Supreme Court of India
Raghbir Singh Gill vs Gurcharan Singh Tohra & Ors on 9 May, 1980
Equivalent citations: 1980 AIR 1362, 1980 SCR (3)1302
Author: D Desai
Bench: Desai, D.A.

PETITIONER:
RAGHBIR SINGH GILL

Vs.

RESPONDENT:
GURCHARAN SINGH TOHRA & ORS.

DATE OF JUDGMENT09/05/1980

BENCH:
DESAI, D.A.
BENCH:
DESAI, D.A.
GUPTA, A.C.

CITATION:
1980 AIR 1362 1980 SCR (3)1302
CITATOR INFO :
R 1982 SC1569 (14)
R 1985 SC 89 (14)

ACT:
Representation of the People Act , 1951, Section 94-Secrecy of voting -Scope of Section 94-Constitution of India Articles 326 & 327-Tampering with records-Applicability of Section 64A of the Act to the present case-Rule 56(2) of the Election Rules, scope of-Section 100(d)(1) (iii) of the Act and void elections-Petitioner for recount, when to be ordered-Non-appearance of election Petitioner in the witness box, whether vitiates the petition-Interference by Supreme Court in an election petition.

HEADNOTE:
An election petition was filed by the respondent against the appellant, a returned candidate to the council of the State from the constituency of the Punjab Legislative Assembly, on the ground that the result of the election was materially effected (a) by non-compliance with the provisions of the Representation of the People Act and the rules made thereunder; (b) by improper reception of votes in his favour by tampering with the postal ballot papers and by commission of corrupt practice in the interest of the appellant by its agents and also commission of corrupt

practice by obtaining assistance of persons in the service of the Punjab Government. The appellant denied all the allegations and contested the petition. The High Court found that the four ballot papers one each allotted to P.Ws. (the voters) Nos. 13, 14, 15 and 16 were tampered with in that each the voter had cast his first preference vote in favour of unsuccessful Akali candidate Gurcharan Singh Tohra and no second preference vote was indicated and each one of the vote was so altered as to appear that each one of them has cast his first preference vote in favour of the appellant and second preference vote in favour of Gurcharan Singh. The High Court allowed the election petition and declared the unsuccessful Akali candidate Gurcharan Singh Tohra as elected and set aside the election of the appellant.

Dismissing the appeal, the Court

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HELD: (1) Section 94 of the Representation of People Act, 1951 cannot be interpreted or examined in isolation. Its scope, ambit and underlying object must be ascertained in the context in which it finds its place in the Act, and further in the context of the fact that the Act itself was enacted in exercise of power conferred by Articles in Part XV titled "Election" in the Constitution with a view to achieve the constitutional goal, viz., setting up of democratic sovereign socialist secular republic. For this a free and fair election, a fountain spring and corner stone of democracy, based on universal adult suffrage is the basic. The regulatory procedure for achieving free and fair election for setting up democratic institution in the country is provided in the Act which includes the cross or performance indicated by the dumb-sealed lip voter in the ballot paper. That is his right and the trust reposed by the Constitution in him is that he will act as a responsible citizen choosing his masters for governing the country for the period prescribed by it. Therefore, any interpretation of s. 94 must essentially subserve the purpose for which it is enacted. The interpretative process must advance the basic postulate of free and fair election for setting up democratic institution and not retard it. [1312 G-H, 1313 A-C, E-F]

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H. H. Kesavananda Bharati Sripadagalavaru v. State of Kerala, [1973] Suppl. S.C.R. 1; Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi & Ors., [1978] 2 S.C.R. 272, referred to.

(2). It is legitimate and indeed proper to have recourse to heading and sub-heading given to a group of sections in an Act of Parliament to find guidance for the construction of the words in a statute. One of the canons of construction is that every section of a statute is to be construed with reference to the context and other sections of the Act, so as, as far as possible, to make a consistent enactment of the whole statute. [1316 F-G]

Rex v. Board of Trade, Ex-parte St. Martin's Preserving Co. Ltd., [1965] 1 Q.B. 603 at 607 referred to.

(3). Provisions cast in negative words are generally treated as absolute admitting of no exception. But this is not a universal rule. The words 'negative' and 'affirmative' statutes mean nothing in particular. The question is one of intendment. Emphasis is more easily demonstrated when a statute is negative than when it is affirmative, but the question is one of intendment. If the language is open to two constructions one must ascertain the intendment, the mischief sought to be remedied and the remedy provided to cure the mischief. And, in such a situation the court must escalate in favour of that construction which carries out the intendment behind enactment and accords with reason and fairplay. [1318 E-G]

Mayor of London v. Rex, [1848] 3 Q.B. 30; Victoria Sporting Club Ltd. v. Hannam, (1969) 2 W.L.R. 454 referred to.

(4). The words "shall be required" in s. 94 of the Act, which is cast in negative language indicate an inbuilt element of compulsion. Section 94 carves out an exception to section 132 of the Evidence Act and also section 95 of the Representation of People Act, 1951. In view of the imperative language of s. 132 of the Evidence Act and also from the constitutional guarantee against self-incrimination as enacted in Article 20(3)of the Constitution a witness when questioned in the witness box relevant to the matter in issue in a proceeding in which he is called as a witness has to answer the question put to him and cannot escape the obligation to answer the question even if the answer was likely to incriminate him except to the extent the qualified privilege is extended to him under the proviso to section 132 of Evidence Act. A conspectus of the relevant provisions of the Evidence Act and ss. 93, 94 and 95 of the Representation Act makes it clear that they provide for a procedure, including the procedure for examination of witnesses, their rights and obligations in the trial of an election petition. The expression "other person" extends the protection to a forum outside courts. Section 94, therefore, cannot be singled out as a substantive provision and being unrelated to the procedure prescribed for trial of election petition. [1314 A, B, E, F, 1315 A, F-G, 1316 C-F]

Dr. Chhotalal Jivabhai Patel v. Vadilal Lallubhai Mehta and Ors. (1971) 12 Guj. L.R. 850 @ 860 approved.

(5) Section 94 of the Representation of the People Act, 1951 can be construed in two possible ways firstly, that the section casts an absolute prohibition and seals the mouth of the voter permanently and admits of no exception in which he can divulge his vote, and secondly, that it is a privilege of the voter to disclose his vote if he voluntarily chooses to do so

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but he cannot be compelled by court or any other authority

to divulge his vote. [1318 G-H, 1319 A]

If s. 94 is interpreted to mean to be a privilege of the voter to divulge or not to divulge how he voted and if he chooses not to divulge, s. 94 protects him inasmuch as he cannot be compelled to divulge that information, then it does not stand in conflict with the other important principle of free and fair elections to sustain parliamentary democracy. When it is said that no witness or other person shall be required to state for whom he has voted at an election it only means that both in the Court when a person is styled as a witness and outside the Court when he may be questioned about how he voted though he would not have the character or the qualification of a witness yet in either situation he is free to refuse to answer the question without incurring any penalty or forfeiture. That guarantees the vital principles behind secrecy of ballot in that the voter would be able to vote uninhibited by fear. But if he chooses to open his lips of his own free will without direct or indirect compulsion and waive the privilege, nothing prevents him from disclosing how he voted as there is no provision in the Act which would expose him to any penalty. If a voter voluntarily chooses to disclose how he voted or for whom he voted s. 128 of the Representation of People Act has nothing to do with the voter disclosing for whom he voted. It casts an obligation of secrecy on those connected with the process of election and not on the voter. [1319 A-D]

If the other construction is adopted the mischief thereby perpetrated can be demonstrably established. One can then manipulate the vote cast by a voter and poor voter will be helpless and unable to assist the court by his testimony which is the best direct evidence to establish for whom he voted and what mischief has been played with his vote. [1319 E-F]

(6) Free and fair election is not an a priori concept but of cherished constitutional goal oriented value. Secrecy of ballot though undoubtedly a vital principle for ensuring free and fair elections, it was enshrined in law to subserve the larger public interest, namely, purity of election for ensuring free and fair election. The principle of secrecy of ballot cannot stand aloof or in isolation and in confrontation to the foundation of free and fair elections, namely, purity of election. They can co-exist but where one is used to destroy the other, the first one must yield to principle of purity of election in larger public interest. In fact secrecy of ballot, a privilege of the voter, is not inviolable and may be waived by him as a responsible citizen of this country to ensure free and fair election and to unravel foul play. [1320 F-H, 1321 A]

N. P. Ponnuswami v. Returning Officer, Namakkal Constituency & Others, [1952] S.C.R. 218 at 230, referred to.

(7). Ordinarily secrecy of ballot has to be guarded,

but where secrecy of the ballot itself is sought to be availed of as a protective sheath against disclosure of fraud, forgery or wrongful conduct, it must yield in the larger public interest to ensure purity of free and fair election. [1322 D-E]

Queen v. Beardsall, LR [1875-76] 1 Q.B. 452 quoted with approval.

(8) Section 94 of the Act enacts a qualified privilege in favour of the voter in that no one can compel him to disclose for whom he voted but the

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privilege ends there for if he desires to waive the privilege and volunteers to give information as to for whom he voted, neither s. 94 nor any provision of the Act is violated. No one can prevent him from doing so nor a complaint can be entertained from any one including the person who wants to keep the voters mouth sealed as to why he disclosed for whom he voted. Once the voter chooses to waive the privilege and volunteers to disclose for whom he voted there is no contravention of s. 94 nor any other provision of the Act and there is no illegality involved in it. [1324 B-E]

(9) Normally, where a prohibition enacted is founded on public policy Courts should be slow to apply the doctrine of waiver. But, if a privilege was granted for the benefit of an individual, in the instant case for the benefit of voter, even if it was conferred to advance a principle enacted in public interest nonetheless the person for whose benefit the privilege was enacted has a right to waive it because the very concept of privilege inheres a right to waive it. And where a voter waives his privilege not to be compelled to disclose for whom he voted, if he wants to run the gamut of risk of disclosure it does not violate any other principle because it was enacted to help him to vote free from any inhibition or fear or apprehension of being subjected to some calamity. [1321 E-G]

Basheshar Nath v. The Commissioner of Income-tax, Delhi

JUDGMENT:

Behram Khurshed Pesikaka v. The State of Bombay, [1955] 1 S.C.R. 613 at 654 applied.

