Bhag Mal vs Ch. Parbhu Ram And Others on 30 October, 1984

Equivalent citations: 1985 AIR 150, 1985 SCR (1)1099, AIR 1985 SUPREME COURT 150, 1985 UJ (SC) 537, 1985 (1) SCC 61, (1985) 1 SCR 1099 (SC), (1985) 1 CURCC 345

Author: A. Varadarajan

Bench: A. Varadarajan, Syed Murtaza Fazalali, Sabyasachi Mukharji

PETITIONER:
BHAG MAL

Vs.

RESPONDENT:
CH. PARBHU RAM AND OTHERS

DATE OF JUDGMENT30/10/1984

BENCH:
VARADARAJAN, A. (J)
BENCH:
VARADARAJAN, A. (J)
FAZALALI, SYED MURTAZA
MUKHARJI, SABYASACHI (J)

CITATION:
1985 AIR 150 1985 SCR (1)1099
1985 SCC (1) 61 1984 SCALE (2)702
CITATOR INFO :
R 1987 SC 831 (9)

ACT:
Representation of the People Act 1951-S. 27 (1)-Recrimination petition-What is the effect of omission to make recrimination petition by returned candidate-In absence of recrimination petition Election Tribunal has no jurisdiction to go into the question whether any wrong votes were counted in favour of election petitioner-Parties must conform strictly to the letter of the law in regard to the procedure laid down under the Act and the Rules.

Representation of the People Act, 1951 -Election petition-Powers of the Election Tribunal (High Court) to decide election petition-Powers are wholly the creature of statute-Election petition is not an action at law or a suit in equity-Election of successful candidate not to be lightly interfered with Purity of election process must be safeguarded. Reliefs as are available according to law can

only be granted

Representation of People Act 1951-S. 97-A rule of procedure-Must be so construed that it serves wishes of the voters.

Interpretation of statute-Court must construe procedural provision of law in such a manner that procedure does not defeat purpose or object of law-Where plain and literal interpretation of a statutory provision produces a manifestly absurd and unjust result Court may modify language used or even do some violence to it so as to achieve the obvious intention of the legislature and produce a rational construction and just result.

HEADNOTE:

The appellant was declared elected as a member of the Haryana Legislative Assembly from the Sadbure Scheduled Caste Reserved Constituency in the election held on 19th May, 1982. The contest was between the appellant and 12 others including respondent 1. The appellant secured 20981 votes while respondent 1 secured 20971 votes, that is the appellant secured 10 votes more than the respondent 1. Respondent 1 filed an election petition in the High Court challenging the election of the appellant on the ground that the counting of votes was not proper. Respondent 1 prayed not only for recounting of the votes but also for declaration that he was the duly elected candidate Respondent 1 alleged that on his application to which the appellant had also consented, though the Returning Officer had initially ordered recounting of all the ballot papers, the ballot papers of the appellant and respondent 1 only were recounted and therefore

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the recount was void. The respondent 1 also alleged that in the recounting, the Returning Officer had improperly rejected about 100 ballot papers said to have been cast in favour of respondent 1 as invalid under the influence of the Naib Tehsildar (Election). The issue framed by the High Court was as to whether respondent 1 was entitled to recount The High Court found that the discretion of the Returning Officer in the matter of rejection of some doubtful ballot papers had been influenced by the opinion of the Naib Tehsildar. In those circumstances, the High Court found a prima facie case made out for ordering rechecking and recounting of the rejected ballot papers. On March 15, 1983 the High Court ordered scrutiny and recount of only the rejected ballot papers of the appellent and respondent 1 by District judge (Vigilance), Punjab. The High Court was of the opinion that no case had been made out for ordering recounting of all the votes. The appellant filed a special leave petition against the High Court's order dated 15.3.1983 which was dismissed by this Court. After the

recounting it was found that respondent 1 and the appellant had gained 14 and 8 more votes respectively in addition to the votes already counted in their favour by the Returning Officer. The High Court held that since the appellant had not filed any recrimination application under s. 97 (1) of the Representation of People Act, 1951 (hereinafter referred to as 'the Act'), the rejected votes of the appellant, the returned candidate, could not be scrutinized and the appellant could not have the benefit of the 8 ballot papers found to have been wrongly rejected. The High Court found that the result of the returned candidate (appellant) had been materially affected by the wrongful rejection of valid votes cast in favour of respondent 1 and it accordingly allowed the election petition and set aside the appellant's election and declared respondent 1 to be duly elected. Hence this appeal.

The appellant contended (1) that no recounting at all should have been ordered by the High Court and (2) that if the votes found in the recounting by the Court to have been improperly rejected were to be taken into account at all they must be taken into account not only in regard to respondent 1 but also in regard to the appellant. Relying upon the dissenting view of Ayyangar, J. in the case of Jabar Singh v. Genda Lal (1966) 6 SCR 66, the appellant submitted that it would not be in conformity with the principles of democracy and the will of the electorate to hold, by refusing to take into account the 8 rejected ballot papers in favour of the appellant, that the election of the appellant had been materially affected by the improper rejection of the 14 votes cast in favour of respondent 1 and declare respondent 1 to have been duly elected merely because the appellant had not filed a recrimination application under s. 97 (1) of the Act.

Dismissing the appeal by majority,

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HELD: (per S. Murtaza Fazal Ali and A. Varadarajan, JJ.)

The High Court found that the allegation of respondent 1 that the Returning Officer obtained the guidance of the Naib Tehsildar in his decision as regards the doubtful votes is probabilised by the evidence of not only the appellant but also of his election agent. The High Court also

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found that the admission of the observer, R.W. 4 that respondent I took objection to the presence of the Naib Tehsildar during the recounting probabilises the contention of respondent I that the Naib Tehsildar was influencing the opinion of the Returning Officer in his decision on doubtful votes. Admittedly, some ballot papers meant for the Kalka constituency had been issued and they had been cast in favour of respondent I and were rejected on the ground that they were not meant for use in this constituency. We think that the rejection of these ballot papers without any

finding on the question whether the mistake in the use of the ballot papers relating to the Kalka constituency in this constituency had been caused by any mistake or failure on the part of the Returning Officer or polling officer as required by the proviso to rule 56 (2) (g) of the Conduct of Conduct of Elections Rules, 1961 is a ground which could have been taken into consideration for ordering recount of the rejected ballot papers of respondent 1. On a perusal of the rejected ballot papers of the appellant and respondent, 1, we are satisfied about the correctness of the High Court's finding regarding the number of ballot papers improperly rejected by the Returning Officer. In these circumstances, we are clearly of the opinion that the High Court was perfectly justified in ordering recount of the rejected ballot papers relating to respondent 1. [1114G-H; 1115A-B; D-E; H]

We agree with respondent 1's submission that after dismissal of the special leave petition filed by the appellant the High court's order dated 15.3.1983 directing recount of the rejected ballot papers in so far as it is not in excess of the jurisdiction of the Tribunal (High Court) has become final and that it is not open to the appellant to reagitate that question in this appeal which is no doubt under s 116 of the Act, as the principle of construction res judicata applies. [1116A-B]

The appellant's contention that the will of the electorate should not be thwarted by holding that the result of the appellant's election is materially affected by the improper rejection of some ballot papers relating to respondent I alone and declaring respondent I to be the duly elected candidate has do substance. This contention of the appellant has already been answered by this Court in P. Malaichami v. M. Andi Ambalam and Others. We agree with the following observations of the Court made in that case. Courts in general are averse to allow justice to be defeated on a mere technicality. But in deciding an election petition the High Court is merely a Tribunal deciding an election dispute. its powers are wholly the creature of the statue under which it is conferred the power to hear election petitions. An election petition is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and the Court possesses no common law power. It is always to be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that the people do not get elected by flagrant branches of that law or by corrupt practices.

