provide that a ballot paper shall be invalid on which the figure 1 is not marked or the figure 1 is set opposite the name of more than one candidate or is so placed as to render it doubtful to which it is intended to apply. Sub-clause (c) of sub-rule (2) of rule 73 further brings out the intendment of the provision because it mandates that the ballot paper shall be invalid on which the figure 1 and some other figures 1 are set opposite the name of the same candidate. It, therefore, necessarily, follows that when voting is in accordance with the proportional representation by means of the single transferable vote it is obligatory to cast the first preference vote for ensuring the validity of the ballot paper and the first preference vote must be so cast as not to leave any one in doubt about it. The remaining preferences are optional with the elector. He may or may not exercise his franchise for the remaining preferences. If he chooses not to exercise remaining preferences the

ballot paper cannot be rejected as invalid for failure to exercise the remaining preferences. Rule 73 (2) is exhaustive of the grounds on which a ballot paper at a voting at election by Assembly members shall be rejected as invalid and on a true and in depth reading of it, it does not transpire that the failure to cast the remaining preferences would invalidate the ballot paper. This conclusion is reinforced by the provision contained in rule 37A (1) which provides that every elector has only one vote at an election irrespective of the number of seats to be filled. Therefore, the vote is only one and even if there is more than one seat to be filled in, subsequent preferences may be indicated by the elector and it is optional with him not to exercise preferences outside his only one vote which he must cast by indicating unambiguously his first preference.

What then follows ? If there is only one vote at such an election and the preference are as many as there are seats chronologically to be indicated and failure to exercise preferences subsequent to first preference would not invalidate the ballot paper, it must follow as a corollary that if the elector has committed some error in exercising his preferences lower down the ladder the whole of the ballot paper cannot be rejected as invalid. To illustrate, if the elector has with sufficient clarity exercised his preferences, say 1 to 5 in chronological order but while exercising his sixth preference he having the right to exercise the preference up to 11, has committed an error, the error, in exercising his sixth preference would not render the whole ballot paper invalid and his preference up to 5 will have to be taken into account while computing the votes. We specifically invited learned counsel on both sides to assist us in examining this aspect as we were treading on an uncovered ground. In fact, we adjourned the matter to enable Mr. Chauhan, learned counsel for the petitioner and Mr. A.K. Sen, learned counsel for the respondent to study the problem and at the resumed hearing it was not only not disputed but unambiguously conceded that in view of the provision contained in rule 37A read with rule 73 (2) once the first preference vote has been clearly and unambiguously exercised the ballot paper cannot be rejected on the ground that lower down the ladder there was some error in exercising the subsequent preferences. If this is the correct interpretation of rule 37A, it must follow that not only such a ballot paper has to be held as valid ballot paper but its validity shall continue up to the stage in preferences where an error or confusion transpires which would not permit computation of subsequent preferences below the level of error. To illustrate the point, if as in the present case the voter had option to exercise 11 Preferences and if he has exercised his preferences 1 to 5 correctly and unambiguously and has committed an error in exercising sixth preference and it cannot be said with certainty for whom the sixth preference vote was cast, the ballot paper has to be held valid in computation of votes up to and inclusive of the fifth preference and rejected for the preferences down below as if the elector has not exercised his further preferences which was optional with him. The ballot paper can thus be partially valid. This is not a startling proposition but is the logical outcome of the system of voting. No authority is needed in support of it but one is required it is to be found in the statement of law in paragraph 636, page 345, Vol. 15 of the Halsbury's Laws of England, 4th Edn. It may be extracted :

"636. Ballot papers rejected in part-Where at a local government election or poll consequent on a parish or community meeting the voter is entitled to vote for more than one candidate or at a poll consequent on a parish or community meeting on more than one question, a ballot paper is not to be deemed to be void for uncertainty as respects any vote as to which no uncertainty arises and that vote is to be counted".