(10) A recount of votes cannot be ordered just for the asking. A petition for recount after inspection of some ballot papers must contain an adequate statement of material facts on which the petitioner relies in support of his case. The Tribunal must be prima facie satisfied that in order to decide the dispute and to do complete justice between the parties an inspection of the ballot papers is necessary. Only on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount and not for the purpose of fishing out materials for declaring an election void. [1324 H, 1325 A-C] Jitendra Bahadur Singh v. Krishna Behari & Ors., [1970] 1 S.C.R. 852; Smt. Sumitra Devi v. Sheo Shanker Prasad Yadav & Ors. [1973] 2 S.C.R. 920; Bhabhi v. Sheo Govind & Ors., [1975] Suppl. S.C.R. 202; Ram Autar Singh Bhadouria v. Ram Gopal Singh & Ors., [1976] 1 S.C.R. 191; and

R. Narayanan v. S. Semmalai & Ors. [1980] 1 S.C.R. 571 followed.

(11) In an election appeal under s. 116A of the Act the Supreme Court does not ordinarily interfere with the finding of facts recorded by the High Court particularly when the High Court comes to a conclusion on appreciation of all material evidence placed before it. As a corollary this Court would be slow to interfere with such findings of facts based on appraisal of evidence unless there is something radically wrong with the approach of the learned judge trying the election petition. [1330 C-E] Ramji Lal v. Ram Babu Maheshwari & Anr. AIR 1970 SC 2075; D. Gopala Reddy v. S. Bai Talpalikar & Ors. (1972) 39 Election Law Reports 305 (SC) and Smt. Sumitra Devi v. Sheo Shanker Prasad Yadav & Ors. [1973] 2. S.C.R. 920, applied.

(12) A petition for a recount on the allegation of miscount or error in counting is based upon not specific allegation of miscounting but errors which may indicate a miscount and recount becomes necessary. When it is alleged that postal ballot papers were tampered with, the implication in law is that those postal ballot papers have been wrongly received in favour of a candidate not entitled to the same and improperly refused in favour of the candidate entitled to the same and therefore there is a miscount and a recount is necessary. In the very nature of things the allegation can be not on each specific instance of an error of counting or miscount but broad allegations indicating error in counting or miscount necessitating a recount. In the instant case, the discretion used regarding the necessity of inspection of ballot papers is amply justified. Further it is established that the four ballot papers have been tampered with. [1326 C-F, 1333 C] (13) To avail of the procedure prescribed in s. 64A of the Act the conditions prescribed in that section must be satisfied. Section 64A envisages a situation where tampering, damaging, destruction or loss of ballot papers used at a polling station is on such a large scale that the result of the poll at the polling station cannot be ascertained. But s.64A is not attracted in the facts and circumstances of this case. The four ballot papers sent from different jails and received as postal ballot papers are shown to have been tampered with. The votes cast by the ballot papers can be succinctly ascertained and have in fact been ascertained. [1333 G-H, 1334 A] (14) The decision in Jagannath Rao v. Raj Kishore & Ors. AIR [1972] SC 447 does not purport to lay down that as soon as it is shown that some ballot papers have been tampered with, the Court has merely to chart an easy course of rejecting these ballot papers. Such an approach, apart from anything else, would be a premium on unfair election practice. Where voting is by the system of proportional representation by means of the single transferable vote, if a tampering as of the nature indulged into in this case is brought to light, the necessity of rejecting such ballot papers as invalid would give an unfair advantage to the very person who indulged into such practice. When the Returning Officer did not reject the ballot paper as being invalid, under Rule 56(2) of the Election Rules, 1961, once tampering is held proved if the circumstances permit and evidence of unquestionable character is available it would be perfectly legitimate for the Court in an election petition to ascertain for whom the vote was cast before it was tampered with and if it can be ascertained as a valid vote it must be accepted as such. Any other approach has an inbuilt tendency to give an unfair advantage either to the candidate who himself might have indulged in tampering or someone who must have acted for his benefit. [1334 C-G] (15) The expression "improper reception" and "improper refusal" of vote must carry out the purpose underlying the provision contained in s.100 of the R. P. Act. Section 100(1) (d) (iii) comprehends a situation where the result of an election in so far as it concerns a returned candidate has been materially affected by

improper reception, or improper refusal of any vote or the reception of any vote which is void. The adjective 'improper' qualifies not only the word 'reception' but also the word 'refusal'. When a vote is received by the returning officer at the time of counting it implies two things, that it is not only received as a valid vote but that the valid vote is cast in favour of one of the contesting candidates at the election. Similarly, when it is said that there is improper refusal of any vote it implies again two things, namely, a vote which ought to have been accepted as valid vote has been improperly refused as an invalid vote, or there is an improper refusal to accept the vote in favour of a particular candidate. Therefore, an improper reception of any vote or an improper refusal of any vote implies not only reception or refusal of a vote contended to be invalid or valid, as the case may be, but subsequent reception in favour of any contesting candidate at the election which would simultaneously show the vote being refused in counting to any other candidate at the election. The expression 'refusal' implies 'refuse to accept' and the expression 'reception' implies 'refuse to reject'. [1335 D-H] (16) The wide comprehensive panorama of s. 100 of the Representation of People Act, 1951 embraces within its fold, all conceivable infirmities which may be urged for voiding an election. To construe otherwise will have the election petitioners without a remedy. It would mean that even though one can indulge into forgery what is tampering of ballot papers, if not forgery-and get away with it. [1337 D-H] Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi & Ors., [1978] 2 S.C.R. 272 followed.

& CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1035 of 1978.

Appeal under Section 116-A of the Representation of People Act 1951 from the Judgment and Order dated the 5th June 1978 of the Punjab and Haryana High Court in Election Petition No. 1 of 1976.

U.R. Lalit, O.P. Sharma, Vivek Seth and Miss Anil Katyar for the Appellant.

Hardev Singh, R.S. Sodhi, M.S. Gupta and Miss Manisha Gupta for Respondents.

The Judgment of the Court was delivered by DESAI, J.-Purity of election and secrecy of ballot, two central pillars supporting the edifice of Parliamentary democracy envisioned in the Constitution stand in confrontation with each other or are complimentary to each other, present the core problem in this appeal.

First to the factual matrix. Punjab Legislative Assembly formed a constituency for electing members to the Council of States. On March 3, 1976, a notification was issued calling upon the members of Punjab Legislative Assembly to elect three members to the Council of States. The election programme was: March 10, 1976, was prescribed as the last date for filing nominations; the scrutiny of the nominations was to be made on March 11, 1976; March 13, 1976, was the last date by which it was permissible to withdraw from the election; in the event of contest, poll was to take place on March 27, 1976; counting was to be done on the same day. Respondent 4 Smt. Amarjit Kaur and respondent 5 Sat Pal Mittal were nominated as candidates of the political party described as Indian National Congress. Appellant Sardar Raghbir Singh Gill claimed to be an independent candidate. Respondent 1 Gurcharan Singh Tohra was a nominee of the Akali Party. As there were three seats and four candidates, poll was conducted on March 27, 1976. The voting was in accordance with the

system of proportional representation by means of the single transferable vote. Counting took place on the same day after the poll closed at the prescribed hour. Two candidates of the Indian National Congress, Smt. Amarjit Kaur and Sat Pal Mittal secured 29 and 27 first preference votes respectively. Appellant secured 23 first preference votes. Respondent 1, the Akali nominee also secured 23 first preference votes. The quota was 25.51 votes. Accordingly, Smt. Amarjit Kaur and Sat Pal Mittal who had secured first preference votes in excess of the ascertained quota were declared elected. The surplus first preference votes according to the second preference votes to the tune of 4.81 votes were added to the first preference votes polled by the appellant and he was declared elected to the third seat. Respondents 2 and 3 two sitting members of Punjab Legislative Assembly and, therefore, eligible electors, filed an election petition on May 10, 1976, challenging the election of the present appellant, the independent candidate who was declared elected to the third seat, inter alia, contending that the result of the election of the present appellant has been materially affected (i) by noncompliance with the provisions of the Representation of the People Act, 1951, and the Rules made thereunder; (ii) by improper reception of votes in favour of respondent 1, and (iii) by commission of corrupt practice in the interest of appellant by his agent as also commission of corrupt practice by obtaining assistance of persons in the service of the Punjab Government. The allegation was that Giani Zail Singh was the Chief Minister of Punjab at the relevant time and it was he who had put up the appellant as a candidate even though the members of the Assembly belonging to Indian National Congress computing their voting strength in the Assembly had only fielded two candidates Smt. Amarjit Kaur and Sat Pal Mittal. The Chief Minister Giani Zail Singh in order to snatch the third seat not legitimately available, fielded appellant as his candidate and to secure his election, power of office was abused. Seven members of Assembly belonging to Akali Party and a lone Jan Sangh M.L.A. were detained under the Maintenance of Internal Security Act, the detenus included P.W. 16 S. Parkash Singh Badal, detained in Tihar Central Jail at Delhi, P.W. 15, S. Jaswinder Singh Brar, and P.W. 15 S. Jagdev Singh Talwandi, detained in Central Jail at Patiala, S. Basant Singh Khalsa, detained in Jail at Nabha, P.W. 13 S. Surjit Singh Barnala, detained in Jail at Jullundur, S. Gurbachan Singh and S. Kundan Singh, Patang, detained in Jail at Sangrur, all belonging to Akali Party and Dr. Baldev Prakash belonging to Jan Sangh. These detenus applied for postal ballots with a view to exercising their right of franchise and they did in fact exercise their franchise. In course of counting it transpired that four postal ballot papers were tampered with and the tampering indicated that the first preference vote in favour of respondent 1, Gurcharan Singh Tohra, the Akali candidate was altered to show second preference vote as also to indicate a first preference vote in favour of the appellant. This was noticed by PW. 2 S. Manjit Singh Khera who was the counting agent of respondent 1. It was alleged that Giani Zail Singh abused his power as Chief Minister by bringing pressure upon S. Partap Singh, the Returning Officer, Sardar Tirth Singh Sobti, a Sub-Post Master and the Superintendents of Jails at Sangrur, Patiala and Nabha, for facilitating the tampering and thereby four additional first preference votes were wrongly received in favour of the appellant to which he was not entitled and the valid votes in favour of first respondent were denied to him by improper refusal and that it has directly and materially affected the result of the election. It was, however, stated in the petition that though the tampering of four ballot papers was self-evident, they, the petitioners were not in a position to state the exact method adopted in this behalf. The allegation of corrupt practice was that with the assistance of Chief Minister Giani Zail Singh official machinery was pressurised and utilised to get the appellant elected. To the election petition the returned candidate, namely, the present appellant whose election was called in