[1121E; 1122B; 1121G H; 1122A]

P. Malaichami v. M. Andi Ambalam and Others, [1973] 3 SCR 1026, referred to.

What is the effect of the omission to make a recrimination application

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under s. 97 (1) of the Act by the returned candidate within the time allowed by the statute in a case where the election petitioner makes a double prayer, namely, declaration of the returned candidate's election as void and a further declaration that he is the duly elected candidate ? In Jabar Singh v. Genda Lal, the majority view of this Court was that in an election petitioner where the election petitioner makes a double claim: it claims that the election of the returned candidate is void and also asks for a declaration that the petitioner himself or some other person has been duly elected the returned candidate must make a recrimination petition under s.97 (1) if he wants to raise pleas in support of his cause that the other person in whose favour a declaration is claimed cannot be said to have been validly elected. Section 97(1) undoubtedly gives an opportunity to the returned candidate to dispute the validity of any of the votes cast in favour of the alternative candidate or to plead for the validity of any vote cast in his favour which has been rejected; but if by his failure to make recrimination within time as required by s. 97 the returned candidate is precluded from raising any such plea at the hearing of the election petition, there would be nothing wrong if the Tribunal proceeds to deal with the dispute under s. 101 (a) on the basis that the other votes counted by the Returning Officer were valid votes and that votes in favour of the returned candidates, if any, which were rejected were invalid. This Court in P. Malaichami v. M. Andi Ambalam and Others observed that it is not enough to say that what ought to be looked into is the substance and not the form. If a relief provided under statute could be obtained only by following a certain procedure laid therein for that purpose, that procedure must be followed if he is to obtain that relief. It is not a question of mere pleading, it is a question of jurisdiction. The Election Tribunal had no jurisdiction to go into the question whether any wrong votes had been counted in favour of the election petitioner who had claimed the seat for himself unless the successful candidate had filed a petition under s. 97. The law reports are full of cases where parties have failed because of their failure strictly to conform to the letter of the law in regard to the procedure laid down under the Act and the rules.

[1122B-C; 1117B-C; 1118C-D; 1123G-H 1125A-A]

Jabar Singh v. Genda Lal, [1964] 6 SCR 57 and P. Malaichani v. M. Andi Ambalam and Others, [1973] 3 SCR 1026, referred to.

The appellant's submission that the majority view in the case of Jabar Singh v. Genda Lal should be ordered to be considered by a much larger bench in view of the dissenting judgment of Ayyangar, J. cannot be accepted. Such a request has already been considered and rejected by this Court in P. Malaichami v. M. Andi Ambalam and Others on the ground with

which we agree, that the dissenting judgment does not throw much light on the subject. [1121A-B]

Jabar Singh v. Genda Lal, [1964] 6 SCR 57 and P. Malaichami v. M. Andi Ambalam and Others, [1973] 3 SCR 1026, referred to.

There is no scope for equity since the entire gamut of the process of election is covered by statute. Reliefs as are available according to law can only be granted. [1125E] 1103

Arun Kumar Bose v. Mohd. Purkan Ansari and Others, AIR 1983 SC 1311, referred to.

In the instant case, respondent 1 has challenged the appellant's election on the ground of improper rejection of ballot papers which is certainly a ground for declaring an election void. If it was the case of the appellant that any vote validity cast in his favour had been improperly rejected he could have urged it as a ground in a recrimination application filed under s. 97(1)of the Act against respondent 1's prayer that he be declared as the duly elected candidate. Therefore, we do not agree with the appellant that s. 97 (1) will not apply to the facts of the present case and that it will apply only to cases where the returned candidate seek to challenge the prayer in the election petition that the election petitioner or some other candidate be declared to be the duly elected candidate on some other grounds such as corrupt practice. [1128 A-C]

In the absence of a recrimination application under s.97 (1) of the Act the High Court originally committed a jurisdictional error in directing the District Judge (Vigilance), Punjab to recheck and recount the rejected ballot papers relating to the appellant. But that mistake has been rectified by the High Court subsequently by not taking into account the 8 ballot papers relating to the appellant which appear to have been wrongly rejected. In these circumstances we hold that the High Court was justified in directing recount of the rejected ballot papers relating to respondent I and declining to take into account the 8 ballot papers relating to the appellant found by the District Judge (Vigilance), Punjab to have been improperly rejected in the absence of a recrimination application under s.97 (1) of the Act and holding that the election of the appellant had been materially affected by the improper rejection of 14 ballot papers relating to respondent 1 and that respondent 1 is entitled to be declared to have been duly elected. [1128D-F]

Jabar Singh v. Genda Lal, [1964] 6 SCR 57 (majority view), p. Malaichami v. M. Andi Ambalam and Others, [1973] 3 SCR 1026 and Arun Kumar Bose v. Mohd. Furkan Ansari and Others, AIR 1983 SC 1311, followed.

Anirudh Prasad v. Rajeshwari Saroj Das & Others, [1976] Suppl. SCR 91 and Janardan Dattuappa Bondre, etc. v. Govindprasad Shivprasad Choudary & Others, etc., [1979] 3 SCR 897, referred to.

(Per Sabyadsachi Mukharji, J.)

The entire purpose of the constitutional provisions as well as other provisions of law is to ensure that true democracy functions in this country and the will of the people prevails. The purpose of the Representation of the People Act is to safeguard that one who obtains majority of valid votes by proper and due process of law alone should represent the constituency and will of the people. All the legal provisions and the procedures of the enactment should be so construed as to ensure that purpose. It would really be a mockery to the procedure of law if a situation here it is demonstrated duly in the court that a person who obtained four votes

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less than other next candidate should be declared elected in preference to the others and allowed to represent the constituency. It is not an appeal to any abstract justice nor it is an appeal to equity but it is to emphasise that procedure should be so construed that these rules of procedure such as s. 97 of the Act subserves the wishes of the voters. For this reason the views expressed by Ayyangar, J. in Jabar Singh v. Genda Lal appeals to me more reasonable though these may strain the literal provisions of the section a bit, Even if the legislature has not amended the relevant provisions after the said decision, I am of the opinion that in a matter of this nature, this Court has a responsibility to construe the procedural provisions of the law in such manner that the procedure does not defeat the purpose or object of the Act. [1130 D-H] 1131 A]

Jabar Singh v. Genda Lal, [1964] 6 SCR 66 and Income-tax (Central) Calcutta v. B.N. Bhattachargee and Another, 118 I.T.R. 461 at 480 referred to.

A Statutory provision must be so construed. if it is possible, that absurdity and mischief may be avoided. Where the plain and literal interpretation of a statutory provision produces a manifestly absurd and unjust result, the Court might modify the language used by the legislature or even do some violence to it so as to achieve the obvious intention of the legislature and produce a rational construction and just result [1132B-C]

K.P. Varghese v. Income-tax Officer, Ernakulam and Another, 131 I.T.R. 597, referred to.

I feel that in view of the lapse of time and the very convincing arguments advanced by Ayyangar, J.,Jabar Singh's case requires reconsideration by a larger Bench. [1132D]

A party cannot take advantage of one part of the order which is advantageous to him and discard the other part of the order which may not be to his advantage especially when an application for special leave from that order has been rejected. If that order has to be given effect to as has been done in this case, it has been found that taking into account the eight ballot papers relating to the appellant which had been improperly rejected and also taking into

account other ballot papers which had been improperly rejected in favour of respondent No 1, it is manifest by mechanical recounting that the appellant had secured four votes more than respondent No. 1. If that is the position, then in my opinion this Court cannot and should not declare respondent No. 1 to have obtained majority of the valid votes. The order of 15th March, 1983 must stand or fall together. In my opinion it cannot be bifurcated. It cannot be said that the recounting in so far as it was directed of the rejected ballot papers of respondent No. 1 the High Court was within its jurisdiction and in so far as the High Court directed recounting of the rejected ballot papers of appellant also it had committed a jurisdictional error. This is more so after the application for special leave was rejected by this Court. Apart from that I am of the opinion that there was no jurisdictional error-there was power of the High Court to order such a recount. Even if there was no such prayer in hot
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petition before the High Court, it cannot be said that the High Court acted without jurisdiction. In such a situation, applying the principle of majority view of Jabar Singh's case, there certain exceptions where even without recrimination petition, a candidate like the appellant in the present case can take advantage of the ballot papers which have not been properly counted in his favour.[1132F-H; 1133A-D]

Janardan Dattuappa Bondre, Etc. v. Govindprasad Shivprasad Choudhary & Ors. Etc., [1979] 3 SCR 897, referred to.

I must observed that reference has been made to certain observations in some of the decisions to the effect that in election petitions, there was no question of importing any equitable principle or of importing any principle of remedying injustice as such. With respect I cannot persuade myself to this angle of vision. In construing both statutory provisions as well as provisions giving remedy provided under special statute, efforts should be made that patent injustice and inequity which repels commonsense and which defeats the purpose of the statute, should be avoided. [1135A-B]

In the instant case I find it difficult to declare respondent No. 1 who has admittedly received less votes than the appellant to have been duly elected.[1135C]

In view of the facts and circumstances of the instant case I am of the opinion that even proceeding on the basis that the views expressed by majority of the learned judges in Jabar Singh's case is correct, upon which I must proceed for the purpose of this case but which I still feel should be reconsidered by a larger Bench, on the analogy of the decision in the case of Janardan Dattuappa Bondr, Etc. v. Govindprasad Shivprasad Choudhary and Ors. Etc. I would allow this appeal.[1135D-E]

Janardan Dattuappa Bondre, Etc. v. Govindprasad Shivprasad Choudhary and Ors. Etc., [1979] 3SCR 897, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION; Civil Appeal No. 1451 of 1984.

