P. MALAICHAMI

v.

M. ANDI AMBALAM & ORS.

April 18, 1973

[D. G. PALEKAR AND A. ALAGIRISWAMI, JJ.]

Representation of People's Act, Sec. 97 Recrimination petition—Necessity of—Respondent challenging election of appellant and seeking declaration of election himself—Appellant not filing Recrimination petition u/s 97—In general recount valid votes cast in favour of appellant cannot be taken account for non-compliance of sec. 97—High Court would have no jurisdiction.

The respondent filed an election petition, not only questioning the election of the appellant but also claiming the seat for himself, alleging infraction of the Conduct of Election Rules. Accordingly, he prayed for recounting of the votes and for declarations that he was duly elected and that the election of the appellant was void. The appellant in his counter affidavit denied all the allegations in the petition. However, the appellant did not file any Recrimination application u/s 97 of the Act. The respondent filed an interlocutory application for directing a scrutiny and recounting of all the votes. The evidence was duly recorded and the learned Judge of the High Court eventually passed an order on various grounds for recount of the votes. As a result of the recount, it was finally found that the majority of 127 votes by which the appellant had been declared elected was reduced to 75 votes.

The respondent urged before the High Court that in a case where the election petitioner had applied not merely for setting aside the election of the successful candidate but also for declaring himself (the defeated candidate) as elected, it was the duty of the successful candidate to have filed a Recrimination application u/s 97 of the Act. The High Court took the view that in the absence of the Recrimination petition u/s 97 the appellant was not entitled to question any votes which might have been improperly received on behalf of the respondent. Consequently, the High Court found that leaving out of account votes improperly received on behalf of the respondent and taking into account only the votes which ought to have gone to the respondent which had been improperly rejected, the respondent had secured 96 votes more than the appellant and declared him elected.

On appeal to this Court the appellant made the following submissions : (i) Sec. 97 has no application to a case where a prayer is for total count and re-scrutiny; (ii) Sec. 97 has no application to the present case where the returned candidate let in or did not have to let in any evidence on any single vote all of which were produced and tendered in evidence by the election petitioner notwithstanding the respondent's protest; iii) Since no case has been made out in respect of individual votes and no finding given for inspecting individual votes, the petitioner would not be entitled to the benefit of the decision in *Jabar Singh's case* [(1964) 6 S.C.R. 54] and his right is only to a general recount or none at all; (iv) The respondent is estopped from questioning the result of the recount because of mutual concessions; (v) The present case is wholly different from the one in *Jabar Singh* v. *Genda Lal* and the whole question should be reconsidered by a larger

A bench in view of Justice Rajagopala Ayyangar's dissenting judgment; and (vi) The democratic process should be allowed to have full sway and no more technicality should be allowed to come in the way of justice being done.

Dismissing the appeal,

B HELD : (1) The appellant did not comply with the requirements of Sec. 97 of the Act. The appellant had not given notice u/s 97 within 14 days of his appearance to give evidence to prove that the election of the respondent would have been void if the respondent had been the returned candidate nor had he given the security and further security referred to in sections 117 and 118 respectively nor was there any statement and particulars as required u/s 83 in case of an election petition. Even when an attempt was made to file a recrimination peti-
C tion with a petition to excuse the delay, the other requisites of Sec. 97 were not complied with. [1032–G–1033B]

(2) The respondent's prayer for recount was not a request for mere mechanical process of counting but for counting contemplated u/r. 56 with all its implications. The very grounds on the basis of which the re-count was ordered by the learned Judge show that there was a possibility of mistakes having arisen under any one of the grounds set
D out in R. 56 (2) clauses (a) to (h) and it is to have them taken into account and tested correctly that the respondent wanted recount. When the respondent wants recount for the purpose of setting aside the appellant's election, he necessarily has got to have not merely the benefit of votes which would have originally gone to him but which had been wrongly given to the appellant but also all votes which had been cast in his favour but had been rejected wrongly on one or the other grounds mentioned in R. 56(2) clauses (a) to (h). It was
E necessary for the purpose of respondent's case not merely that votes which were held invalid should be re-scrutinised but also votes which had been held to have been cast in favour of the appellant. The improper reception or rejection, therefore, would include not merely cases where a voter appears before the Presiding Officer at the time of the polling and his vote is received where it should not have been received and his vote rejected where it should not have been rejected. The
F improper rejection or reception contemplated u/s 100 (i)(d)(iii) would include mistakes or wrong judgments made by the Returning Officer while counting and exercising his powers under R. 56(2) clauses (a) to (h). [1035D-H]

The appellant knew not only that the respondent wanted his election to be set aside but also that he wanted himself declared elected. He
G should have, therefore, filed a recrimination petition in proper compliance with Sec. 97.