question, two other returned candidates and the defeated Akali candidate were impleaded as respondents.

The returned candidate, the present appellant contested the petition, inter alia, contending that the whole petition is based on conjectures and surmises. The allegation of corrupt practice was firmly denied. He also denied his relationship with Giani Zail Singh and further denied that he was a candidate put up by Giani Zail Singh. Any allegation of tampering was denied and it was contended that Akali Party presented a picture of a house divided and, therefore, the surmise made that members belonging to the Akali Party would en block vote for the Akali candidate is not justified. It was contended that the petitioners as admitted by them in the petition were not in a position to state the exact method and process adopted by the Returning Officer and his accomplices in tampering with the postal ballots, and, therefore, the case put forth in the petition is a figment of imagination, devoid of particulars and the petition is liable to be thrown out on this ground.

The learned Judge of the High Court before whom the petition came up for hearing framed as many as seven issues. One issue was whether a case for inspection of ballot papers is made out ? The central issue was whether four ballot papers were unauthorisedly tampered with after the voters thereof had cast their first preference on them in favour of Akali candidate, and if so, whether they were hereby converted in favour of the returned candidate by changing the figure I placed against the name of the Akali candidate into figure II and further placing the figure I in favour of the returned candidate ? On the finding of this issue a further issue had to be answered whether the four votes were improperly received and counted in favour of the returned candidate and improperly refused to Akali candidate in whose favour they were cast, and if this miscount materially affected the result of the election ? There was an issue about alleged corrupt practice which was held not proved and was answered in favour of the returned candidate.

It may be noticed that neither the election petitioners (respondents 2 and 3 in this appeal) nor the appellant, the returned candidate, nor respondent 1 the unsuccessful Akali candidate stepped into the witness box. Election petitioners examined P.W. 2 Sardar M. S. Khera, counting agent of respondent 1 four voters whose votes were alleged to have been tampered with and an expert P.W. 17 Dewan K. S. Puri. On behalf of the appellant R.W. 1 S. Partap Singh, the Returning Officer, R.W. 2 Karnail Singh Marhari, R.W. 3 Master Jagir Singh to prove defection from Akali Party, and R.W. 4 the expert Mr. R. K. Vijh to prove that though the four ballot papers appear to be tampered, it must be by voters themselves, were examined.

The learned Judge held that the four ballot papers, one each allotted to P.W. 13 S. Surjit Singh Barnala, P.W. 14 S. Jagdev Singh Talwandi, P.W. 15 S. Jaswinder Singh Brar and P.W. 16 S. Parkash Singh Badal, were tampered with in that each of the voter had cast his first preference vote in favour of the unsuccessful Akali candidate S. Gurcharan Singh Tohra and no second preference vote was indicated and each one of the vote was altered so as to appear that each one of them had cast his first preference vote in favour of the returned candidate, the appellant, and second preference vote in favour of S. Gurcharan Singh Tohra. On this finding the learned Judge concluded that these four votes were improperly received in favour of returned candidate and improperly refused to the unsuccessful Akali candidate and there has thus been a miscount and a recount was necessary and

on the recount the unsuccessful Akali candidate secured 27 first preference votes by the addition of the aforementioned four tampered votes to the 23 first preference votes already polled by him and that deducting four first preference votes from the 23 first preference votes already counted in favour of returned candidate he polled 19 first preference votes. On this recount unsuccessful Akali candidate respondent 1 was shown to have polled first preference votes in excess of the quota and, therefore, there was no necessity to take into account the second preference votes. Accordingly the election petition was allowed and the unsuccessful Akali candidate was declared elected and the election of the returned candidate was set aside. Hence this appeal by the returned candidate.

When the petition was set down for recording parol evidence M. S. Khera, polling and counting agent for respondent 1 was examined on behalf of the petitioners. He was followed by P.W. 13 S. S. Barnala. In his examination- in-chief the following two questions were asked: "Q. How many preferences did you cast on the ballot paper aforesaid" ? This was objected to on behalf of the returned candidate which objection was overruled and the following answer was recorded: "A. I cast only one preference vote and did not cast any second preference in favour of any other candidate". "Q. In whose favour did you cast your first preference vote" ? An objection was taken on behalf of the returned candidate that the question violates the secrecy of the ballot as ensured by s. 94 of the Representation of the People Act, 1951 ('Act' for short), and, therefore, the question was impermissible. At that stage Civil Miscellaneous Application No. 13-E of 1977 was presented on behalf of the election petitioners purporting to be under s. 115 of the Code of Civil Procedure, requesting the Court that the four tampered postal ballot papers be allowed to be inspected and the concerned witnesses be permitted to be questioned with reference to them when they enter the witness box. The application was contested. Ultimately, the learned Judge by his reasoned order dated October 25, 1977, granted the application. As a serious exception was taken to a part of this direction, the same may be reproduced in extenso:

> "I would accordingly allow the application and direct the inspection and examination of the postal ballot papers in the present case. Inevitably the witnesses relevant to these ballot papers are also allowed to be examined with regard thereto in the interest of justice."

This order was questioned by the returned candidate by filing a petition to obtain special leave to appeal to this Court but subsequently it was withdrawn. Thereafter all the four concerned witnesses were questioned in their respective examination-in-chief with regard to the first preference vote cast by each of them and also a negative answer was taken that none of them had cast his second preference vote.

Mr. P.R. Mridul, learned counsel who appeared for the appellant directed a frontal attack on the order dated October 25, 1977, by which the learned Judge not only allowed the inspection and examination of the postal ballot papers but also permitted the witnesses to be questioned relevant to the ballot papers.

The contention is that the impugned order dated October 25, 1977, is bad in law and unsustainable on facts and if that order is illegal, the evidence permitted pursuant to the order would be

inadmissible and if that inadmissible evidence is excluded even if the Court accepts the evidence of the expert examined on behalf of the election petitioners that the four ballot papers were tampered with, yet there would not be further material to show as to what was the vote originally recorded by the voter and the nature and character of simultaneous or subsequent alteration. Consequently, he says that these four postal ballot papers will have to be excluded from counting and if they are so excluded the appellant returned candidate would still be having greater number of first preference votes and his election could not be set aside. This is the fundamental issue in this appeal and it is the appellant's sheet anchor and as it goes to the root of the matter and the fate of appeal substantially hangs on it, in fairness to the appellant the contention may be examined in all its ramifications. There were various limbs of the submission and for clarity each submission may be examined separately.

The first limb of the contention is that the Order dated October 25, 1977, violates the mandate of s. 94 of the Act and strikes at the root of a fundamental principle governing elections in a democratic polity and is, therefore, impermissible. Section 94 of the Act reads as under:

> "94. Secrecy of voting not to be infringed-No witness or other person shall be required to state for whom he has voted at an election".

Section 94 cannot be interpreted or examined in isolation. Its scope, ambit and underlying object must be ascertained in the context of the Act in which it finds its place, viz., the Representation of the People Act, 1951, and further in the content of the fact that this Act itself was enacted in exercise of power conferred by the articles in Part XV titled 'Elections' in the Constitution. An Act to give effect to the basic feature of the Constitution adumberated and boldly proclaimed in the preamble to the Constitution, viz., the people of India constituting into a sovereign, socialist, secular, democratic republic, has to be interpreted in a way that helps achieve the constitutional goal. Preamble sets out the political society which we wanted to set up and, therefore, it must be given all importance. The realisation of goals and vision set out in the preamble forms the fabric and permeates the whole scheme of constitution. The goal on the constitutional horizon being a democratic republic, a free and fair election, a fountain spring and cornerstone of democracy, based on universal adult suffrage is the basic. The regulatory procedure for achieving free and fair election for setting up democratic institution in the country is provided in the Act. Further, Sikri, C.J., Shelat, Grover, Hegde, Mukherjea & Reddy, JJ. in His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala(1), have in clear and unambiguous terms laid down that republic democratic form of Government is one of the basic and essential features of our Constitution. In Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi & Ors.(2), Krishna Iyer, J. has quoted with approval a statement of Sir Winston Churchill which reads as under :

> "At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper-no amount of rhetoric or voluminous discussions can possibly diminish the overwhelming importance of the point."