From the Judgment and Order dated the 23rd February, 1984 of the Punjab and Haryana High Court in Election Petition No. 6 of 1984.

Shanti Bhushan, N.M. Ghatate and S. V. Deshpande for the Appellant.

Kapil Sibal, R N. Karanjawala and Mrs. Manik Karanjawala for the Respondent.

The following Judgments were delivered VARADARAJAN, J. This appeal is directed against the judgment of the Punjab and Haryana High Court allowing Election Petition 6 of 1982 filed by respondent 1.

The appellant, Bhag Mal, was declared elected as a Member of the Haryana Legislative Assembly (Vidhan Sabha) from No. 3, Sadhura Scheduled Caste reserved constituency in the election held on 19.5.1982 The contest was between the appellant and 12 others including respondent 1, Parbdu Ram, who was the election petitioner. The appellant secured 20981 votes while respondent 1 secured 20971 votes and he was declared to have been elected. Respondent 1 challenged the election of the appellant on the ground that the counting was not proper and invalid and he prayed not only for recounting of the votes but also for declaration that he is the duly elected candidate.

Respondent 1 alleged in the election petition that the Returning Officer initially ordered the recount of the ballot papers of himself and the appellant in respect of all the booths after a sample checking but on the application of the appellant that the ballot papers of all the candidates should be recounted, to which respondent 1 consented, he ordered recount of all the votes. However, it was alleged that the Returning Officer recounted the ballot papers of the appellant and respondent 1 alone and therefore the recount was void. In the original counting 1277 ballot papers were rejected as invalid but in the recounting by the Returning Officer 1377 ballot papers were rejected on that ground. The additional ,100 ballot papers which were alleged to have been originally accepted in favour of respondent I were alleged to have been rejected by the Returning Officer under the influence of the Naib Tehsildar (Election) of Ambala who was alleged to have been favouring the appellant. Three ballot papers alleged to have been cast in favour of respondent I at booth No. 19 were alleged to have been rejected by the Returning Officer on the ground that they were meant for the Kalka constituency. Thus this ground alleged by respondent 1 relates to improper rejection of about 100 ballot papers said to have been cast in favour of respondent 1 in the recounting by the Returning Officer.

Respondent 1 pleaded nine other grounds in his election petition but did not lead any evidence or advance any argument in respect of the same.

As stated already, respondent 1 prayed not only recounting and setting aside the election of the appellant but also for a declaration that he is the duly elected candidate.

The appellant alone contested the election petition. In his counter-affidavit he raised two preliminary objections, namely, that copies and annexures supplied to him were not duly attested to be true copies under the signature of respondent I and therefore the election petition was liable to be dismissed and that the election petition had not been properly verified. There objections were rejected by the High Court by and order dated 4.10.1982.

On merits the appellant admitted that recount of the ballot papers of all the candidates was ordered by Returning Officer but denied the other allegations made in the election petition and contended that the recounting was properly made and that there is no ground to order recounting by the Court.

On the pleadings the material issue framed by the High Court was as to whether respondent 1 is entitled to recount.

Though the Returning Officer, R.W. 3. had stated in his oral evidence that only the ballot papers of the appellant and respondent 1 were in fact rechecked and recounted the High Court found on the basis of his report Exh. P.W.4/4 and the entries made in the two forms No. 20, Exh.P.W.1/1 and P.W.1/2A, that the ballot papers of all the candidates were recounted by the Returning Officer and that in the application Exh.P.W. 2/5 presented to the Returning Officer by respondent 1 immediately after the recounting was over no grievance was made by respondent 1 that the ballot papers of any other candidate were not recounted.

The High Court found that the allegation of respondent 1 that the Returning Officer obtained the guidance of the Naib Tehsildar, Dhan Singh, in making his decision regarding doubtful votes is probablised by the evidence of the appellant, R.W.1, and his election agent Suraj Bhan, R.W.2 who have admitted in their evidence that the Naib Tehsildar had not been put on any particular duty during the recounting and that he was sitting near the dais and was consulted by the Returning Officer sometimes on the question of the doubtful nature of some ballot papers. The observer, R.W. 4, has admitted in his evidence that respondent 1 took objection to the presence of the Naib Tehsildar during the recounting by the Returning Officer. In these circumstances the High Court found that while making his quasi-judicial decision regarding the doubtful ballot papers the Returning Officer consulted the Naib Tehsildar and thus allowed his opinion to influence his own discretion in accepting or rejecting the doubtful ballot papers.

The High Court rejected the next ground alleged by respondent 1 for claiming recount, namely, that about 100 ballot papers cast in his favour were rejected illegally because they bore some slight indecipherable impressions of the finger or the thumb of the voters on the ground that sufficient acceptable evidence was not available to rebut the evidence of the Returning Officer. R.W. 3, that no valid ballot paper cast in favour of respondent 1 was rejected on any such flimsy ground. In reaching

this conclusion the High Court took note of the fact that no such grievance was made by respondent 1 in his application Exh.P.W. 2/5 filed soon after the recounting was over.

Admittedly some ballot papers meant for the Kalka constituency had been issued for use in this constituency and they had been cast in favour of respondent 1 and were rejected on the ground that those ballot papers were not meant for use in this constituency. Under the proviso to Rule 56A (2) (g) of the Conduct of Election Rules, 1961 (hereinafter referred to as 'the Rules) a ballot paper shall not be rejected on the ground that it bears a serial number or a design different from the serial number or design of the ballot papers authorised for use at a particular polling station if the Returning Officer is satisfied that such defect had been caused by any mistake or failure on the part of the presiding officer or polling officer. The Returning Officer, R.W. 3. when questioned in this regard, was unable to say anything positive in regard to the matter though he had admitted in his evidence that some ballot papers meant for use in the Kalka constituency had been used in this constituency and were rejected. The High Court thought that the rejection of those ballot papers was probably due to inadvertence to the said proviso but however, it held that it is difficult to record a definite finding as to whether those ballot papers were rightly or wrongly rejected.

The margin of difference between the votes polled to the appellant and respondent 1 was 5 in the original counting and 10 in the recounting made by the Returning Officer. Out of the 100 votes rejected by the Returning Officer in the recounting as invalid 93 related to the other candidates and only 7 related to the appellant and respondent 1, and the reason for rejection of those 7 ballot papers was not quite clear to the High Court, There is also the doubt, according to the High Court, as to the correctness or otherwise of the rejection of the ballot papers meant for use in the Kalka constituency but actually used in this constituency. The High Court found, as already stated, that the discretion of the Returning Officer in the matter of rejection of some doubtful ballot papers has been influenced by the opinion of the Naib Tehsildar. In those circumstances, the High Court found a prima facie case made out for ordering rechecking and recounting of the rejected ballot papers. Therefore, the High Court appointed the District Judge (Vigilance) Punjab as the agent of the Court to scrutinize and recount the invalid ballot papers in the presence and under the supervision of the Court, making it clear that the rechecking and recounting of only the rejected ballot papers had been ordered because respondent 1's claim was confined only to that relief in the application made before the Returning Officer and the High Court was of the opinion that no case had been made out for ordering a recount of all the votes. Accordingly, the High Court ordered the District Election Officer, Ambala to produce only the rejected ballot papers for rechecking and recounting by the Court through the District Judge (Vigilance), Punjab in its presence and under its supervision.