We have examined this aspect in depth because out of 11 invalid ballot papers which we have marked now in the Xerox copies from 'A' to 'K' for identification, ballot paper marked 'B' has been rejected under rule 73 (2) (b) by the Returning Officer on the ground that figure 1 appears against two candidates J.P. Singh and Surendra Mohan. The High Court has accepted the rejection as valid. It is difficult to accept this view of the Returning Officer affirmed by the High Court because figure 1 has been clearly marked against the candidate Surendra Mohan and the figure 11 is noted against the candidate J.P. Singh. There is some overwriting in the two strokes of 11 but it must be remembered that explanation appended to rule 37A permits that the figures indicating preferences may be marked in the international form or in Indian numerals or in the Roman form or in the form used in any Indian language but shall not be indicated in words. All other figures indicating the preferences have been written in Hindi numerals and 11 is by two strokes having the loop at the top slightly overwritten but the preference is the 11th preference against J.P. Singh, is indisputable and is clearly visible to the naked eye. Obviously this ballot paper marked 'B' could not have been rejected on the ground mentioned in rule 73 (2) (b).

We may now turn to remaining nine ballot papers. Remaining nine ballot papers have been rejected on the ground that by some mark on the ballot paper itself the voter can be identified. There is a specific allegation to that effect in para 18 of the election petition. Before we examine each individual ballot paper, let the full import of the provision be made clear. Rule 73 (2) (d) provides that a ballot paper shall be invalid on which there is any mark or writing by which the elector can be identified. Section 94 of the 1951 Act ensures secrecy of ballot and it cannot be infringed because no witness or other person shall be required to state for whom he has voted at an election. Section 94 was interpreted by this Court on *Raghubir Singh Gill v. Gurcharan Singh Tohra & Ors.*⁽¹⁾ to confer a privilege upon the voter not to be compelled to disclose how and for whom he voted. To ensure free and fair election which is pivotal for setting up a parliamentary democracy, this vital principle was enacted in s. 94 to ensure that a voter would be able to vote uninhibited by any fear or any undesirable consequence of disclosure of how he voted. As a corollary it is provided that if there is any mark or writing on the ballot paper which enables the elector to be identified the ballot paper would be rejected as invalid. But the mark or writing must be such as would unerringly lead to the identity of the voter. Any mark or writing of an innocuous nature or meaningless import cannot be raised to the level of such suggestive mark or writing as to reveal the identity of the voter. In *Wodward v. Sarsons & Anr.*,⁽¹⁾ interpreting an identical provision it was observed as under :

"It is not every writing or every mark besides the number on the back which is to make the paper void, but only such a writing or mark as is one by which the voter can be identified".

It would imply that there must be some causal connection between the mark and the identity of the voter that looking at one the other becomes revealed. Therefore, the mark or a writing itself must reasonably give indication of the voter's identity. It may be that there must be extrinsic evidence from which it can be inferred that the mark was placed by the voter by some arrangement. In this context one can advantageously refer to the statement of law in *Halsbury's Laws of England*.⁽²⁾ It may be extracted :

"634. Ballot papers rejected for marks of identification-Any ballot paper on which anything is written or marked by which the voter can be identified, except the printed number on the back, is void and must not be counted. The writing or mark must be such that the voter can be, and not merely might possibly be, identified"

"As respects ballot papers which have names, initials, figures or other possible marks of identification on them by which it might be suggested that the voter could be identified, it has been said that the court should look at the paper and from its own opinion whether what is there has been put there by the voter for the purpose of indicating for whom he votes; if the voter has not voted in the proper way (if for example he has made two crosses, or some other such marks which might have been intended for purposes of identification), but the Court comes to the conclusion on looking at the paper that the real thing that the voter has been doing is to try, badly or mistakenly, to give his vote, and make it clear for whom he voted, then these marks should not be considered to be marks of identification unless there is positive evidence of some agreement to show that it was so".