The election petition is not an action in law or a suit in equity but one under the provisions of the statute which has specifically created that right. If a relief provided under the statute can be obtained only by following a certain procedure laid down therein for that purpose, that procedure must be followed if the relief is to be obtained. It is
H not a question of mere pleading. It is a question of jurisdiction. The Election Tribunal had no jurisdiction to go into the question whether any wrong votes had been counted in favour of the election petitioner. who had claimed the seat for himself. unless the appellant had filed a recrimination petition u/s 97. [1037D]

(3) It was not necessary to lead evidence in respect of any individual vote about the improper reception or improper rejection as the decision on that question had been given mostly on concessions by both the parties and in disputed cases by the Judge himself scrutinising the votes. There is no such thing as a general recount and there is no authority in law for suggesting that all that the respondent could have asked for was either a general recount or none at all. [1037F]

(4) No question of estoppel arises, where the law provides that no evidence can be given about the improper reception of votes in favour of the defeated candidate who had claimed a seat for himself unless the successful candidate had complied with Sec. 97. Concession is akin to admission and the use of such an admission would be evidence. What is barred under the proviso to Sec. 97 is the giving of evidence by the appellant. The evidence furnished by the valid as well as invalid votes in favour of both the petitioner and the respondent was not admissible because of the appellant's failure to comply with the provisions of Sec. 97. [1038B]

(5) There is no justification for ordering that the case should be heard by a larger bench for re-consideration of the decision in *Jabar Singh's* case.

(6) Courts in general are averse to allow justice to be defeated by a mere technicality. But in deciding an election petition, the High Court is merely a Tribunal deciding the election dispute. Its powers are wholly the creature of the statute under which it is conferred the power to hear the election petition. The election petition is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and the Court possess no common law power. Though the election of a successful candidate is not to be lightly interfered with one of the essentials of that law is also to safeguard the purity of the election process and also to see that people do not get elected by flagrant breaches of that law or by corrupt practice. [1029C]

Kamaraja Nadar v. *Kunju Thevar*, [1959] S.C.R. 583 at 596, *Venkateswar* v. *Narasimha*, [1969] 1 S.C.R. 679 at 685, *Ch. Subbarao Member, Election Tribunal*, 1964 D.E.C. 270, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 649 of 1972.

Appeal under S. 116A of the Representation of the People Act, 1951 from the judgment and order dated March 13, 1972 of the Madras High Court in Application No. 648 of 1972, and E.P. No. 2 of 1971.

K. K. Venugopal and *A. Subhashini*, for the appellant.

T. N. Srinivasa Varadacharya, G. Viswanathan, K. Jayaram and *R. Chandrasekhara*, for respondent No. 1.

M. C. Chagla and *A. V. Rangam*, for respondents Nos. 3 and 4.

A The Judgment of the Court was delivered by

ALAGIRISWAMI, J. This appeal arises out of the election held in March 1971 to the Tamil Nadu Legislative Assembly to fill a seat from the Melur (North) constituency in Madurai district in which the appellant was declared elected by a majority of 127 votes receiving 37,337 votes as against 37,210 received by the respondent B 3,381 votes were held invalid. The respondent filed an election petition on 23-4-1971 not only questioning the election of the appellant but also claiming the seat for himself. He made various allegations in his petition which related to infraction of many of the rules regarding the conduct of election. But we may refer to four important matters, which he had referred to in his petition, the C importance of which would become clear in due course. In paragraph (g) of his petition he has stated :

> "The mixing of the papers, with rapid counting, has resulted in large number of votes polled in favour of the petitioner erroneously added and bundled in the votes D polled by the respondent. This has also resulted in wrong counting."

In paragraph (1) he has stated :

> "Therefore the petitioner submits that the ballot papers may be directed to be arranged according to the serial number and then counted. The petitioner submits E that this will reveal the introduction of unauthorised ballot papers, if any, and use of different inks for marking."

Paragraph (n) runs as follows :

> "The petitioner states that a number of votes have F been declared invalid without any justification whatsoever. Many of the votes declared invalid were cast in favour of the petitioner. In the counting, some of the invalid votes were taken in favour of the first respondent. In view of the mixing of the ballot papers counting was done hastily and rapidly without any opportunity to candidate or his agent to G supervise the counting. In fact, some of the numbers of counting were wrongly mentioned and went to the respondent instead of counting in the name of the petitioner. If recount has been taken the petitioner would have been declared elected."