After the recounting was accordingly made by the District Judge (Vigilance), Punjab under the supervision of the Court it was found that respondent 1 and the appellant had gained 14 and 8 more votes respectively in addition to the votes already counted in their favour by the Returning Officer in his recounting. If these 8 votes are taken into account it will be clear that the appellant would still have a majority of 4 votes over respondent 1. But the appellant had not filed any recrimination application under s. 97 (1) of the Representation of People Act, 1951. (hereinafter referred to as 'the Act') Therefore, it was contended before the High Court on behalf of respondent 1 that the rejected votes of the appellant, the returned candidate, cannot be scrutinised and that the appellant cannot

have the benefit of the 8 ballot papers found to have been wrongly rejected. This was naturally opposed by the learned counsel for the appellant before the High Court. The High Court rejected the appellant's contention and accepted the contention of respondent 1 and observed:

> "There are, however, cases in which the election petition makes a double claim: it claims that election of the returned candidate is void, also ask for a declara-
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> tion that the petitioner himself or some other person has been duly elected. It is in regard to such a composite case that section 100 as well as section 101 would apply, and it is in respect of the additional claim for a declaration that some other candidate has been duly elected that section 97 comes into play. Section 97 (1) thus allows the returned candidate to recriminate and raise pleas in support of his case that the person in whose favour a declaration is claimed by the petition cannot be said to be validly elected and these would be pleas of attack and it would be open to the returned candidate to take these pleas, because when he recriminates, he really becomes a counter- petitioner challenging the validity of the election of the alternative candidate. The result of section 97 (1) there fore, is that in dealing with a composite election petition the Tribunal enquires into only the case made out by the petitioner but also the counter- claim made by the returned candidate. That being the nature of the proceedings contemplated by section 97 (1), it is not surprising that the returned candidate is required to make his recrimination and serve notice in that behalf in the manner and within the time specified by section 97 (1) proviso and section 97 (2).

If the returned candidate does not recriminate as required by section 97, then he cannot make any attack against the alternative claim made by the petition. In such a case an enquiry would be held under section 100 so far as the validity of the returned candidate's is concerned and if as a result of the said enquiry declaration is made that the election of the returned candidate is void, then the Tribunal will proceed to deal with the alternative claim, but in doing so, the returned candidate will not be allowed to lead any evidence because he is precluded from raising any pleas against the validity of the claim of the alternative candidate."

The High Court rejected the contention urged on behalf of the appellant that the Election Tribunal cannot record the finding that the alternative candidate (respondent 1) has secured a majority of valid votes unless all the votes cast in the election are scrutinised and counted having regard to the fact that the appellant had not filed any recrimination application under s. 97 (1) of the Representation of People Act, 1951 which undoubtedly confers a right on the returned candidate to dispute the validity of any of the votes cast in favour of the alternative candidate or to pled for the validity of votes cast in his favour which had been improperly rejected. The High Court thus held that the votes gained by the appellant on scrutiny and recount by the High Court had to be ignored in determining whether the election of the returned candidate (appellant) had been materially affected by the improper rejection or reception of any vote. In so doing, the High Court found that respondent I had secured 20985 votes and the appellant had secured 20981 votes and that the result of the returned candidate (appellant) had been materially affected by the wrongful rejection of valid

votes cast in favour of respondent 1, and it accordingly allowed the election petition and set aside the appellant's election and declared respondent 1, to be duly elected and directed the parties to bear their respective costs.

As stated earlier, the margin of difference between the votes polled by the appellant and respondent 1 was 5 in the original counting and 10 in the recounting made by the Returning Officer, R.W. 3, in favour of the appellant. Although respondent 1 prayed in the election petition for the recounting of all the votes of all the candidates the High Court ordered recounting of only the rejected ballot papers of all the candidates, and with regard to the appellant and respondent 1 it was found by the District Judge (Vigilance), Punjab who made the recounting of the rejected ballot papers under the supervision of the High Court that respondent 1 had gained 14 and the appellant had gained 8 more votes in addition to the votes already counted in their favour by the Returning Officer in his recounting. If, as already stated, these 8 votes are taken into account the appellant would still have a majority of 4 votes over respondent I and his election could not be set aside and respondent 1 could not be declared to have been validly elected.

Mr. Shanti Bhushan, learned senior counsel appearing for the appellant submitted (I) that no recounting at all should have been ordered by the Court and (2) that if the votes found in the recounting by the Court to have been improperly rejected are to be taken into account at all they must be taken into account not only in regard to respondent I but also in regard to the appellant. These 8 votes found by the Court to have not been improperly rejected as regards the appellant have been taken into account by the High Court having regard to the fact that the appellant had not filed any recrimination application under s. 97 (1) of the Act. S.97 (1) and the proviso there to read thus:

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

In regard to the second submission the questions posed by Mr. Shanti Bhushan are:

> (i) whether the Court was justified in not counting the votes improperly rejected qua the appellant who is the returned candidate merely because a recrimination application under s. 97 (1) of the Act had not been filed?: and
>
> (ii) what is the scope of the High Court's order dated 15.3.1983 directing recount of the rejected ballot papers not only of respondent I but also of the appellant which

forms the first part of the judgment of the High Court which pronounced its second part on 23.2.1984 holding that the election of the appellant is void on account of the improper rejection of 14 valid ballot papers relating to respondent I and that respondent I is duly elected from the constituency concerned?

Mr. Kapil Sibal, learned counsel appearing for respondent I submitted that though respondent I had prayed for recount of the votes of all the candidates the High Court ordered recount of only the rejected ballot papers of the appellant and respondent I and that the High Court committed a jurisdictional error in its earlier order dated 15.3.1983 in directing the recount of the rejected ballot papers of even the appellant in the absence of any recrimination application under s. 97 (1) of the Act but that error has been subsequently rectified in the final judgment in which the 8 ballot papers found by the District Judge (Vigilance), Punjab to have been improperly rejected qua the appellant had not been taken into account. Mr. Sibal submitted that the High Court was justified in not taking into account those 8 ballot papers having regards to the fact that no recrimination application under s. 97(1) of the Act. had been filed, that the appellant did not have recourse to r. 63(2) of the Rules and that on the other hand the appellant's contention in his written statement as well as his evidence was that the counting by the Returning Officer, R.W.3. was proper and there is no ground for recounting.

The first contention of Mr. Shanti Bhushan is short and can be disposed of first. In this connection, Mr. Shanti Bhushan invited our attention to ground No. 2 urged in the election petition. There it is alleged that respondent I in the election petition, namely, the appellant filed an application before the Returning Officer requesting that the ballot papers of the other candidates also should be checked to make the recounting fair as in fact respondent 1 also wanted recounting of all the ballot papers of all the candidates in order to make the recounting fair and the election agent of respondent 1 consented to the application filed by the appellant and submitted a note that the election agent of respondent I had no objection to the application of the appellant being allowed. The other grounds urged in the election Petition are grounds relied upon by respondent 1 for the Court ordering recount of the rejected ballot papers. Under s. 100 (1) (d) (iii) of the Act, subject to the provisions of sub-section (2), if the High Court is of the opinion that the result of the election, in so far as it concerns a returned candidate, has been materially affected by the improper reception, refusal or rejection of any vote or the reception of any vote which is void the High Court shall declare the election of the returned candidate to be void. Sub-section (2) of s. 100 of the Act with which we are not concerned in this case, relates to corrupt practice by an agent other than the election agent of the returned candidate. The improper reception or the reception of any vote which is void, referred to in s. 100 (1) (d) (iii) can relate only to the improper reception of any vote or reception of any vote which is void in regard to the returned candidate and the refusal or rejection of any vote referred to in that sub- clause could relate only to refusal or rejection of any vote cast in favour of any candidate other than the returned candidate.

The submission of Mr. Sibal that whereas respondent 1 complied with the requirement of r. 63 (2) of the Rules the appellant did not do so, was not disputed by Mr. Shanti Bhushan. Under r. 63 (1) after the completion of the counting the Returning Officer shall record in the result sheet in Form 20 the total number of votes polled by each candidate and announce the same. R. 63 (2) lays down that

after such announcement has been made, a candidate or, in his absence, his election agent or any of his counting agents may apply in writing to the Returning Officer to recount the votes either wholly or in part stating the grounds on which he demands such recount. R. 63(6) lays down that after the total number of votes polled by each candidate has been announced under sub-rule (1) or sub-rule (5), the Returning Officer shall complete and sign the result sheet in Form 20 and no application for recount shall be entertained thereafter. The proviso to that sub-rule lays down that no step under this rule shall be taken on the completion of the counting until the candidates and election agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by sub-rule (2). Mr.Sibal submitted that the appellant or his election agent or counting agent did not apply in writing to the Returning Officer or any recount of the votes either wholly or in part stating the grounds on which he demanded recount as required by r. 63 (2) and therefore it is not open to the appellant to ask for any recount of his rejected ballot papers having regard to the bar of the proviso to r. 63 (6) of the Rules. Mr. Sibal also submitted that the contention of the appellant not only in his written statement filed in the election petition but also in his evidence given before the High Court was that there was nothing wrong in the counting by the Returning Officer. These facts were not disputed by Mr. Shanti Bhushan. On the other hand, the case of respondent 1 was that the result of the appellant's election has been meterially affected by the improper rejection of votes validly cast in his favour, The High Court has found that the allegation of respondent 1 that the Returning Officer R.W. 3, obtained the guidance of the Naib Tehsildar, Dhan Singh, in his decision as regards the doubtful votes is probablised by the evidence of not only the appellant examined by R.W.1 but also of his election agent, Suraj Bhan, R.W. 2 both of whom have admitted in their evidence that the Naib Tehsildar had not been put on any particular duty during the recounting and that he was however sitting near the dais and was consulted by the Returning Officer sometimes on the ques-