In Woodward's case the Court came to the conclusion that the placing of two crosses or three crosses or a single stroke in line of a cross or a straight line or a mark like imperfect letter 'P' in addition to the cross or star instead of a cross or a cross blurred or marked with a tremulous hand, or a cross placed on the left side of the ballot paper, or a pencil line drawn through the name of the candidate not voted for, or a ballot paper torn longitudinally through the centre, are not marks which would invalidate the votes on the ground that the mark was such that the voter can be identified. Similarly, Election Tribunal in Sohan Lal v. Abinash Chander & Ors.,⁽¹⁾ held that addition of a horizontal line after figure 1 indicating first preference vote would not invalidate the ballot paper, unless there was evidence that the horizontal line was drawn so as to reveal the identity of the voter. In the absence of any such evidence the ballot paper was held valid. It would, therefore, follow that the mark or writing which would invalidate the ballot paper must be such as to unerringly point in the direction of identity of the voter. In the absence of such suggested mark or writing the ballot paper cannot be rejected merely because there is some mark or writing on the ground that by the mark or writing the voter may be identified. One has to bear in mind the difference between 'can be identified' and 'might possibly be identified'.

The High Court did not examine the other 9 ballot papers on the erroneous view that only two were correlated to the averments in the plaint. There was specific averment in para 18 of the petition that the marks were not such as to lead to identity of the elector and that the ballot papers could not be rejected as invalid under rule 73 (2)

(d). This allegation is wholly substantiated by a casual look at the remaining nine ballot papers. The error is apparent. Once the error has been established the scrutiny and recount had to be ordered as a prima facie case of miscount is made out and, therefore, the decision of the High Court is liable to be set aside. At one stage we were inclined to examine the validity of each ballot paper. But as the High Court has not undertaken that exercise it would not be proper for us to undertake the same for the first time here. The position of law having been made very clear, namely, that once an error is

established it is not necessary that the pleadings must show error in respect of each individual invalid ballot paper, and prima facie proof of error resulting in miscount having been established, a scrutiny and recount has to be ordered. And the scrutiny of invalid ballot papers must precede the recount. It is further made clear that where voting is in accordance with the proportional representation by the single transferable vote a ballot paper can be valid in part. And it must be remembered that every mark or writing does not result in invalidation of the vote. The mark or identification should be such as to unerringly reveal the identity of the voter and the evidence of prior arrangement connecting the mark must be made available. There is no such evidence. Therefore, the ballot papers could not have been rejected on the ground mentioned in rule 73 (2) (d), such marks being in this case some erasures or a bracket.

Free and fair election being the fountain source of Parliamentary democracy attempt of the Returning Officer and the Court should be not to chart the easy course of rejecting ballot papers as invalid under the slightest pretext but serious attempt should be made before rejecting ballot papers as invalid to ascertain, if possible, whether the elector has cast his vote with sufficient clarity revealing his intendment. In this case we are satisfied that the Returning Officer has charted an easy course unsupportable by evidence and the High Court failed to exercise its jurisdiction of scrutiny of all ballot papers once a serious error has been pointed out in respect of two ballot papers out of a total of 11 invalid ballot papers. Therefore, we find it difficult to accept the view taken by the High Court. Accordingly, this appeal is allowed and the judgment and order of the High Court are set aside and the matter is remanded to the High Court for further proceeding according to law. The High Court shall examine all invalid ballot papers, ascertain the reasons for the rejection, satisfy itself whether the reason is valid or unconvincing, and decide the validity of the ballot paper as a whole or in part and direct computation of the votes over again. The High Court may bear in mind that the decision of the Returning Officer rejecting ballot papers as invalid is subject to review of the High Court in a proper election petition (See Halsbury's Laws of England, para 638, page 345, Vol. 15, 4th Edn.).

It would be open to the High Court to take assistance of the Chief Electoral Officer or such other person well versed in computing the votes in this complicated system of counting as considered necessary to determine the final outcome of recount.

As the matter has been delayed sufficiently, we hope that the High Court would expeditiously dispose of the same. The costs of the hearing in this Court would abide the final outcome of the appeal.

S.R.

Appeal allowed.