In paragraph (s) it is stated : H

> "The petitioner also states that at the time of counting, the votes in favour of the petitioner were bundled in the bundles containing the votes in favour of the respon-

dent and they were counted for the first respondent. Nunmber of ballot papers were found outside the counting place." A

Finally, he prayed to the Court to:

(a) direct recounting of the votes;

(b) declare the petitioner duly elected;

(c) declare the election of the 1st respondent to Melur North Constituency void, and B

(d) . . . . . .

The appellant in his counter affidavit denied all the allegations in the petition. The respondent filed an interlocutory application for directing a scrutiny and recounting of all the votes. To this application no counter affidavit was at all filed by the appellant. C Five witness including the petitioner were examined on his side and on the respondent's side also five witnesses including the Returning Officer, the Assistant Returning Officer as well as the successful candidate were examined at great length. The learned Judge after an elaborate, careful, thorough and meticulous examination, which are almost a model of judicial balance and D propriety, passed an order for recount of the votes. We consider it unnecessary to set them out at length. It may be useful to set out the main grounds on which he ordered recount. These are found in paragraph 22 of his order.

"22. From the foregoing discussion, the following facts emerge : E

(i) Over-worked and tried personnel were employed for the counting. There are reasonable grounds to think that the counting was not done properly.

(ii) When the counting was in progress, the petitioner admittedly complained about the hasty counting, and there are reasonable grounds to think that on account F of the hurry and haste, in which counting was done, the counting was not likely to be correct or proper.

(iii) The unlawful entry of Mr. O.P. Raman into the counting hall, when the counting was going on, caused dislocation and disturbance to the counting, which was likely to have affected the accuracy in the count- G ing.

(iv) The Assistant Returning Officer could not have checked each of the ballot papers brought to him in the doubtful bundles in the way in which such papers should have been checked by him, having regard to the time within which he claims to have completed the H checking and counting, whereas much longer time would be required to check up these bundles in the

A proper and prescribed way. This leads to the reasonable inference that each of the ballot papers contained in the doubtful bundles was not checked.

(v) The order of the Returning Officer directing recounting of the ballot papers treated as invalid lends support to the contention of the petitioner that the B votes were not properly scrutinised.

(vi) The failure of the Returning Officer to implement his order to recount has vitiated the declaration of the result.

(vii) The Returning Officer and the Assistant Returning Officer totally failed to check up the valid votes and C this is clearly a breach of the instructions issued by the Election Commission and also by the State Government. There is no assurance that the votes were properly sorted and counted. There is reasonable possibility to hold that the counting was not proper; and

D (viii) The test check conducted by me of some of the ballot papers treated as invaild clearly shows that some valid votes secured by the petitioner and some secured by the respondent have been treated as invalid and rejected. This clearly shows that the counting was wrong."

F It would be noticed that the main attack was in respect of the counting and the findings of the learned Judge also related to the same question. The appellant had very hotly contested the propriety of the request for recount. The learned Judge considered the decisions in *Ram Sewak* v. *H. K. Kidwai*(1), *Jagjit Singh* v. *Kartar Singh*(2), *Jitendra Bahadur* v. *Krishna Behari*(3), *Swami Rameshwara Nand* v. *Madho Ram*(4), *Nathu Ram Mirdha* v. F *Gordhaba Soni*(5) and after a very elaborate consideration of the facts as well as the principles involved in those decisons had held that recount should be ordered. We are satisfied that the High Court has taken into consideration all the material circumstances and has appreciated the evidence from the correct perspective in coming to the conclusion that the circumstances under which the G counting was carried out necessitated a recount.

The recount was ordered to be done by four advocates acting as tellers, two from each side out of a list of four furnished by each side. Both the parties and their respective counsel were permitted to be present alongwith four counting agents for petitioner as well as the respondent and an Assistant Registrar of H the High Court was appointed to preside over the recount of the

(1) A.I.R. 1964 S.C. 1249 (2) A.I.R. 1966 S.C. 773
(3) A.I.R. 1970 S.C. 276 (4) 1968 (8) D.E.C. 163
(5) 1968 (8) D.E.C. 286.