tion of doubtful ballot papers. The High Court found that the admission of the observer, R.W. 4 that respondent 1 took objection to the presence of the Naib Tehsildar during the recounting probablises the contention of respondent 1 that the Naib Tehsildar was influencing the opinion of the Returning Officer in his decision on doubtful notes. Admittedly, some ballot papers meant for the Kalka constituency had been issued and they had been cast in favour of respondent 1 and were rejected on the ground that they were not meant for use in this constituency. Under the proviso to rule 56 A (2) (g) of the Rules a ballot paper shall not be rejected on the ground that it bears a serial number or a design different from the serial number or design of the ballot paper authorised for use at the particular polling station if the Returning Officer is satisfied that such defect has been caused by any mistake or failure on the part of the Returning Officer or polling officer. Though we do not agree with the High Court that it is difficult to record a definite finding as to whether those ballot papers were rightly or wrongly rejected we think that the rejection of these ballot papers without any finding on the question whether the mistake in the use of the ballot papers relating to the Kalka constituency in this constituency had been caused by any mistake or failure on the part of the Returning Officer or polling officer is a ground which could have been taken into consideration for ordering recount of the rejected ballot papers of respondent

1. On a perusal of the rejected ballot papers of the appellant and respondent 1 with the assistance of the learned counsel for the parties, we are satisfied about the correctness of the High Court's finding

regarding the number of ballot papers improperly rejected by the Returning Officer. For reasons which will become clear from what would appear later in this judgment we agree with Mr. Sibal that the High Court originally committed a jurisdictional error in directing the District Judge (Vigilance), Punjab to recheck and recount the rejected ballot papers of even the appellant in the absence of a recrimination application required by s. 97 (1) of the Act especially having regard to the fact that it was not the case of the appellant that there was anything wrong with the counting by the Returning Officer, as mentioned above. In these circumstances, we are clearly of the opinion that the High Court was perfectly justified in ordering recount of the rejected ballot papers relating to respondent 1. We may also observe that the appellant filed a special leave petition against the High Court's order dated 15. 3. 1983 directing recount of the rejected ballot papers of the appellant and respondent 1 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 in so far as it is not in excess of the jurisdiction of the Tribunal has become final and that it is not open to the appellant to reagitate that question in this appeal which is no doubt under s. 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.

Now we proceed to consider the second contention. Under r. 64 of the Rules the returning officer shall, subject to provisions of s.65 which relates to counting at two or more places, and so far as they apply to any particular case, declare in Form 21 C of Form 21D as may be appropriate, the candidate to whom the largest number of valid votes have been given, to be elected under s.66 and send signed copies thereof to the appropriate authority, the Election Commission and the Chief Electoral Officer; and complete and certify the return of election in Form 21E and send signed copies thereof to the Election Commission and the Chief Electoral officer. Thus, a candidate to be declared to have been duly elected must have secured the largest number of valid votes. Mr. Shanti Bhushan vehemently submitted that since the appellant has been found to have secured 5 votes more than respondent I in the original counting and 10 votes more than respondent 1 in the recounting by the Returning officers and it has been found even in the recounting of the rejected ballot papers by the Court that 8 ballot papers relating to the appellant have been improperly rejected it is clear that the appellant has secured 4 votes more then respondent 1 even if the 14 votes found to have been improperly rejected qua respondent I are taken into account and it would not be in conformity with the principles of democracy and the will of the electorate to hold, by refusing to take into account these 8 rejected ballot papers in favour of the appellant that the election of the appellant has been materially effected by the improper rejection of the 14 votes cast in favour of respondent I and declare respondent I to have been duly elected merely because a recrimination application under s. 97 (1) has not been filed. Mr. Shanti Bhushan invited our attention to the decision of a Constitution Bench of this Court in Jabar Singh v. Genda Lal and relied very strongly upon the dissenting view of N. Rajagopala Ayyangar,J. in that case. Gajenderagadkar, J. (as he then was) who spoke for the majority of four has observed:

> "There are, however, cases in which the election petition makes a double claims that the election of the returned candidate is void, and also asks for a declaration that the petitioner himself or some other person has been duly elected. It is in regard to such a composite case that s. 100 as well as s. 101 would apply, and it is in respect of the

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

It is true that s. 101 (a)' requires the Tribunal to find that the petitioner or such other candidate for the declaration of whose election a prayer is made in the election petition has in fact received a majority of the valid votes. It is urged by Mr. Kapoor that the Tribunal cannot make a finding that the alternative candidate has in fact received a majority of the valid votes unless all the votes cast at the election are scrutinised and counted. In our opinion, this contention is not well founded. we have already noticed that as a result of rule 57, the Election Tribunal will have to assume that every ballot paper which had not been rejected under r.56 constituted one valid vote and it is on that basis that the finding will have to be made under s. 101 (a). S. 97 (1) undoubtedly gives an opportunity to the returned candidate to dispute the validity of any of the votes cast in favour of the alternative candidate or to plead for the validity of any vote cast in his favour which has been rejected; but if by his failure to make recrimination within time as required by s. 97 the returned candidate is precluded from raising any such plea at the hearing of the election petition, there would be nothing wrong if the Tribunal proceeds to deal with the dispute under s. 101 (a) on the basis that the other votes count ed by the returning officer were valid votes and that votes in favour of the returned candidate, if any, which were rejected were invalid. What we have said about the presumed validity of the votes in dealing with a petition under s. 101 (a) is equally true in dealing with the matter under s. 100 (1) (d) (iii). We are, therefore, satisfied that even in cases to which s. 97 applies, the enquiry necessary while dealing with the dispute under s. 101 (a) will not be wider if the returned candidate has failed to recriminate. N. Rajagopala Ayyangar, J. who dissented from the above view has observed:

The language used in s. 101 (a) is, no doubt, in fact received the majority of the valid votes." I do not, however, consider that the use of the words 'in fact' involves scrutiny of a type different from that which the Tribunal conducts for ascertaining whether by reason of the improper reception or rejection of votes the election of a returned candidate has been materially affected so as to Justify its being set aside. The inquiries are identical. If every vote which has been improperly received is eliminated and every vote which has been improperly refused or rejected is added you get the totality of the valid votes cast in favour of a candidate. That is precisely the inquiry which is prescribed to be conducted under s. 100 (1) (d) read with cl. (iii). The word 'in fact' used in s. 101 (a) to my mind do not add any new element as regards either the scrutiny or the counting. If so, on the construction which I have endeavoured to explain. when once it is as certained that the returned candidate has obtained a majority of valid votes there is no question of his election having to be set aside. But it might be shown that he had not obtained the majority of valid votes. In other words. by the scrutiny that has taken place in order to test the validity of his election the Tribunal might have arrived at a conclusion that he had not receive the majority of valid votes. Immediately that stage is reached and that conclusion is arrived at the Tribunal proceeds to declare the election void. If there is no claim to a seat there is nothing more to be done, with the result that is stops with declaring the election void in which event there would be a re-election. If however, the seat is claimed by a defeated candidate or on his behalf there has to be a further inquiry which the Tribunal is called upon to conduct. For the purpose of declaring the election void the Tribunal would have arrived at the figures of the valid votes cast in favour of the several candidates. It might be that the petitioner who made the claim to the seat or the person on whose behalf that is made might not have obtained the highest number of valid votes in which case, of course, a claim to the seat would be rejected. It is this situation which is indicated by s. 101 (a). It provides that there cannot be a declaration in favour of the claimant to a seat merely because the election of the returned candidate has been declared void but he must in addition have secured the majority of the lawful votes cast. A question might arise as to how this total is to be ascertained. It is obvious that for this purpose the Tribunal ought to scrutinise not merely the ballot papers of the claimant and the returned candidate but also of the other candidates. Thus, for instance, taking the case only of the petitioner who is a claimant, among the votes counted in his favour might be some which were really votes cast in favour of a defeated candidate and similarly votes properly cast for him might have been improperly counted as the votes of the other defeated candidates. Undoubtedly the irregularities would have to be pleaded, but I am now concerned with whether even if pleaded, the Tribunal would on a proper interpretation of ss. 100 and 101 have jurisdiction to entertain the pleas and embark on such a scrutiny. Proceeding then on the footing that the necessary averment have been made in the pleadings filed there would have to be a scrutiny of the ballot papers before it can be ascertained whether or not the person who or on whose behalf the seat is clammed has obtained a majority of valid votes in order to sustain the claim to the seat. After this stage is passed and the Tribunal has reached the conclusion that the claimant