To adopt it with a slight variation, nothing can diminish the overwhelming importance of that cross or preference indicated by the dumb sealed lip voter. That is his right and the trust reposed by the Constitution in him is that he will act as a responsible citizen choosing his masters for governing the country for the period prescribed by it. Any interpretation of s. 94 must essentially subserve the purpose for which it is enacted. The interpretative process must advance the basic postulate of free and fair election for setting up democratic institution and not retard it. Section 94 cannot be interpreted divorced from the constitutional values enshrined in the Constitution.

To start with it is necessary to examine the format and setting of section 94. It finds place in Chapter III headed "Trial of Election Petitions". A cursory glance at various provisions included in Chapter III from s. 86 to s. 107 would leave no room for doubt that the Chapter prescribes procedure for trial of election petitions. Section 87(2) provides for application of the provisions of the Indian Evidence Act (`Evidence Act' for short) to the trial of election petitions subject to the provisions of the Act. In order to unfetter election petitions from the fetter of property laws a far reaching exception had to be enacted in s. 93 lifting the embargo on the admissibility of documents for want of registration or inadequacy of stamp. Section 95 is to some extent in pari materia with s. 132 of the Evidence Act inasmuch as it does not excuse a witness from answering questions in the trial of an election petition upon the ground that the answer may incriminate him or may expose him to any penalty or forfeiture but extends protection in respect of such answer by giving him a certificate of indemnity in respect of specified offences. Looking to the format and setting, the question is : does s. 94 create merely a processual inhibition against compelling a witness to answer a question disclosing for whom he had voted or does the substantive provision, as was contended on behalf of the appellant, enacted with a view to ensuring total secrecy of ballot as an integral part of free and fair election vouchsafed by the Constitution, put a complete embargo on the disclosure for whom the witness voted ? The larger question whether free and fair elections necessarily imply secrecy of voting or to ensure free and fair elections in a given situation secrecy or voting has to yield to the fundamental principle of free and fair election, will be presently examined. At this stage it is necessary to confine to the language in which the provision is couched.

Does s. 94 prevent any one from seeking information about how a person has cast his vote from the mouth of the person or is it the privilege of the voter not to be compelled to disclose for whom he has voted ? The provision is cast in negative language. The important words are "shall be required". The word `required' has an inbuilt element of compulsion. When it is said that no witness shall be required to state for whom he has voted at an election, on a pure grammatical construction uninhibited by any other consideration it would mean that the witness cannot be compelled against his will to disclose how he has voted or for whom he has voted. When a witness is put in the witness box and he is questioned under oath as to any matter relevant to the issue in any suit or in any civil or criminal proceeding, in which he is called to give evidence, the witness is not excused from answering any question relevant to the matter under enquiry upon any ground including the ground that the answer to such question will criminate or may tend directly or indirectly to criminate such witness or that it will expose or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind as provided in s. 132 of the Evidence Act. There is a proviso to the section which extends protection in respect of such compelled testimony to the extent indicated in the proviso. Section 87(2) of the Act was enacted to avoid any contention that an election petition is

neither a civil nor a criminal proceeding and hence s. 132 of the Evidence Act is not attracted. But as the proviso to s. 132 of the Evidence Act extends only a qualified privilege, s. 95 of the Act which is in pari materia with s. 132 of the Evidence Act had to be incorporated in the chapter with its own proviso' for a slightly larger protection. In view of the imperative language of s. 132 of the Evidence Act a witness cannot refuse to answer a question which is relevant to the matter under enquiry in which he is called as a witness even on the pain of self-incrimination. In the past in the countries governed by Anglo-Saxon jurisprudence the witness was privileged both from answering questions and producing documents the tendency of which was to expose the witness to any criminal charge, penalty or forfeiture (see Spokes v. Grosvenor Hotel (1). This privilege was founded upon the maxim nemo tenetur seipsum prodere, meaning, no one is bound to criminate himself and to place himself in peril. Over a period, as Wigmore puts it, the privilege indirectly and ultimately works for good-for the good of the innocent accused and of the community at large, but directly and concretely it works for ill-for the protection of the guilty and the consequent derangement of civic order and, therefore, there ought to be an end of judicial cant towards crime. The result is that the privilege is withdrawn as clearly transpires from the language of s. 132 of the Evidence Act and the proviso only affords a qualified privilege inasmuch as any such answer which a witness shall be compelled to give under the main part of s. 132 shall not subject him to any arrest or prosecution, or be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer. One may recall here the constitutional guarantee against self-incrimination as enacted in Article 20(3) which provides that no person accused of any offence shall be compelled to be a witness against himself. It would, therefore, appear that a witness when questioned in the witness box relevant to the matter in issue in a proceeding in which he is called as a witness has to answer the question put to him and cannot escape the obligation to answer the question even if the answer was likely to incriminate him except to the extent the qualified privilege is extended to him under the proviso. Section 87(2) of the Act provides that the provisions of the Indian Evidence Act, 1872, shall, subject to the provisions of the Act, be deemed to apply in all respects to the trial of an election petition. Section 95(1) of the Act re-enacts the main part of s. 132 of the Evidence Act. The combined effect of s. 87(2) read with s. 95 of the Act, and omitting s. 94 for the time being, would be that if a witness in an election petition is questioned as to for whom he voted he would be under an obligation to answer that question. The principle of secrecy of ballot necessitated a specific provision excusing the witness from answering such a question which he would be under an obligation to answer under s. 132 of the Evidence Act or s. 95(1) of the Act. Section 94 precedes s. 95 which obliges a witness to answer all questions relevant to the enquiry in an election petition even on the pain of self- incrimination. But for s. 94, the witness could not have avoided answering the question put to him as to for whom he voted.

Secrecy of ballot undoubtedly is an indispensable adjunct of free and fair elections. A voter had to be statutorily assured that he would not be compelled to disclose by any authority as to for whom he voted so that a voter may vote without fear or favour and is free from any apprehension of its disclosure against his will from his own lips. To that extent s. 94 of the Act carves out an exception to s. 132 of the Evidence Act and s. 95 of the Act (see Dr. Chhotalal Jivabhai Patel v. Vadilal Lallubhai Mehta & Ors.) (1). As section 94 carves out an exception to s. 132 of the Evidence Act as also to s. 95 of the Act it was necessary to provide for protection of the witness if he is compelled to answer a question which may tend to incriminate him. Section 95 provides for grant of a certificate of indemnity in the circumstances therein set out. A conspectus of the relevant provisions of the

Evidence Act and ss. 93, 94 and 95 of the Act would affirmatively show that they provide for a procedure, including the procedure for examination of witnesses, their rights and obligations in the trial of an election petition. The expression `witness' used in the section is a pointer and the further expression `other person' extends the protection to a forum outside courts. Section 94, therefore, cannot be singled out as was contended on behalf of the appellant as a substantive provision and being unrelated to the procedure prescribed for trial of election petition. This conclusion is reinforced by the title of Chapter III "Trial of Election Petitions" because it is legitimate and indeed proper to have recourse to heading and sub-heading given to a group of sections in an Act of Parliament to find guidance for the construction of the words in a statute (see R. v. Board of Trade; Ex-parte St. Martin's Preserving Co. Ltd.) (2). Coupled with this one can advantageously refer to a known canon of construction that every section of a statute is to be construed with reference to the context and other sections of the Act, So as, as far as possible, to make a consistent enactment of the whole statute.

The marginal note of s. 94 says `secrecy of voting not to be infringed'. Section 128 of the Act casts an obligation on every officer, clerk, agent or other person to maintain and aid in maintaining secrecy of the voting and they shall not (except for some purpose authorised by or under any law) communicate to any person any information calculated to violate such secrecy. Rule 23(3) of the Conduct of Election Rules, 1961 (`Rules' for short) imposes a duty to conceal the serial number of the ballot paper effectively before it is issued at election in any local authorities' constituency or by assembly members. Similarly, rules 23(5)(a) and (b) of the Rules provide for effectively maintaining the secrecy of the postal ballot papers in the manner prescribed therein. Rules 31(2), 38(4), 39(1), (5), (6) and (8), 40(1) second proviso, 38A(4), 39A(1) & (2) and similar other rules provide for maintaining secrecy of ballot. It cannot be gainsaid that various provisions referred to above ensure secrecy of ballot and even s. 94 has been enacted to relieve a person from a situation where he may be obliged to divulge for whom he has voted under testimonial compulsion. Secrecy of ballot can be appropriately styled as a postulate of constitutional democracy. It enshrines a vital principle of parliamentary institutions set up under the Constitution. It subserves a very vital public interest in that an elector or a voter should be absolutely free in exercise of his franchise untrammeled by any constraint which includes constraint as to the disclosure. A remote or distinct possibility that at some point a voter may under a compulsion of law be forced to disclose for whom he has voted would act as a positive constraint and check on his freedom to exercise his franchise in the manner he freely chooses to exercise. Therefore, it can be said with confidence that this postulate of constitutional democracy rests on public policy.

Having said this, the substantial question is whether s. 94 enacts an absolute prohibition or a total embargo on a voter being questioned about how he voted which will infringe the secrecy of a ballot? The question is whether it is the privilege of the voter to refuse to answer a question as to for whom he voted or in order to ensure the secrecy of ballot there is a total embargo and absolute prohibition on finding out through the mouth of a voter for whom he voted? Is it inviolable in any situation, or contingency? Undoubtedly, secrecy of ballot is a key stone in the arch of constitutional democracy and that it rests on public policy, namely, that a voter shall be free from any kind of constraint or fear or untrammeled by any apprehension while voting. But this basic postulate of constitutional democracy, namely, secrecy of ballot was formulated not in any abstract situation or to be put on a

pedestal and worshipped but for achieving another vital principle sustaining constitutional democracy, viz., free and fair election.