ballot papers and to be assisted by the members of staff dealing with election cases. He was ordered to submit his report within two days after the completion of the recounting. It was ordered that on receipt of that report an opportunity will be given to both parties to be heard on that report and necessary orders will be passed thereon. The Assistant Registrar submitted his reports on 19-2-1972, and on 23-2-1972, 24-2-1972, 25-2-1972 and 28-2-1972, the Judge himself took up for decision the validity or otherwise of the various votes which were disputed and dictated orders then and there. Even before him some concessions were made in respect of certain votes by both the parties and some the Judge decided by himself. The Assistant Registrar himself dealt merely with votes which were conceded by one side or the other as having been validly cast in favour of the opposite side. Before him out of the votes which were held invalid by the Returning Officer, 2583 were agreed as rightly held invalid but there was dispute about 804 votes (it thus appears that there was a mistake even in the counting of the invalid votes). From out of the votes counted in rounds 8 to 11, 11,301 votes in favour of the respondent were conceded as valid and 395 were disputed; 11,951 were conceded as valid in favour of the appellant and 567 were disputed. Thus the total of these disputed votes amounting to over 1700 were decided by the Judge himself in the presence of the parties and their advocates, some on the basis of concessions, some as decided by the Judge himself, as already mentioned. It is necessary to mention also that as in the recount from among the votes held invalid by the Returning officer petitioner conceded 65 were valid votes cast for the respondent. He also conceded that 11 votes counted by the Returning Officer in his favour were valid votes cast for the respondent. 19 votes held by the Returning Officer as validly cast for the petitioner were conceded by him to be invalid. The total came to 95. Similarly 126 votes cast for the petitioner but rejected by the Returning Officer were found valid and 14 votes counted by the Returning Officer as cast for the respondent were found to have been really cast for the petitioner. These facts clearly establish large scale mistakes in counting. As a result of all this it was finally found that the appellant had got 37,372 votes and the respondent 37,297 votes. Thus the majority obtained by the appellant was reduced from 127 to 75.

It may be remembered that one of the grounds on which the learned Judge had come to the conclusion that recount should be ordered was that the unlawful entry of a Minister, Mr. O. P. Raman into the counting hall when the counting was going on, had caused dislocation and disturbance to the counting which was likely to affect the accuracy of the counting. The learned Judge had dscussed this question at length and before us a special Leave Petition was filed by the Returning Officer questioning the decision

A of the learned Judge in the petition for recount as well as in the main election petition. We had rejected that petition. But we should make it clear that the learned Judge has been very fair in his discussion of this matter. It seems to have been contended before him that Mr. Raman had a right to enter the place where the counting was going on, under Rule 66 of the Conduct of
B Elections Rules in order to get the certificate. The Minister concerned was the successful candidate for the Melur (south) Constituency, the counting for which was over at 5 a.m. on 11-3-71- in the same building. At 8 a.m. began the counting of the votes for the Melur (North) Constituency, i.e. the election in dispute. Mr. Raman was not a candidate in that election who was entitled
C under Rule 53 to be present in the room where the counting was going on. We cannot understand the anxiety of the Returning Officer in questioning the orders of the learned Judge in the petition for recount as well as the main election petition. After all the concerned parties were fighting it out under the ostensible excuse of questioning the decision of the learned Judge regarding his interpretation of rules 53 and 66, it has been filed really due
D to the hypersensitiveness on the part of the Minister. Indeed the learned Judge has made fairly strong remarks against the Returning Officer in other respects. He has stated at one place that the Returning Officer had failed in his duty, and at another place that the Returning Officer and the Assistant Returning Officer came forward with a story totally devoid of truth. Nothing is said in the
E petition about all this which shows that our inference on this point is correct. The petition on behalf of the Returning Officer was wholly uncalled for. It would appear that he is not a free agent.

After the counting was over, as already shown the majority in favour of the appellant was reduced from 127 to 75. Even so
F his election would have had to be sustained. But on behalf of the respondent it was urged before the learned Judge that in a case where an election petitioner had applied not merely for setting aside the election of the successful candidate but also for declaring himself (the defeated candidate) as elected, it was the duty of the successful candidate to have filed a Recrimination
G application under s. 97 of the Representation of the People Act. This argument was based on the decision of this Court in *Jabar Singh* v. *Genda Lal*(1). This Court there referred to the earlier decisions on the subject and by a majority of 4 to 1 held that in such a case it was the successful candidate's duty to have filed a recrimination petition under s. 97 which would be like a counter petition. It is unnecessary to set out the very instructive discussion
H in that case at length. It would be enough if the headnote alone is set out

(1) [1964] (6) S.C.R. 54.

"The appellant was declared elected having defeated the respondent by 2 votes. Thereafter the respondent filed an election petition. The respondent challenged the validity of the appellant's election on the ground of improper reception of votes in favour of the appellant and improper rejection votes in regard to himself. His prayer was that the appellant's election should be declared void and a declaration should be made that the respondent was duly elected.