> has, in fact, received the majority of valid votes that the Tribunal embarks on the further inquiry as to whether there are any reasons why he should not be declared. And it is at this stage that the provisions of s. 97 in regard to recrimination come into play. If no recrimination is filed then on the terms of s . 101 (a) the claimant would be immediately declared elected but if there is a recrimination then s. 101 (b) is attracted and the Tribunal would have to inquire whether if the claimant were a returned candidate there are circumstances in which his election could be declared void. This would indicate that the recrimination is concerned with a stage which emerges after the scrutiny is completed and assumes that the scrutiny has resulted in the claimant being found to have obtained the majority of valid votes. This construction would harmonise the provisions of ss. 97, 100 (1) (d) and 101 and would lead to a rational result.
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> This brings me to a submission based upon rule 57(1) to which reference was made by Mr. Garg. He referred us to the words of that rule reading;
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> "Every ballot paper which is not rejected under Rule 56 shall be counted as one Valid vote."

as throwing some light on the construction of s.100 (1)

(d) (iii) and as favouring the interpretation which he invited us to put upon the provision. I consider that the rule has not bearing at all upon the point now in controversy."

While strongly relying upon the above dissenting view of N. Rajagopala Ayyangar, J. Mr. Shanti Bhushan submitted that the majority opinion in that case should be ordered to be reconsidered by a much larger bench in view of that dissenting judgement. Such a request was made by Mr. K.K. Venugopal when he appeared for the appellant in P. Malaichami v. M. Andi Ambalam & Others. and it was rejected by Alagiriswami, who spoke in that case for himself and Palekar, J. in these words;

> "N. Rajagopala Ayyangar, J. was solitary Judge who dissented from the majority judgment and we have gone through his judgment with all the care and the respect that it deserves and we do not see that it throws much light on the subject."

With respect we are also of the same opinion as regards the dissenting view of N. Rajagopala Ayyangar, J. in that decision and decline to comply with the request of Mr. Shanti Bhushan.

The decision in P. Malaichami v. M. Ambalam & Others (supra) provides an answer to the contention of Mr. Shanti Bhushan that the will of the electorate should not be thwarted by holding that the result of the appellant's election is materially affected by the improper rejection of some ballot papers relating to respondent 1 alone and declaring respondent 1 to be the duly elected candidate. There, the learned Judges have observed;

> "The last appeal is particularly interesting. Courts in general are averse to allow justice to be defeated on a mere technicality. But in deciding an election petition the High Court is merely a Tribunal deciding an election dispute. Its powers are wholly the creature of the Statute under which it is conferred the power to hear election petitions. An election petition, as has been pointed out again and again, is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and the Court possesses no common law power. It is always to be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that the people do not get elected by flagrant branches of that law or by corrupt practices."

We agree with this view and hold that there is no substance in the above contention of Mr. Shanti Bhushan.

The learned Judges in that case also had considered the effect of the omission to make a recrimination application under s. 97 (1) of the Act by the returned candidate with the time allowed by the Statute in a case where the election petitioner makes a double prayer, namely, declaration of the returned candidate's election as void and a further declaration that he is the duly elected candidate. The learned Judges observed:

"The question still remains whether the requirements of s.97 have to be satisfied in this case. It is argued by Mr. Venugopal that the gravamen of the respondent's petition was breach of many of the election rules and that he asked for a total recount, a request to which the appellant had no objection and that there was, therefore, no rule or need for filing a recrimination petition under s. 97. This, we are afraid, is a complete misreading of the petition. No doubt the petitioner has asked for a recount of votes. It may legitimately be presumed to mean a recount of all the votes, but such a recount is asked for the purpose of obtaining a declaration that the appellant's election was void and a further declaration that the respondent himself had been elected. This aspect of the matter should not be lost sight of. Now, when the respondent asked for a recount, it was not a mere mechanical process that he was asking for. The very grounds which he urged in support of his petition (to which we have referred at an earlier stage) as well as the application for recount and the various grounds on which the learned Judge felt that a recount should be ordered showed that many mistakes were likely to have arisen in the counting and as revealed by the instances which the learned Judge himself looked into and decided..... ..... The improper reception or rejection, therefore, would, include not merely cases where a voter appears before the presiding officer at the time of polling and his vote is received where it should not have been received and his vote rejected where it should not have been rejected. The improper rejection or reception contemplated under s.100 (1) (d) (iii) would include mistakes or wrong judgments made by the returning officer while counting and exercising his powers under Rule 56 (2) clauses (a) to (h). The fact, therefore, that the respondent asked for recounting of all the votes does not mean that he wanted also that votes which had been wrongly held to have been cast in his favour but should have gone to the appellant as also votes which had been rejected, but which should have gone to the appellant should be taken into account. The respondent was interested in no such thing. He made no such prayer. It was only the

appellant that was interested and bound to do it if he wanted to defeat the respondent's claim that he should be declared elected and s.97 is intended for just such a purpose. It was asked what was the purpose and where was the need for the appellant to have filed a recrimination under s.97 and what he could have filed when the respondent had asked for a total recount. What we have stated above furnishes the necessary answer. The appellant knew not only that the respondent wanted his election to be set aside but also that he wanted himself (the respondent) to be declared elected. He should have, therefore, stated whatever material was necessary to show that the respondent, if he had been the successful candidate and the petition had been presented calling in question his election, his election would have been void, in other words comply with s.83. He could have stated therein setting out that while he had no objection to a recount to be ordered (we have already shown that he strongly opposed the recount) there were many votes which would have rightly gone to him (the appellant) which have wrongly been given to the respondent, that there were many votes which should have rightly gone to him but which have been improperly rejected. He should also have complied with the other requirements of s. 97. If he had done that that could have been taken into consideration. There was no difficulty at all about his doing all this. His contention that he had no objection to the recount and there was no role or any need for him to file a recrimination is wholly beside the point. He had in his counter to the main election petition repudiated every one of the allegations in the election petition. It was at that stage that he should have filed the petition under. s.97 (of course, within 14 days of his appearance.) It was not at the stage when the petitioner filed his application for recount that the opportunity of need for a petition under s.97 arose.

It was then urged that when all the material was before the court it was unnecessary for him to have done so. As we have already pointed out this is not an action at law or a suit in equity but one under the provisions of the statute which has specifically created that right. If the appellant wanted an opportunity to question the respondent's claim that he should be declared elected he should have followed the procedure laid down in s. 97. In this connection it is interesting to note that in the decision in Jabar Singh v. Genda Lal (supra) the successful candidate in his own petition had pleaded that many votes cast in favour of himself had been wrongly rejected, in regard to which details were given, and that similarly several votes were wrongly accepted in favour of the election petitioner and in regard to which also details were given, and it ended with the prayer that if a proper scrutiny and recount were made of the valid votes received by each, it would be found that he-the returned candidate-had in fact, obtained larger number of votes than the election petitioner and for this reason he submitted that the election petition ought to be dismissed. In spite of this it was held that he had to fail because he had not filed a recrimination petition under s. 97. So it is not enough to say that what ought to be looked into is the substance and not the form. If a relief provided under a statute could be obtained only by following a certain procedure laid therein for that purpose, that procedure must be followed if he is to obtain that relief.

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

Mr. Sibal invited our attention to another decision of this Court rendered in Arun Kumar Bose v. Mohd. Furkan Ansari & others where learned brother R.N. Misra, J. speaking for himself and A.N. Sen, J. has observed thus:

> "Admittedly no application for recrimination was filed. Mr. Rangarajan has strenuously contended that keeping the scheme and the purpose of law in view, in a case of this type refusal to count the other rejected ballot papers on the plea of non-filing of a recrimination petition would lead to injustice. We have already indicated the pronounced view of this Court in Jagan Nath's case (AIR 1954 SC 210) which has been followed throughout and the last in series is the case of Jyoti Basu (AIR 1982 SC 983) to which also we have adverted. There is no scope for equity since the entire gamut of the process of election is covered by statute. Reliefs as are available according to law can only be granted..... .....
>
> ....In the absence of a recrimination petition conforming to the requirements of Section 97 of the Act the appellant who happens to be an Advocate and is presumed to know the law, was not entitled to combat the claim of the election petitioner on the ground that if the remaining rejected ballot papers had been counted, the election petitioner would not have been found to have polled the majority of the valid votes."