Free and fair elections are the mainspring of a healthy democratic life and a barometer of its strength and vitality. Electoral administra-

tion must, therefore, be free from pressure and interference of the executive and legislature. It should be able to secure fairness to all parties and candidates. An awareness by the people of the significance of their vote and the need for them to exercise it responsibly and an assurance that the voter would be able to exercise the franchise untrammeled by any fear and apprehension of any adverse consequence flowing therefrom are the main ingredients of a truly democratic and successful electoral system (see Elections in India by R. P. Bhalla). If free and fair election is the life-blood of constitutional democracy and if secrecy of ballot was ensured to achieve the larger public purpose of free and fair elections either both must be complimentary to each other and co-exist or one must yield to the other to serve the larger public interest.

This situation immediately raises the question of construction of s. 94. Does it lend itself open to two constructions? If so, are there inner indicia to prefer one to the other? Can external aid be sought for correct construction to unravel the intention of the Parliament in enacting s. 94?

It was said that s. 94 lends itself open to one construction alone. It is cast in negative language which usually is treated as absolute. Proceeding further it was said that this negative provision admits of no exception and enacts an absolute prohibition. Provision cast in negative words are generally treated as absolute admitting of no exception. But this is not a universal rule. The words `negative' and `affirmative' statutes mean nothing in particular. The question is, what was the intendment? Emphasis is more easily demonstrated when statute is negative than when it is affirmative but the question is one of intendment (see Mayor of London v. R.) (1). If language is open to two constructions one must ascertain the intendment, the mischief sought to be remedied and the remedy provided to cure the mischief (see Victoria Sporting Club Ltd. v. Hannam) (2). And in such a situation the Court must escalate in favour of that construction which carries out the intendment behind enactment and accords with reason and fairplay.

Two possible constructions are, firstly, that the section casts an absolute prohibition and seals the mouth of the voter permanently and admits of no exception in which he can divulge vote, and secondly, that it is a privilege of the voter to disclose his vote if he voluntarily chooses to do so but he cannot be compelled by court or any other authority to divulge his vote. Which of the two constructions advances the object of enactment?

If s. 94 is interpreted to mean to be a privilege of the voter to divulge or not to divulge how he voted and if he chooses not to divulge, s. 94 protects him inasmuch as he cannot be compelled to divulge that information, then it does not stand in conflict with the other important principle of free and fair elections to sustain parliamentary democracy. When it is said that no witness or other person shall be required to state for whom he has voted at an election, it only means that both in the Court when a person is styled as a witness and outside the Court when he may be questioned about how he voted

though he would not have the character or the qualification of a witness yet in either situation he is free to refuse to answer the question without incurring any penalty or forfeiture. That guarantees the vital principle behind secrecy of ballot in that the voter would be able to vote uninhibited by fear. But if he chooses to open his lips of his own free will without direct or indirect compulsion and waive the privilege, nothing prevents him from disclosing how he voted. No provision was brought to our notice which would expose him to any penalty if a voter voluntarily chooses to disclose how he voted or for whom he voted. Section 128 has nothing to do with the voter disclosing for whom he voted. It casts an obligation of secrecy on those connected with the process of election and not on the voter.

If the other construction is adopted, the mischief thereby perpetrated can be demonstrably established. One can then manipulate the vote cast by a voter and poor voter will be helpless and unable to assist the Court by his testimony which is the best direct evidence to establish for whom he voted and what mischief has been played with his vote.

The interpretation of s. 94 which appeals to us ensures free and fair elections. Secrecy of ballot was mooted to ensure free and fair elections. If the very secrecy of ballot instead of ensuring free and fair elections strikes at the root of the principle of free and fair elections this basic postulate of democracy would be utilised for undoing free and fair elections which provide life-blood to parliamentary democracy. If secrecy of ballot instead of ensuring free and fair elections is used, as is done in this case, to defeat the very public purpose for which it is enacted, to suppress a wrong coming to light and to protect a fraud on the election process or even to defend a crime, viz., forgery of ballot papers, this principle of secrecy of ballot will have to yield to the larger principle of free and fair elections.

It was, however, contended that like secrecy of ballot the concept of purity of election is one of the essential postulates of a democratic process but the concept of purity of elections is not an esoteric principle but a principle enshrined in and codified by the provisions of the Act. Says, Mr. Mridul, that this principle is operative only to the extent it is enacted in the various provisions of the Act and vague, theoretical concept of purity not articulated in the provisions of law cannot be the basis for overriding the concept of secrecy which is expressly provided for in s. 94 of the Act. Reference was made to the Statement of Objects and Reasons of the Act and to N.P. Ponnuswami v. Returning Officer, Namakkal Constituency & Others,(1) where it was observed that the Act is a self-contained enactment so far as elections are concerned which means that whenever one has to ascertain the true position in regard to any matter connected with the elections, one has only to look at the Act and the Rules made thereunder. Undoubtedly, the Act is a self-contained Code but the Act was enacted in exercise of the power conferred by Part XV of the Constitution which envisages setting up of an independent Election Commission. Article 326 ensures that elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage. Article 327 confers power on Parliament to make provision with respect to all matters relating to or in connection with elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses. The preamble to the Constitution enshrines a solemn declaration to constitute India into a sovereign,

socialist, secular, democratic Republic. Therefore, the Act enacted pursuant to a power conferred by the Constitution for setting up Parliamentary institutions in this country envisaged by the Constitution for the governance of this country cannot be interpreted divorced from the constitutional values enshrined in the Constitution. And there is one fundamental principle which permeates through all democratically elected parliamentary institutions, viz., to set them up by free and fair election. It is not an a priori concept but of cherished constitutional goal oriented value. Secrecy of ballot though undoubtedly a vital principle for ensuring free and fair elections, it was enshrined in law to subserve the larger public interest, namely, purity of election for ensuring free and fair election. The principle of secrecy of ballot cannot stand aloof or in isolation and in confrontation to the foundation of free and fair elections, viz., purity of election. They can co-exist but as stated earlier, where one is used to destroy the other, the first one must yield to principle of purity of election in larger public interest. In fact secrecy of ballot, a privilege of the voter, is not inviolable and may be waived by him as a responsible citizen of this country to ensure free and fair election and to unravel foul play.

An apprehension was, however, voiced that the principle of secrecy enshrined in s. 94 of the Act having been enacted in public interest and it being a prohibition based on public policy, it cannot be waived. Reliance was placed on Basheshar Nath v. The Commissioner of Income-tax, Delhi & Rajasthan and Another,(1) where the question whether the doctrine of waiver can be invoked when the constitutional or statutory guarantee of a right is not conceived in public interest or when it does not affect the jurisdiction of the authority infringing the said right, was examined. It was held that if the privilege conferred or the right created by the statute is solely for the benefit of the individual, he can waive it. It was, however, said that even in those cases the Courts invariably administered a caution that having regard to the nature of the right some precautionary and stringent conditions should be applied before the doctrine is invoked or applied. In Behram Khurshed Pesikaka v. The State of Bombay,(2) it was observed that fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy. Undoubtedly, where a prohibition enacted is founded on public policy Courts should be slow to apply the doctrine of waiver but this approach overlooks the fact that if a privilege was granted for the benefit of an individual, in the instant case for the benefit of voter, even if it was conferred to advance a principle enacted in public interest nonetheless the person for whose benefit the privilege was enacted has a right to waive it because the very concept of privilege inheres a right to waive it. And where a voter waives his privilege not to be compelled to disclose for whom he voted, if he wants to run the gamut of risk disclosure it does not violate any other principle because it was enacted to help him to vote free from any inhibition or fear or apprehension of being subjected to some calamity. To hold otherwise is to perpetuate the very mischief which is sought to be suppressed. The inescapable conclusion is that s. 94 enacts a qualified privilege in favour of a voter not to be compelled to disclose for whom he voted but if he chooses to volunteer the information s. 94 is not violated.

Having dealt with the question of construction of s. 94 of the Act on first principle, a reference to the precedents to which our attention was drawn would buttrss our conclusion. In the Queen v.

Beardsall,(1) at a trial of indictment against a Deputy Returning Officer, for offence under the Ballot Act, 1872, charging him with having fraudulently placed papers purporting to be, but to his knowledge not being, ballot papers in the ballot box, Blackburn, J. allowed the counterfoils and marked register produced under the aforesaid order to be given in evidence, and the face of the voting papers to be inspected so as to show how the votes appeared to have been given. Upholding this order, Kelly, C.B., observed that, "the legislature has no doubt provided that secrecy shall be preserved with respect to ballot papers and all documents connected with respect to ballot papers and all documents connected with what is now made a secret mode of election. But this secrecy is subject to a condition essential to the due administration of justice and the prevention of fraud, forgery, and other illegal acts affecting the purity and legality of elections."

Lush, J., observed as under :

> "It was argued that secrecy was the only object of the Ballot Act, but I do not agree to the proposition. Secrecy was one object, the other was to secure purity of election; and it is difficult to say which is most important".

It thus clearly transpires that ordinarily secrecy of ballot has to be guarded but where secrecy of the ballot itself is sought to be availed of as a protective sheath against disclosure of fraud, forgery or wrongful conduct, it must yield in the larger public interest to ensure purity of free and fair election.

Schofield in "Parliamentary Elections", 3rd Edn., p. 453, states the law as under :

> "Evidence may be called but witnesses must not be asked for whom they voted for no person who has voted at the election shall in any legal proceeding to question the election or return be required to state for whom he voted. There would appear to be no objection to the witness volunteering this information particularly in a case of personation".

It was however, said that Schofield's statement of law should not be accepted because this proposition is not noted in Halsbury's Laws of England, 4th Edn., Vol. 15, p. 494, para 909, wherein on the question of secrecy of vote the following statement of law is to be found:

> "A witness may not be required to disclose for whom he has voted and it is only in those cases where he has publicly held himself out as belonging to some political party that he may be asked to which party he belongs.
>
> The Court may not discover how a person has voted untill it has been proved that he voted and his vote has been declared to be void".