The appellant urged before the Tribunal that there had been improper rejection of the votes, and improper acceptance of the votes of the respondent, and his case was that if recounting and re-scrutiny was made, it would be found that he had secured a majority of votes. The respondent objected to this course; his case was that since the appellant had not recriminated nor furnished security under s. 97 of the Act, it was not open to him to make this plea. The Tribunal rejected the objection of the respondent and accepted the plea of the appellant. The Tribunal re-examined the ballot papers of the respondent as well as the appellant and came to the conclusion that 22 ballot papers cast in favour of the respondent had been wrongly accepted. The result was that the respondent had not secured a majority of votes. The Tribunal declared that the election of the appellant was void and refused to grant a declaration to the respondent that he had been duly elected. Both the appellant and the respondent preferred appeals before the High Court against the decision of the Tribunal. The High Court dismissed both the appeals and the decision of Tribunal was confirmed. Hence the appeal.

Held : (1) The scope of the enquiry in a case falling under s. 100(1)(d)(iii) is to determine whether any votes have been improperly cast in favour of the returned candidate or any votes have been improperly refused or rejected in regard to any other candidate. These are the only two matters which would be relevant in deciding whether the election of the returned candidate has been materially affected or not. At this enquiry the onus is on the petitioner to prove his allegation. Therefore, in the case of a petition where the only claim made is that the election of the returned candidate is void, the scope of the enquiry is clearly limited by the requirement of s. 100(1)(d) itself. In fact s. 97(1) has no application to the case falling under s. 100(1)(d)(iii); the scope of the enquiry is limited for the simple reason that what

A the clause requires to be considered is whether the election of the returned candidate has been materially affected and nothing else.

(ii) There are cases in which the election petition makes a double claim; it claims that the election of a B returned candidate is void and also asks for a declaration that the petitioner himself or some other person has been duly elected. It is in regard to such a composite case that s. 100 as well as s. 101 would apply, and it is in respect of the additional claim for a declaration that some other candidate has been duly elected that s. 97 comes into play. Section 97(1) thus allows the returned candidate C to recriminate and raise pleas in support of his case. The result of s. 97(1) therefore, is that in dealing with a composite election petition the Tribunal enquires into not only the case made out by the petitioner, but also the counter-claim made by the returned candidate. In this connection the returned candidate is required to D comply with the provisions of s. 97(1) and s. 97(2) of the Act. If the returned candidate does not recriminate as required by s. 97, then he cannot make any attack against the alternative claim made by the petitioner. In other words the returned candidate will not be allowed to lead any evidence because he is precluded from raising E any pleas against the validity of the claim of the alternative candidate.

(iii) The pleas of the returned candidate under s. 97 of the Act, have to be tried after a declaration has been made under s. 100 of the Act. The first part of the enquiry in regard to the validity of the election of the F returned candidate must be tried within the narrow limits prescribed by s. 100(1)(d)(iii) and the latter part of the enquiry which is governed by s. 101(a) will have to be tried on a broader basis permitting the returned candidate to lead evidence in support of the pleas which he may have taken by way of recrimination under s. 97(1). G But even in cases to which s. 97 applies, the enquiry necessary while dealing with the dispute under s. 101(a) will not be wider if the returned candidate has failed to recriminate and in a case of this type the duty of the Election Tribunal will not be to count and scrutinise all the votes cast at the election. As a result of r. 57, the H Election Tribunal wall have to assume that every ballot paper which had not been rejected under r. 56 constituted one valid vote and it is on that basis the finding will have to be made under s. 101(a). Therefore, it is clear

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> that in holding an enquiry either under s. 100(1)(d)(iii) or under s. 101 where s. 97 has not been complied with it is not competent to the Tribunal to order a general recount of the votes preceded by a scrutiny about their validity."

B Rajagopala Ayyangar, J. was the solitary Judge who dissented from the majority judgment and we have gone through his judgment with all the care and the respect that it deserves and we do not see that it throws much light on the subject. It seems to ignore s. 97. We may also point out that in *Bhim Sen* v. *Gopali*,(1) which was considered in the above decision it was observed :

C

> "As we have already pointed out, in his first written statement respondent I made a positive averment that no void votes had been allowed to be used by the returning officer and that the returning officer had fully discharged his duties under section 63. It is true that after it was discovered that he had received 37 void votes respondent I attempted to make an allegation that the appellant may likewise have received similar void votes, but it was too late then, because the time for making such an allegation by way of a recriminatory proceeding had elapsed and respondent I had failed to furnish the security of Rs. 1,000 as required by section 97(2) of the Act. If under these circumstances respondent I was not allowed to pursue his allegation against the appellant, he is to blame himself."