These three decisions provide a complete answer to Mr.Shanti Bhushan's said contention. But Mr. Shanti Bhushan relied strongly upon the decisions of this Court in Anirudh Prasad v. Rajeshwari Saroj Das & Others and Janardan Dattuappa Bondre, etc. v. Govindprasad Shivprasad Choudary & Others etc. In these decisions, Y.V, Chandrachud, J., as he then was, speaking for himself and V.R. Krishna Iyer and A.C. Gupta, JJ. has observed:

> "An election-petitioner may either ask for the relief under section 100 of the Act that the election of the returned candidate be declared void or he may ask for the additional relief under section 101 that he or any other candidate may be declared as elected. It is only if such a composite claim is made that section 97 is attracted. The returned candidate can then recriminate against the person in whose favour a declaration is claimed under section 101. The recriminatory plea is in truth and substance not so much a plea in defence of one's own election, though that be its ultimate purpose and effect, as a plea of attack by which the successful candidate assumes the role of a counter-petitioner and contends that the election of the candidate in whose favour the declaration is claimed would have been void if he had been the returned candidate and a petition had been presented calling his election in question."

We do not think that this observation or any other portion of the judgment in that case helps or aids the contention of Mr. Shanti Bhushan. In the second case R.S.Pathak, J. speaking for himself and V.R.Krishna Iyer, J. has observee:

> "Now, as was observed in Jabar Singh v. Genda Lal (supra) where both reliefs are claimed in an election petition the Court must first "decide the question whether the election of the returned candidate is valid or not, and if it is found that the said election is void, it makes a declaration to that effect and then deals with the further question whether the petitioner himself or some other person can be said to have been duly elected, A notice of recrimination under section 97 of the Act is necessary only where the returned candidate or other candidate disputes the grant of the further declaration sought by the election petitioner that he or some other candidate should be declared duly elected. When the recount was taken, the High Court had not yet concluded that the election of the appellant was invalid. It was in the process of determining giving to the appellant the benefit of all the votes cast for him. These would include the 250 votes cast in his favour, even though they were found placed in Bahekar's packet. Once the benefit of his 250 votes is given to the appellant, he becomes the candidate with the highest number of votes. His election cannot be declared void. That being so, no question arises of the appellant wanting to give evidence to prove that the election of any other candidate would have been void if he had been the returned candidate. Therefore, no notice for recrimination under section 97 was necessary. In the circumstances, the High Court erred in declining to count the appellant's 250 votes in his total on the ground that no notice of recrimination under section 97 of the Act had been given.

In P. Malichami v. M. Ambalalm (supra) on which the High Court relied, the facts were different. In that case the recount ordered did not involve the mere mechanical process of counting the valid votes cast in favour of the parties. It involved the kind of counting contemplated under Rule 56 of the conduct of Election Rules, 1961 'with all its implications". The validity of the votes was to be under re-examination. And if the returned candidate intended to take the benefit of such a recount against the election petitioner or other candidate, in whose favour the further declaration of being duly elected had been claimed, it was necessary for him to file a notice of recrimination. In the present case, the appellant was concerned with his claim to his 250 votes. The claim did not involve any reconsideration of the validity of any votes, whether cast in his favour or any other candidate; what was called for was a mere mechanical process of counting. That every order of recount does not bring section 97 into play was laid down by this Court in Anirudh Prasad v. Rajeswari Saroj Das & Ors. (Supra).

With respect we are unable to follow what has been laid down by the learned Judges in this decision having regard to the earlier view of Palekar and Alagiriswami, JJ. in P. Malaichami v. M. Andi Ambalam & Others (supra) and the majority view in Jabar Singh v. Genda Lal (supra). Improper rejection of ballot papers is certainly a ground for declaring an election void. It is only this ground that respondent 1 has challenged the appellant's election. If it was the case of the appellant that any vote validly cast in his favour had been improperly rejected he could have urged it as a ground in a recrimination application filed under s. 97 (1) of the Act against respondent 1's prayer that he be declared as the duly elected candidate. Therefore, we do not agree with Mr. Shanti Bhushan that s. 97 (1) will not apply to the facts of the present case and that it will apply only to cases where the returned candidate seeks to challenge prayer in the election petition that the election petitioner or

some other candidate be declared to be the duly elected candidate on some other grounds such as corrupt practice. Respectfully following these two decisions and the decision in Arun Kumar Bose v. Mohd. Furkan Ansari and others (supra) we hold that in the absence of a recrimination application under s. 97 (1) of the Act the High Court originally committed a jurisdictional error in directing the District Judge (Vigilance), Punjab to recheck and recount the rejected ballot papers relating to the appellant. As stated earlier, that mistake has been rectified by the High Court subsequently by net taking into account the 8 ballot papers relating to the appellant which appear to have been wrongly rejected. In these circumstances, we hold that the Election Tribunal (High Court) was justified in directing recount of the rejected ballot papers relating to respondent 1 and declining to take into account the 8 ballot papers relating to the appellant found by the District Judge (Vigilance), Punjab to have been improperly rejected in the absence of a recrimination application under s. 97 (1) of the Act and holding that the election of the appellant had been materially affected by the improper rejection of 14 ballot papers relating to respondent 1 and that respondent 1 is entitled to be declared to have been duly elected. The appeal accordingly fails and is dismissed with costs of respondent 1.

SABYASACHI MUKHARJI, J. Whether a candidate who has undisputably and demonstratively received four votes less than the other contesting candidates is entitled to be declared elected as a result of this election petition, is the question that arises in this appeal under Section 116 of the Representation of People Act, 1951, hereinafter called the 'Act'. Is that the correct position in law or should it be so ? This conclusion is sought to be established in view of the terms of Section 100 and Section 101 of the Act and in the absence of any recrimination petition under Section 97 of the Act by the elected candidate who has now been declared to be the defeated candidate. The facts of this case have been set out elaborately in the judgment of Varadarajan, J. No useful purpose, therefore, would be served by reiterating these again. It may, however, be pointed out, as noticed by my learned brother that general recounting and re-checking of all the rejected ballot papers was ordered by the High Court on 15th March, 1983 in the initial stage of the hearing of this election petition. That recounting was of the rejected ballot papers of the appellant as well as of respondent No. 1 only. The order of recount was the subject matter of the application by the appellant for special leave in this Court. That application, after giving notice to the parties, was dismissed by this Court. No reason, however, was indicated in the order dismissing that special leave petition. It has been observed by my learned brother that it was contended on behalf of the respondent that the order of High Court dated 15th March, 1983 directing the recounting of rejected ballot papers even of the appellant, in the absence of any recrimination petition under Section 97 of the Act was a jurisdictional error, and that error, according to the appellant, has been rectified in the final order passed by the High Court by not taking into account valid votes cast in favour of the appellant which were initially rejected in the counting. My learned brother has come to the conclusion that the order directing recount of the ballot papers passed by the High Court on 15th March, 1983 was due to jurisdictional error. Though I have some reservations about the question whether, on the dismissal of the application for special leave under Article 136 of the Constitution, any question which is open to a party under statutory appeal to be filed thereafter becomes barred by res-judicata, it is however, not necessary for the purpose of this appeal for me to express any opinion on that point. I am, however, of the opinion that if any question involved in that special leave application has become barred by res-judicata then the order of the High Court directing the recounting of the rejected ballot papers of the appellant and respondent No. 1, as directed by the order dated 15th March, 1983

has become final. If that is so, then what happened thereafter was a physical rechecking of the ballot papers.