A passage at page 210 in Parker's Conduct of Parliamentary Elections, 1970 Edn., was read out to us in support of the contention that there are certain provisions in an election law containing an absolute enactment which must be obeyed strictly and a breach of which will render the vote void. There is no reference to a provision similar to one found in s. 94 of the Act nor any decision quoted

to show its scope and ambit.

In American Jurisprudence, 2d Vol. 26, page 166, paras 347 and 348 it is stated as under :

> "As an incident of the secret ballot system and in order to preserve the purity and independence of the exercise of the elective franchise, the rule is well established that a legal and honest voter is privileged from testifying as to the candidate for whom he cast his vote .. .. .. the privilege of a legal voter to refuse to testify for whom he cast his ballot may be waived by the voter but since the privilege is personal to the voter, it may be waived only by him".

In Corpus Juris Secundum, Vol. 29, para 278, it is stated as under :

> In the absence of proof or claim of fraud, illegality, or irregularity, parol evidence is not admissible to contradict a ballot, and a voter will not be permitted to testify that he voted in a manner different from that shown by his ballot. However, a voter may testify that another ballot has been substituted for the one he cast, or that his ballot has been changed since it was cast". In para 281 in the same volume it is stated as under : "The policy of the law is to protect legal voters in the secrecy of the ballot. Accordingly a legal voter cannot be compelled to disclose for whom he voted, in the absence of a showing of fraud on the part of the election officers sufficient to invalidate the returns; and it has been held that the same considerations of public policy which relieve the voter himself from being compelled to testify for whom he voted should prevent other proof of the fact".
>
> "Exemption a personal privilege.-By the weight of authority the exemption from obligation to disclose the character of his vote can be claimed only by the voter himself, and, if he sees fit to answer the question, there can be no objection to the testimony, but, according to some authorities, in an election contest voters cannot be permitted to testify at all as to how they voted".

Having anxiously examined the matter both on principle and precedent, there is no gainsaying the fact that s. 94 of the Act enacts a privilege in favour of the voter in that no one can compel him to disclose for whom he voted but the privilege ends there for if he desires to waive the privilege and volunteers to give information as to for whom he voted, neither s. 94 nor any provision of the Act is violated. No one can prevent him from doing so nor a complaint can be entertained from any one including the person who wants to keep the voter's mouth sealed as to why he disclosed for whom he voted. The learned Judge was, therefore, justified in permitting the four voters who were examined as witnesses to waive the privilege and then disclose for whom each one of them voted. If any one of them wanted to claim the privilege, neither the Court nor any other authority could have compelled him to open his mouth and he could have kept his lips sealed but there the embargo placed by s. 94 ends. Once the voter chooses to waive the privilege and volunteers to disclose for whom he voted there is no contravention of s. 94 nor any other provision of the Act and there is no illegality involved in it.

It was, however, contended that apart from the prohibition enacted in s. 94 ensuring secrecy of ballot, the order dated October 25, 1977, is erroneous and unsustainable on facts disclosed in the petition and the evidence recorded till the date of the order. It was contended that the allegations in this behalf in the election petition are vague and wholly devoid of particulars. Says, Mr. Mridul, that virtually the petitioners themselves confess this position when they say that they were hardly in a position to make any specific assertion, a fact demonstrably established, that the election petitioners were not in a position to state the exact method and process adopted by the returning officer and his associates in tampering with the postal ballot. Undoubtedly, in para 18 of the petition the election petitioners have said that they are not in a position to state the exact method and process adopted by the returning officers and his accomplices to tamper with the postal ballots. This is in substance a petition for recount. True, recount cannot be ordered just for the asking. A petition for recount after inspection of the ballot papers contain an adequate statement on material facts on which the petitioner relies in support of his case and secondly the Tribunal must be prima facie satisfied that in order to decide the dispute and to do complete justice between the parties an inspection of the ballot papers is necessary. The discretion conferred in this behalf should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fishing out materials for declaring the election void. Only on the special facts of a given case sample inspecting may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount and not for the purpose of fishing out materials. This is well settled by a catena of decisions. (see Jitendra Bahadur Singh v. Krishna Behari & Ors.,(1) Smt. Sumitra Devi v. Sheo Shanker Prasad Yadav & Ors.,(2) Bhabhi v. Sheo Govind & Ors.,(3) Ram Autar Singh Bhadauria v. Ram Gopal Singh & Ors.,(4) and R. Narayanan v. S. Semmalai & Ors(5).

The petitioners aver in the petition that the returning officer in collaboration and conspiracy with the Superintendents of Jails and under the directions of Giani Zail Singh the then Chief Minister, to help the present appellant, tampered with the postal ballots and changed four of them to this extent that they should be considered and counted as first preference votes for the appellant instead of respondent 1, the unsuccessful candidate. There is also an assertion that when the postal ballot papers were sorted out for the purpose of counting, M. S. Khera. P.W. 2, the counting agent of respondent 1 found to his dismay that the four postal ballot papers were tampered with and the manner in which the tampering appeared to have been done has also been set out in the petition. It was also stated that there was overwriting and there were interpolations in the ballot papers inasmuch as what was originally first preference vote was made to appear second preference and the first preference vote was indicated in favour of the appellant. It was alleged that the counting agent M. S. Khera and his companions objected to receiving the four tampered postal ballot papers in favour of the appellant. This shows that there were sufficient allegations in the election petition about the tampering of four postal ballot papers. Undoubtedly, the method employed in tampering being hatched in and carried out in secrecy may not be known or may not come to light but the result of tam-

pering became manifest as soon as the postal ballot papers were taken out of the envelopes and sorted out for counting. Coupled with this one must remember that eight electors being members of the Legislative Assembly had voted by postal ballot. Those who opted for postal ballot papers were detenus detained under the Maintenance of Internal Security Act. Who they were was known to

every one inasmuch as seven of them belonged to Akali Party and one was a member of Jan Sangh. Their political alignments were known. Therefore, when the postal ballot papers were opened and the counting agent of Akali candidate respondent 1 found that four out of eight postal ballot papers appeared to have been tampered with it was easy for him to deduce that the four voters belonging to Akali Party, if the ballot disclosed a true state of affairs, had cast their votes in favour of the appellant, a candidate opposed to the official Akali candidate. Simultaneously a mere glance at those tampered postal ballot papers would show that the tampering was rather crude and no expertise was necessary to form an opinion that these four postal ballot papers were tampered. And these allegations have been made in the petition. A petition for a recount on the allegation of miscount or error in counting is based upon not specific allegation of miscounting but errors which may indicate a misconduct and recount becomes necessary. When it is alleged that postal ballot papers were tampered with, the implication in law is that those postal ballot papers have been wrongly received in favour of a candidate not entitled to the same and improperly refused in favour of the candidate entitled to the same, and this is a miscount and recount is necessary. In the very nature of things the allegation can be not on each specific instance of an error of counting or miscount but broad allegations indicating error in counting or miscount necessitating a recount.

Coupled with the allegation in the petition, when the election petitioners started examining the witnesses on their behalf, Shri M. S. Khera, P.W. 2 a practising Advocate and counting agent for the unsuccessful Akali candidate gave evidence to the effect that when eight envelopes containing postal ballot papers were taken up for counting two of them were found properly sealed and seal of the Superintendent of the Jail was decipherable. However, the wax seal on the other six envelopes containing ballot papers was not decipherable at all. He said that these six envelopes containing ballot papers did not have the seal of the Superintendent of Jail from where they were despatched. His evidence was further to the effect that after the small inner envelopes containing the ballot papers were opened and the ballot papers were put down on the table with their faces in reverse so that the agents and candidates could not see as to for whom the vote had been cast, he kept a close watch. Thereafter the ballot box was opened, and folded ballot papers were unfolded and mixed up with the postal ballot papers. Thereafter, according to him all these ballot papers were placed in different trays earmarked for the candidates and counted with regard to their preferences. Then comes the very important statement which may be extracted :

> "When this was done, I noticed that the bundle of the returned candidate S. Raghbir Singh contained four postal ballot papers and these had first preference in favour of the returned candidate S. Raghbir Singh and second preference in favour of S. Gurcharan Singh Tohra. The reason only which I could detect this was that the pencil used for marking first preference in the booth was a red one whilst the postal ballots on the other hand had been marked with blue ink and one of them had been marked with red-ball-point. It was, therefore, that I could detect that these were postal ballots. My suspicions were at once aroused because I could not conceive that the postal ballots which were from the leaders of the Akali Party could be of second preference for Mr. G. S. Tohra.

I then asked the Returning Officer to recount the ballot papers of the returned candidate as I seriously doubted the counting thereof. He did so and in the process of this recount I particularly kept a sharp eye on these four ballot papers. Indeed I asked him to count the ballot papers for the third time and he complied with my request as my object was to see as minutely and as surely as possible these ballot papers. In the process aforesaid I found that two out of the four postal ballot papers which were marked with a blue ink were heavily overwritten and especially so as regards the marking for the second preference. The third ballot paper was not as heavily overwritten but it was clear that this also had been so done twice or thrice. As regards the fourth ballot paper marked with a red ballpoint the second preference marking showed a difference in colour of the two lines and as distinguished from the other three which were marked in the Roman whilst this contained two parallel lines for two. From these observations at least I was convinced that the postal ballot papers had been tampered. The aforesaid tampe-

ring was in the column opposite the name of S. Gurcharan Singh Tohra."