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E

It was urged before this Court that in a subsequent decision in *Shankar* v. *Sakharam*(2) this Court itself had differed from the earlier decision. The relevant sentence reads like this :

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> "We also think that the enquiry under s. 100(1)-(d)(iii) is outside the purview of s. 97. On an enquiry under s. 100(1)(d)(iii) with regard to improper refusal of votes, the respondent to the election petition is entitled to dispute the identity of the voters without filing any recrimination under s. 97".

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This argument is clearly based on a misapprehension. The question that arises in this case did not arise there nor was the earlier decision in *Jabar Singh's* case referred to or distinguished. Indeed it was not necessary because they were dealing only with a case falling under s. 100, i.e. a case where the election of the successful candidate was sought to be set aside and not one also falling under s. 101 where the defeated candidate also wants that he should be declared to have been elected.

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(1) 1960 (22) E.L.R. 288. (2) [1965] (2) S.C.R. 403.

A In the present case apparently neither party was aware of the decision in *Jabar Singh* v. *Genda Lal* (supra) till after the counting was over. The learned Judge took the view that in the absence of a recrimination petition under s. 97 the appellant was not entitled to question any votes which might have been improperly received on behalf of the respondent. If that had been done the B appellant, as indicated earlier, would still have won by a majority of 75 votes but as he was not entitled to do so the result of leaving out of account votes improperly received on behalf of the respondent and taking into account only the votes which ought to have gone to the respondent, which had been improperly rejected it was found that the respondent had 96 votes more than the appel- C lant and he was declared elected.

The decision in *Jabar Singh* v. *Genda Lal* (supra) has received reconsideration at the hands of this Court with approval again in *Ravindra Nath* v. *Raghbir Singh*(1) where it was observed :

> "The object of s. 97 is to enable recrimination when D a seat is claimed for the petitioner filing the election petition or any other candidate. In his election petition the petitioner may claim a declaration that the election of all or any of the returned candidates is void on one or more of the grounds specified in sub-s. (1) of s. 100 and may additionally claim a further declaration that he himself or any other candidate has been duly elected on E the grounds specified in s. 101 (see ss. 81, 84, 98, 100 and 101). It is only when the election petition claims a declaration that any candidate other than the returned candidate has been duly elected that s. 97 comes into play. If the respondent desires to contest this claim by leading evidence to prove that the election of the other F candidate would have been void if he had been the returned candidate and an election petition had been presented calling in question his election, the respondent must give a formal notice of recrimination and satisfy the other conditions specified in the proviso to s. 97. The notice of recrimination is thus in substance a counter G petition calling in question the claim that the other candidate has been duly elected. In this background, it is not surprising that the legislature provided that notice of recrimination must be accompanied by the statement and particulars required by s. 83 in the case of an election petition and signed and verified in like manner and H the recriminator must give the security and the further security for costs required under ss. 117 and 118 in the case of an election petition.

(1) [1968] (1) S.C R. 104.

Looking at the object and scheme of s. 97 it is manifest that the provisions of ss. 117 and 118 must be applied *mutatis mutandis* to a proceeding under s. 97. The recriminator must produce a government treasury receipt showing that a deposit of Rs. 2,000 has been made by him either in a Government Treasury or in the Reserve Bank of India in favour of the Election Commissioner as costs of the recrimination. As the notice of recrimination cannot be sent by post, it must be filed before the Tribunal, and reading s. 117 with consequential adaptations for the purposes of the proviso to s. 97(1), it will appear that the treasury receipt showing the deposit of the security must be produced before the Tribunal along with the notice of recrimination. It follows that the recriminator must give the security referred to in s. 117 by producing the treasury receipt showing the deposit of the security at the time of the giving of the notice under the proviso to s. 97(1).

If the recriminator fails to give the requisite security under s. 117 at the time of giving the notice of recrimination, he loses the right to lead evidence under s. 97 and the notice of recrimination stands virtually rejected."