With this background in mind and keeping in view the other facts as observed in the judgment of my learned brother, the question which we have to consider is, whether in view of the decision of this Court in the case of Jabar Singh v. Genda Lal, the appellant was disentitled from asking this Court to take into account in his favour the ballot papers in respect of the votes cast in his favour which were rejected initially, but which have now been found as a result of recounting directed by the High Court and done under the supervision of the High Court to have been improper. That decision has been the subject matter of consideration in several subsequent decisions of this Court. It is, therefore, not necessary for me to re-examine the decisions again. I would however, express my respectful agreement with the view and the observations of Ayyangar, J. in that decision. It seems to me that the conclusion and the views expressed by Justice Ayyangar are in consonance with the purpose of the Act and would further the cause of democratic process, which the Constitution aims. It is true that in spite of that decision of this Court rendered as early as December, 1963, the legislature has not amended the relevant provisions to make the Act more responsive on this aspect to the wishes of the people. The entire purpose of the constitutional provisions as well as other provisions of law is to ensure that true democracy functions in this country and the will of the people prevails. The purpose of the Act is to safeguard that one who obtains majority of valid votes by proper and due process of law alone should represent the constituency and will of the people. All the legal provisions and the procedures of the enactment should be so construed as to ensure that purpose, It would really be a mockery to the procedure of law if a situation where it is demonstrated duly in the court that a person who obtained four votes less than the other next candidate should be declared elected in preference to the others and allowed to represent the constituency. It is not an appeal to any abstract justice nor it is an appeal to equity but is to emphasise that procedure should be so construed that these rules of procedure such as Section 97 of the Act subserves the wishes of the voters. For this reason the views expressed by Ayyangar, J. appeals to me more reasonable though these may strain the literal provisions of the section a bit. Even if the legislature has not amended the relevant provisions after the said decision, I am of the opinion that in a matter of this, nature this Court has a responsibility to construe the procedural provisions of the law in such manner that the procedure does not defeat the purpose or object of the Act. This Court has done that on appropriate occasions. Reference may be made to the observations of Krishna Iyer, J. in the case of Commissioner of Income-tax (Central), Calcutta v. B.N. Bhattachergee and Another.

> "Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsman of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsman have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts or Parliament were drafted with divine prescience and perfect clarify. In the absence of

> it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. That was clearly laid down by the resolution of the judges..... in the Heydon's case [1584] 3 Co Rep 7b, and it is the safest guide to-day. Good practical advice on the subject was given about the same time by Plowden..... Put into homely metaphor it is thus: A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it-how would they have straightened it out ? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases."

A Statutory provision must be so construed, if it is possible, that absurdity and mischief may be avoided. Where the plain and literal interpretation of a statutory provision produces a manifestly absurd and unjust result, the court might modify the language used by the legislature or even do some violence to it so as to achieve the obvious intention of the legislature and produce a rational construction and just result. See in this connection the observations of Bhagwati, J. in the case of K.P. Varghese v. Income-tax Officer, Ernakulam and another.

In view of the fact that several submissions for reconsideration of the position expressed by the majority of the learned judges in Jabar Singh's case have been refused in subsequent decisions as has been noticed by my learned brother, subject to the judicial discipline as I am, I must proceed to decide this case on the basis of the views expressed by the majority of the learned judges in Jaber Singh's case I must, however, make it clear that speaking for myself, I feel that in view of the lapse of time and the very convincing arguments advanced by Ayyangar, J., Jabar Singh's case requires reconsideration by a larger Bench. In view, however, of the position in law, even if I proceed on the basis of the majority view in Jabar Singh's case, on that basis I think the facts of this case warrant a different conclusion as I shall presently notice. In this case as has been mentioned by my learned brother there was an order for recount of the rejected ballot papers for respondent No. 1 and the appellant. As indicated before, that order of recount was the subject matter of an application for special leave and that special leave application was rejected. A party cannot take advantage of one part of the order which is advantageous to him and discard the order part of the order which may not be to his advantage specially when an application for special leave from that order has been rejected. If that order has to be given effect to as has been in this case, it has been found that taking into account the eight ballot papers relating to the appellant which had been improperly rejected and also taking into account other ballot papers which had been improperly rejected in favour of respondent No.1, it is manifest by mechanical recounting that the appellant had secured four votes more then respondent No.1. This position has been noted in the judgment delivered by my learned brother. If that is the position, then in my opinion this Court cannot and should not declare respondent No.1 to have obtained majority of the valid votes. The order of 15th March, 1983 must stand or fall together. In my opinion it cannot be befurcated. It cannot be said that the recounting in so far as it was directed of the rejected ballot papers of respondent No. 1, the High Court was within its jurisdiction and in so far as the High Court directed recounting of the rejected ballot papers of

appellant also, it had committed a jurisdictional error. This is more so after the application for special leave was rejected by this Court. Apart from that I am of the opinion that there was no jurisdictional error there was power of the High Court to order such a recount. Even if there was no such prayer in the petition before the High Court, it cannot be said that the High Court acted without jurisdiction. In such a situation, applying the principal of majority view of Jabar Singh's case, there are certain exceptions where even without recrimination petition, a candidate like the appellant in the present case can take advantage of the ballot papers which have not been properly counted in his favour. Such an exception can be found in the case of Janarden Dattuappa Bondre v. Govindprasad Shivprasad Choudhary & Ors, Etc. There the appellant was declared elected to the State Assembly in the General Election in 1978. He has secured 27785 votes. The fifth respondent got 27,604 votes and the third respondent 27,447 votes. At page 901 of the report, Justice Pathak observed that the High Court had ordered recount on the application of the election petitioner. What the High Court required was to physically count the votes recorded in favour of the appellant and the other candidates in order to ascertain whether those votes were less in number of the votes declared as having been respectively secured by them. During the recount, the appellant in this case had applied to the Special Officer that if any votes cast in his favour were found to have been erroneously counted in the total of other candidates, that mistake should be rectified by including these in his total. A similar application was made by Bahekar, the third respondent. The High Court rejected the appellant's application on the ground that he had not filed a petition for recrimination. This Court observed in that decision that when the High Court directed the "physical" count of the votes cast in favour of the appellant, Bahekar and others what was intended was a mechanical recount of those votes and nothing more. It did not envisage any other enquiry into their validity and whether any of them had been improperly received. When the appellant requested that the 250 votes cast in his favour but included in the packet pertaining to Bahekar should be counted in his total, he was asking for nothing more than the application of a mechanical process. Those votes had never been recorded as cast in favour of Bahekar. There was never any dispute that these votes were cast for the appellant. Their validity was never doubted. Plainly what had happened was that by an error 250 ballot papers cast in favour of the appellant had been erroneously included in the packet of Bahekar. It is in such a case that it did not require any recrimination petition. This Court observed at page 903 as follows:

> "In P. Malaichami v. M. Ambalam (supra), on which the High Court relied, the facts were different. In that case, the recount the ordered did not involve the mere mechanical process of counting the valid votes cast in favour of the parties. It involved the kind of counting contemplated under Rule 56 of the Conduct of Election Rules, 1961, "with all its implications." The validity of the votes was to be under re-examination. And if the returned candidate intended to take the benefit of such a recount against the election petitioner or other candidate, in whose favour the further declaration of being duly elected had been claimed, it was necessary for him to file a notice of recrimination. In the present case, the appellant was concerned with his claim to his 250 votes. The claim did not involve any reconsideration of the validity of any votes, whether cast in his favour or any other candidate; what was called for was a mere mechanical process of counting. That every order of recount does not bring section 97 into play was laid down by this Court in Anirudh Prasad v. Rajeshwari

Saroj Das & Ors."

In the instant case as a result of the recounting order directed by the High Court at the request of Respondent No. 1 and after the special leave against that order had been rejected, it was found on a physical counting and re- checking the validity of the votes in favour of appellant which were initially rejected and about which there was no dispute nor that the appellant had received four more votes.

Before I conclude, I must observe that reference has been made to certain observations in some of the decisions to the effect that in election petitions, there was no question of importing any equitable principle or of importing any principle of remedying injustice as such. With respect I cannot persuade myself to this angle of vision. In construing both statutory provisions as well as provisions giving remedy provided under special statute, efforts should be made that patent injustice and inequity which repels commonsense and which defeats the purpose of the statute, should be avoided. In this case I find it difficult to declare respondent No. I who has admittedly received less votes than the appellant to have been duly elected.

In view of the facts and circumstances of this case as I have indicated hereinbefore I am of the opinion that even proceeding on the basis that the views expressed by majority of the learned judges in Jabar Singh's case is correct, upon which I must proceed for the purpose of this case but which I still feel should be reconsidered by a larger Bench, on the analogy of the decision in the case of Janardan Dajtuappa Bondre, Etc. v. Govindprasad Shivprasad Choudhary & Ors. Etc. (supra) I would allow this appeal with no order as to costs.

H.S.K. Appeal dismissed.