If the allegations in the petition coupled with the evidence of PW.2, M. S. Khera, the counting agent is evaluated, what further proof was needed for inspection of ballot papers? His cross-examination on the relevant point, to say the least, is inept and the witness has remained unshaken. It was, however, contended that evidence of M. S. Khera should not be accepted because he is an interested and partisan witness and his evidence lacked credibility because there was no contemporaneous follow up action taken by him by raising objection in writing and as a practising advocate he was expected to know that such a serious malpractice when noticed by him should have found its place in a contemporaneous written record. It was said that he was aware of the necessity of raising a written objection because on an earlier occasion he in fact did so when voter Shri Karnail Singh Marhari had shown his ballot paper to Shri Prithi Pal Singh which is impermissible. It was also said that election petitioners after making serious allegations in the petition, shunned the witness box and, therefore, the case should be rejected. The criticism is not well merited. Non-appearance of election petitioners in the witness box has to be appreciated in the background of the nature of allegations. And let it be noted that the appellant against whom various allegations were made equally shied off from the witness box. Further, in view of the nature of allegations, P.W. 2 M. S. Khera and the four voters would provide the best evidence. The accusation that P.W. 2 M. S. Khera is not an independent witness may be appreciated in the light of the fact that in an election fought on party lines the election agent, the polling agent and the counting agent of any candidate would ordinarily be one who shares his political philosophy and owes allegiance to the party discipline. The undisputed fact that he was a counting agent establishes his presence at the relevant time. After postal ballot papers were taken out and mixed up and then unfolded for the purpose of counting, if the counting agent keeps a watchful eye he is bound to notice the glaring tampering. He did in fact lodge an oral protest and at his instance recount was ordered thrice. His failure to prepare and submit a contemporaneous written record of what he had noticed cannot detract from his evidence. And a written contemporaneous protest at the counting is not a condition precedent to filing an election petition for recount. It thus clearly transpires that the allegation in the petition coupled with the evidence of M. S. Khera would rather satisfy the test laid down by this Court, namely that the

learned judge had material to be prima facie satisfied that in order to decide the dispute and to do complete justice between the parties an inspection of ballot papers was necessary. The discretion used in this behalf is amply justified.

Once the inspection of ballot papers was permitted and the four voters PW. 13 S. S. Barnala, P.W. 14 Jagdev Singh Talwandi, P.W. 15 Jaswinder Singh Brar and P.W. 16 Prakash Singh Badal were examined and each one was shown his ballot paper and each one volunteered to give information as to for whom he voted, it became crystal clear that their ballot papers were tampered with. In an election of a member to Council of States, the election is by a system of proportional representation by means of the single transferable vote. Each voter had to show his preference by marking his first, second preference. etc. and he may mark as many preferences as there are candidates. But no candidate can mark his first preference for more than one candidate which if done would render his vote invalid (vide Rule 73 of the Rules). The four voters in their respective evidence emphatically stated that each one of them cast his first preference vote in favour of the Akali candidate respondent 1 and did not cast second preference vote in favour of any one else. Their ballot papers show that their first preference is in favour of the appellant a candidate opposed to the Akali candidate and the second preference is in favour of the Akali candidate. This evidence was objected to on two grounds, firstly, that it violates secrecy of ballot, and secondly, that the witnesses answered the question and there is nothing to show that they volunteered the information. When it is said that no witness would be required to disclose for whom he has voted it does not mean that he cannot be questioned but it merely implies a privilege of the voter to refuse to answer the question without incurring any liability and if the witness volunteers the information even in answer to a question, s. 94 of the Act is not violated. Coupled with this is the evidence of the expert P.W. 17 Dewan K. S. Puri. On this evidence it is affirmatively established that these four ballot papers have been tampered with and the alteration of ballot papers disclosing tampering is to the effect that in each case the voter cast his first preference vote for respondent 1 which was altered to show second preference vote, and against the name of the appellant a first preference vote is indicated. A mere casual or cursory glance at the four ballot papers would convince even a lay man that these ballot papers have been tampered with. To say the least, the tampering is rather crude and lacks finnese. In the light of this evidence R.W. 1 Partap Singh, the Returning officer, cuts a sorry figure. He has an ostrich like attitude because he observes no tampering. His evidence has to be discarded.

Mr. Mridul frankly said on behalf of the appellant that the finding of the learned judge that these four ballot papers have been tampered with is not questioned in this appeal. With his usual fairness he said that this Court may proceed upon the basis that these four ballot papers have been tampered with. He made it abundantly clear that the limited concession on behalf of the appellant is that the four ballot papers show overwritings and difference in ink and the use of different instruments. This concession spares us the agonising task of reappraisal of evidence of two experts. But even here both the experts are agreed that there is overwriting, the variance being the source of overwriting. In fact, in an election appeal under s. 116A of the Act this Court does not ordinarily interfere with the finding of fact reached by the High Court particularly when the High Court comes to a conclusion on appreciation of all material evidence placed before it. As a corollary this Court would be slow to interfere with such findings of fact based on appraisal of evidence unless there is something radically wrong with the approach of the learned judge trying the election petition (see Ramji Lal v.

Ram Babu Maheshwari & Anr.,(1) D. Gopala Reddy v. S. Bai Talapalikar & Ors and Sumitra Devi.(2) It must, therefore, be held succinctly established that the four ballot papers of the four witnesses have been tampered with and if their evidence is to be accepted, the tampering is to the effect that each one of them had cast his first preference vote in favour of respondent 1 but it was altered to show that it was a second preference vote and the first preference vote was cast in favour of the appellant.

Mr. Mridul, however, contended that in the circumstances disclosed in this case a possibility that the tampering was indulged into by the very four voters cannot be ruled out and it is impermissible to further probe into the matter. This argument has merely to be mentioned to be rejected. Eight postal ballot papers were received. Out of the detained M.L.A. voters under Maintenance of Internal Security Act, seven belonged to Akali Party and one to Jan Sangh. Akali Party and Jan Sangh had alig-

ned against Indian National Congress. Detenus exercised the option of voting by postal ballot. Strength of the constituency. i.e. Punjab Legislative Assembly and the Partywise strength at the relevant time was under :

Indian National Congress	65 members.
Communist Party of India	10 members.
Akali Party	25 members.
Jan Sangh	1 member.
Communist Party (Marxist)	1 member.
TOTAL :	102 members.

Indian National Congress and Communist Party of India had aligned in this election. Similarly, Akali Party, Jan Sangh and Communist Party (Marxist) had aligned in opposition. Now, when the election is by the system of proportional representation by means of the single transferable vote, it is easy to work out the mechanics of voting party strengthwise after ascertaining the quota. Being conscious of the position the Indian National Congress fielded only two candidates. Appellant was not a candidate of the Indian National Congress. He was in fact claiming to be an independent candidate but the respondents contend that he was supported by the then Chief Minister Giani Zail Singh who was keen to snatch the third seat though on the purely arithmetical calculation and partywise voting there was no ghost of a chance for him to be elected. The quota was worked out at 25.51 first preference votes. Even if the two official candidates of Indian National Congress were assigned specific votes to the exent of quota only, the third candidate supported by that party would have 14 first preference Congress votes and 10 first preference votes of the Communist Party of India. Against that, the Akali candidate would have 27 first preference votes. As a measure of abundant caution the Congress Party seems to have divided its votes between two of its candidates as would be evident from the result of voting that the two candidates secured 29 and 27 first preference votes. Thus 56 first preference votes from among the combined strength of 75 of the Congress and Communist Party of India were appropriated by the two official candidates. The third candidate could at best expect 19 first preference votes. He has secured 23 first preference votes. Mr. Mridul urged that these four voters deliberately pretended to vote for Akali Party candidate so as to

avoid any disciplinary action by the Akali Party but in fact they were keen to vote for the appellant. This necessitates examination of who these four voters are. Out of the four, one is Sardar S. S. Barnala who, when be gave evidence, was Member of Parliament elected on Akali ticket an associate of Janata Party and was a Member of the Central Cabinet. Second was Sardar Parkash Singh Badal who was elected on Akali ticket and associated with Janta Party and joined first as Cabinet Minister in 1977 March when Janata Party was returned to power in 1977 general elections and then subsequently he became Chief Minister of Punjab. The third was Sardar Jagdev Singh Talwandi who was a member of working committee and subsequently became the Vice President of Akali Dal and since the death of Sant Fateh Singh he was President of the Akali Dal. The last is Sardar Jaswinder Singh Brar who was elected to Punjab Legislative Assembly on Akali ticket. He had courted arrest in response to a call given by the Party. He became a Minister when Akali Party formed Ministry after the election to the Punjab Legislative Assembly in 1977. Coupled with this is the fact that all the four were arrested under Maintenance of Internal Security Act by the Government led by Giani Zail Singh who was alleged to be supporting the appellant in his bid to get elected. Even though it is pointed out that there were defections from the Akali Party it is difficult to believe that these members who belonged to the hard core of the Akali Party, denied their liberty by a Party in power and opposed to it, would ever contemplate voting for a protege of the Chief Minister whose Government was responsible for deprivation of their liberty. Again, these four persons were detained in three different jails. There was no meeting of the minds that in each case, unless a case of mental telepathy is made out, each started with a hesitation to vote for Akali Party and, therefore, voted for respondent 1 and before the ballot paper was sealed in an envelope specially provided for the same he changed his mind and indulged into overwriting indicating that the first preference vote was cast in favour of the appellant. Unless a number of fortuitous circumstances and some untenable surmises are indulged into, it is impossible to entertain this contention. And as for defections from Party, less said the better in this judgment because like the biblical phrase. "Let that man cast the first stone who has not committed a sin", similarly, "Let that Party complain of defections whose birth is not rooted in defections or has not suffered defections". And against this innuendo there is the evidence of the four witnesses to whom no such suggestion was made and it has remained unshaken. Common course of human conduct and prudent man's approach militates against acceptance of such contention.