Mr. K. K. Venugopal, appearing on behalf of the appellant made four submissions :

1. Section 97 has no application to a case where a prayer is for total count and rescrutiny.
2. Section 97 has no application to the present case where the returned candidate let in or did not have to let in any evidence on any single vote all of which were produced and tendered in evidence by the election petitioner notwithstanding the respondent's protest.
3. Since no case has been made out in respect of individual votes and no finding given for inspecting individual votes the petitioner would not be entitled to the benefit of the decision in *Jabar Singh's* case and his right is only to a general recount or none at all.
4. The respondent is estopped from questioning the result of the recount because of mutual concessions.

Though stated in a different form the sum and substance of the very vigorous attempt on behalf of the appellant is to question in

A effect the validity of the decision in so far as it is held that s. 97 is applicable to the facts of this case. He even went so far as to suggest that this case is totally different from the one in *Jabar Singh* v. *Genda* Lal (supra) and the whole question, if necessary should be reconsidered by a much larger Bench in view of Justice Rajagopala Ayyangar's dissenting judgment. He finally urged that B the democratic process should be allowed to have full sway and no mere technicality should be allowed to come in the way of justice being done.

The last appeal is particularly interesting. Courts in general are averse to allow justice to be defeated on a mere technicality. But in deciding an election petition the High Court is merely a C tribunal deciding an election dispute. Its powers are wholly the creature of the Statute under which it is conferred the power to hear election petitions. An election petition, as has been pointed out again and again, is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and the Court possesses no common law power. It is always to D be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that the people do not get elected by flagrant breaches of that law or by corrupt practices (see the decisions in *Kamaraja Nadar* v. *Kunju Thevar*,(1) *Venkateswara* v. *Narasimha*(2) and E *Ch. Subbarao* v. *Member, Election Tribunal*(3). We may, therefore, look into the law regarding this matter. Under s. 81 of the Representation of the People Act, 1951 "an election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 to the High Court by any candidate at such election F or any elector within forty-five days from, but not earlier than, the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates." Section 83 reads :

"(1) An election petition—

G (a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) . . . . .

(c) shall be signed by the petitioner and veri- H fied in the manner laid down in the Code

(1) [1959] S.C.R. 583 at 596. (2) [1969] (1) S.C.R. 679 at 685
(3) 1964 D.E.C. 270.

of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings. A

(2) . . . . . ."

Section 84 reads :

"A petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected." B

Section 97 reads :

"(1) When in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election. C

Provided that the returned candidate or such other party as aforesaid shall not be entitled to give such evidence unless he has, within fourteen days from the date of commencement of the trial, given notice to the High Court of his intention to do so and has also given the security and the further security referred to in sections 117 and 118 respectively. D E

(2) Every notice referred to in sub-section (1) shall be accompanied by the statement and particulars required by section 83 in the case of an election petition and shall be signed and verified in like manner."

Section 100 reads : F

"(1) Subject to the provisions of sub-section (2) if the High Court is of opinion—

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

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

(c) that any nomination has been improperly rejected; or

A

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

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

B

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

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

C

(vi) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

the High Court shall declare the election of the returned candidate to be void.

D

(2) If in the opinion of the High Court, a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice but the High Court is satisfied—

(a) that no such corrupt practice was committed at the election by the candidate or his election

E

agent, and every such corrupt practice was committed contrary to the orders, and without the consent of the candidate or his election agent;

(c) that the candidate and his election agent took all reasonable means for preventing the com-

F

mission of corrupt practices at the election; and

(d) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents,

then the High Court may decide that the election

G

of the returned candidate is not void."

Section 101 reads :

"If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and

H

the High Court is of opinion—

(a) that in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes; A

the High Court shall after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected." B

In the present case the grounds for setting aside the election of the petitioner are that the result of the election in so far as the appellant was concerned has been materially affected :

(i) C

(ii) .....

(iii) by improper reception, refusal or rejection of votes which is void, or

(iv) by non-compliance with the provisions of the Constitution or of the Act or of any rules or orders made under the Act. D

The only ground on which the defeated candidate could be declared to be elected is under s. 101(a) that in fact he had received a majority of valid votes. But it is in deciding who has got the majority of valid votes that s. 97 comes into play. When in an election petition a declaration that any candidate other than E the returned candidate has been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election. This right the appellant had but this right is subject to the provision that he shall not be F entitled to give evidence to prove that the election of the petitioner in this case i.e. the respondent would have been void if he had been the returned candidate and the petitioner had presented petition calling in question the election unless he had given notice of his intention to give such evidence and also given security and the further security referred to in ss. 117 and 118 respectively, G and every such notice has to be accompanied by the statement and particulars required under s. 83 in case of an election petition and shall be signed and verified in the like manner. None of these things was done in this case. The petition by the respondent had been filed on 23-4-1971. The orders for the appearance of the respondent were passed on 12-7-1971. The appellant, who was the respondent in that petition, should have given notice under H s. 97 within 14 days of his appearance i.e. on 26-7-1971 and also complied with the other requirements specified therein. The