It is, therefore, an inescapable conclusion that after each of these four voters cast his first preference vote in favour of the Akali candidate and handed in sealed envelopes but before the envelopes contain-

ing the ballot papers were opened at the time of counting someone has indulged into mischief of tampering with these votes. That the votes have been tampered with has not been questioned. The nature of tampering and the advantage derived thereby is self-evident.

The question then is, who would be interested in this tampering ? It must be confessed that there is no direct evidence on this point and presumably there could be none on such a point unless some accomplice betrays the confidence of the conspirators. Petitioners made serious allegations against the Returning Officer but that again is a matter of surmise. It is not possible to say that the Returning Officer obliged the then Chief Minister and was amply rewarded. So also we need not

examine the suggestion that the Sub-Post Master was amply rewarded. The most uncongenial fact that stares into the face is that these four ballot papers have been tampered with and the tampering has benefited none else than the appellant. We say no more.

The second limb of the submission was that even if the tampering of the four ballot papers is held proved, in view of the provision contained in s. 64A of the Act the election petitioners could have obtained relief from the Election Commission as befit the circumstances of the case but not the relief granted to them. Section 64A(i) reads as under:-

> "64A. Destruction, loss, etc., of ballot papers at the time of counting-(1) If at any time before the counting of votes is completed any ballot papers used at a polling station or at a place fixed for the poll are unlawfully taken out of the custody of the returning officer or are accidentally or intentionally destroyed or lost or are damaged or tampered with, to such an extent that the result of the poll at that polling station or place cannot be ascertained, the returning officer shall forthwith report the matter to the Election Commission".

Undoubtedly s. 64A comprehends tampering of ballot papers used at a polling station to such an extent that the result of the poll at that polling station cannot be so ascertained, and in that event the procedure prescribed in that section can be availed of. Section 64A envisages a situation where tampering, damaging, destruction or loss of ballot papers used at a polling station is on such a large scale that the result of the poll at that polling station cannot be ascertained. Such is not the situation. Here four ballot papers received as postal ballot papers are shown to have been tampered with. They were sent from different jails. It cannot be said that because of this tampering the votes cast by the ballot papers could not be ascertained. On the contrary they can be succinctly ascertained and have in fact been ascertained. Therefore, s. 64A is not attracted in the facts and circumstances of this case.

Alternatively it was contended that where certain ballot papers are shown to have been tampered with, all that a Court ought to do is to ignore them and it is not open to the Court to attempt to ascertain as to for whom the vote was cast. Support was sought for this proposition from an observation of this Court in Jagannath Rao v. Raj Kishore & Ors.(1) wherein, after recording a finding that the ballot papers have been tampered with in the High Court at the time of inspection it was observed that in the circumstances the only proper course was to proceed on the basis that the decision of the Returning Officer should be presumed to be correct, and there was no point in the Court trying to find out as to which candidate had obtained more valid votes. The decision does not purport to lay down a wider proposition canvassed on behalf of the appellant in this case that as soon as it is shown that some ballot papers have been tampered with, the Court has merely to chart an easy course of rejecting those ballot papers. Such an approach, apart from anything else, would be a premium on unfair election practice. Where voting is by the system of proportional representation by means of the single transferable vote, if a tampering as of the nature indulged into in this case is brought to light, the necessity of rejecting such ballot papers as invalid would give an unfair advantage to the very person who indulged into such practice. Rule 56 of 1961 Rules would shed some light on this point. Sub-rule (2) provides various situations in which the returning officer

is under an obligation to reject a ballot paper. It does not refer to a tampered ballot paper though it refers to damaged and mutilated ballot paper and how it should be dealt with. Sub-rule (2) further provides that every ballot paper which is not rejected under the rule shall be counted as one valid vote. And in this case the Returning Officer did not reject the ballot paper as being invalid. In such a situation once tampering is held proved if the circumstances permit and evidence of unquestionable character is available it would be perfectly legitimate for the Court in an election petition to ascertain for whom the vote was cast before it was tampered with and if it can be ascertained as a valid vote it must be accepted as such. Any other approach has an inbuilt tendency to give an unfair advantage either to the candidate who himself might have indulged in tampering or someone who must have acted for his benefit.

In this context it was further contended that the Court should not examine the question of benefit which is an equitable principle as it belongs to the doctrine of equity known as that of unjust enrichment. This question does not arise in the situation disclosed in this appeal and it is not necessary to examine the same.

It was lastly contended that the grievance made by the election petitioners in the petition and sought to be established in the case could not be comprehended under s. 100 of the Act and, therefore, no relief could be granted either to respondent 1 or to the election petitioners. Section 100 sets out grounds for declaring election to be void. The relevant portion of s. 100(1)(d)(iii) provides as under:

> "100. Grounds for declaring election to be void- (1) Subject to the provisions of sub-section (2) if the High Court is of opinion-
>
> (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-
>
> (iii) 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".

Section 100(1)(d)(d)(iii) comprehends a situation where the result of an election in so far as it concerns a returned candidate has been materially affected by improper reception, or improper refusal of any vote or the reception of any vote which is void. The objective 'improper' qualifies not only the word 'reception' but also the word 'refusal'. When a vote is received by the Returning Officer at the time of counting it implies two things, that it is not only received as a valid vote but that the valid vote is cast in favour of one of the contesting candidates at the election. Similarly, when it is said that there is improper refusal of any vote it implies again two things, viz., a vote which ought to have been accepted as valid vote has been improperly refused as an invalid vote, or there is an improper refusal to accept the vote in favour of a particular candidate. On a pure grammatical construction of the relevant clause it cannot be gainsaid that an improper reception of any vote or an improper refusal of any vote implies not only reception or refusal of a vote contended to be invalid or valid, as the case may be, but consequent reception in favour of any contesting candidates at the election which would simultaneously show the vote being refused in counting to

any other candidate at the election. The expression `refusal' implies `refuse to accept' and the expression `reception' implies `refuse to reject'. Apart from the setting and the context in which the clause finds its place, in its interpretation it is to be borne in mind that it seeks to specify one of the grounds for declaring an election to be void. In this situation the expressions `improper reception' and `improper refusal' have to be interpreted as would carry out the purpose underlying the provision contained in s. 100.

In the instant case the contention is that each of the four voters cast his first preference vote in favour of respondent 1 and did not cast any second preference vote at the time when each of them exercised his franchise and subsequently these four ballot papers were tampered with by altering them to show that not only each of the four voters cast both first and second preference votes but each of them had cast his first preference vote in favour of the appellant and second preference vote in favour of respondent

1. If once tampering is held proved and not controverted in this appeal, keeping in view the direct testimony of four voters that each one of them signified his first preference vote in favour of respondent 1, the action of the Returning Officer in counting these votes as first preference votes in favour of appellant, would imply improper reception of the first preference vote in favour of appellant for whom it was not meant to be and simultaneously it would imply improper refusal by the Returning Officer to count these four votes as first preference votes in favour of respondent 1 and also concluding that each of them had not exercised his franchise of second preference vote. What was said before this Court was, and we would accept it as a limited concession, that the four ballot papers show overwritings and difference in ink or different instruments used, it would unquestionably establish that what these four ballot papers purported to be at the time of counting were not the ballot papers in their original condition when the four voters exercised their franchise. In such a situation it was the bounden duty of the Returning Officer at the counting as per the second proviso to sub-rule (2) of rule 56 to ascertain the intention of the voter by finding out for whom the vote was cast and add the vote for the candidate for whom it was meant to be. Proviso to sub-rule (2) shows that the ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote shall be for a particular candidate clearly appears from the way the paper is marked. Shorn of tampering, the intention of each voter was clearly indicated and if the gloss of tampering was removed the Returning Officer would have no difficulty in ascertaining the intention of the voters after so ascertaining the intention count the vote accordingly. It is not open to him to take an easy escape route as was contended in this case that once tampering is shown, the ballot paper should be rejected as invalid. The Court in an election petition will have to undertake this exercise.

The ground on which the election is sought to be avoided in the election petition is clearly covered by s. 100(1)(d) (iii). Even apart from this, this position is no more res integra in view of the decision of a Constitution Bench of this Court in Mohinder Singh Gill & Anr. (supra). Krishna Iyer, J., has neatly summed up all embracing and pervasive panorama covered by s. 100 which reads as under :

> "Knowing the supreme significance of speedy elections in our system the framers of the Constitution have, by implication, postponed all election disputes to election

> petitions and tribunals. In harmony with this scheme s. 100 of the Act has been designedly drafted to embrace all conceivable infirmities which may be urged. To make the project foolproof s. 100(1)(d) (iv) has been added to absolve everything left over. The Court has in earlier rulings pointed out that s. 100 is exhaustive of all grievances regarding an election".

Therefore, the wide comprehensive panorama of s. 100 will certainly embrace the grievance made by the election petitioners in this petition. Conversely, s. 80 provides that no election shall be called in question except by an election petition presented in accordance with the provisions of Chapter II in the Act. Section 100 which finds its place in Chapter III sets out grounds for declaring election to be void. If the contention of the appellant that the grievance for voiding the election made in the petition is not comprehended in any of the sub-sections of s. 100 is accepted and there is no other provision in the Act for voiding election, the election petitioners would be without a remedy. It would mean that even though one can indulge into forgery-what is tampering of ballot papers, if not forgery,-and get away with it. In order to ensure the purity of election it is better to so construe s. 100 as to embrace within its fold, as has been done by the Constitution Bench, all conceivable infirmities which may be urged for voiding an election. Therefore, the contention of the appellant must be negatived.

Having examined all the contentions of the appellant with care that an election appeal deserved, I find no merit in any of them and accordingly this appeal fails and is dismissed with costs. Hearing fee in one set. Interim relief, if any, granted during the pendency of the appeal is hereby vacated.

GUPTA, J. I agree with the order made by my learned brother Desai, J. and the essential reasoning in support of it.

S.R. Appeal dismissed.