A issues were framed on 27-7-1971, the recount was ordered on 3-2-1972 and the judgment itself was pronounced on 13-3-1972. It was on 10-3-1972 that an attempt was made to file a recrimination petition with a petition to excuse the delay. But even then the other requisites of s. 97 like giving security or the petition being accompanied by statement and particulars required by s. 83
B were not complied with. A special leave petition was filed in this Court again applying for permission to receive a recrimination petition. There is, thus, no doubt at all that the appellant did not comply with the requirements of s. 97.

The question still remains whether the requirements of s. 97 have to be satisfied in this case. It is argued by Mr. Venugopal
C that the gravamen of the respondent's petition was breach of many of the election rules and that he asked for a total recount, a request to which the appellant had no objection and that there was, therefore, no rule or need for filing a recrimination petition under s. 97. This, we are afraid, is a complete misreading of the petition. No doubt the petitioner has asked for
D a recount of votes. It may legitimately be presumed to mean a recount of all the votes. but such a recount is asked for for the purpose of obtaining a declaration that the appellant's election was void and a further declaration that the respondent himself had been elected. This aspect of the matter should not be lost sight of. Now, when the respondent asked for a recount, it was not a mere mechanical process that he was asking for. The very
E grounds which he urged in support of his petition (to which we have referred at an earlier stage) as well as the application for recount and the various grounds on which the learned Judge felt that a recount should be ordered showed that many mistakes were likely to have arisen in the counting. and as revealed by the instances which the learned Judge himself looked into and decided.
F It may be useful at his stage to set out Rule 56 of the Conduct of Election Rules, 1961 :

> "56. Counting of Votes.—(1) Subject to such general or special directions, if any. as may be given by Election commission in this behalf, the ballot papers
G taken-out of all boxes used in a constituency shall be mixed together and then arranged in convenient bundles and scrutinised.
>
> (2) The returning officer shall reject a ballot paper—
>
> (a) if it bears any mark or writing by which the elector can be identified, or
>
H (b) if, to indicate the votes, it bears no mark at all or bears mark made otherwise than with the instrument supplied for the purpose, or

(c) if votes are given on it in favour of more than one candidate, or

(d) if the mark indicating the vote thereon is placed in such manner as to make it doubtful to which candidate the vote has been given, or

(e) if it is a spurious ballot paper, or

(f) if it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established, or

(g) if it bears a serial number, or is of a design, different from the serial number, or , as the case may be, design, of the ballot papers authorised for use at the particular polling station, or

(h) if it does not bear both the mark and the signature which it should have borne under the provisions of sub-rule (1) of rule 38;

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

Provided further that a 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.

(3) Before rejecting any ballot paper under sub-rule (2), the returning officer shall allow each counting agent present a reasonable opportunity to inspect the ballot paper but shall not allow him to handle it or any other ballot paper.

(4) The returning officer shall endorse on every ballot paper which he rejects the word "Rejected" and the grounds of rejection in abbreviated form either in his own hand or by means of a rubber stamp and shall initial such endorsement.

(5) All ballot papers rejected under this rule shall be bundled together.

(6) Every ballot paper which is not rejected under this rule shall be counted as one valid vote :

A Provided that no cover containing tendered ballot papers shall be opened and no such paper shall be counted.

(7) After the counting of all ballot papers contained in all the ballot boxes used in a constituency has been completed, the returning officer shall make the entries B in a result sheet in Form 20 and announce the particulars.

Explanation.—For the purpose of this rule, the expression "constituency" shall, in relation to an election from a parliamentary constituency, mean the assembly constituency comprised therein."

C So, when counting goes on the returning officer may have rejected a ballot paper on any one of the grounds mentioned in sub-rule (2) of that rule. He might have made a mistake or his decision may be wrong on any one of the points. That is what explains the large number of concessions made by either side when the recount was made before the Assistant Registrar of the High D Court as well as before the learned Judge. So, it is not proper to interpret the respondent's prayer for recount as a request for a mere mechanical process of counting. It was counting contemplated under Rule 56 with all its implications that he was asking for. The very grounds on the basis of which the recount was ordered by the learned Judge show that there was a possibility of mistakes having arisen under anyone of the grounds set out E in Rule 56(2) clauses (a) to (h) and it is to have them taken into account and decided correctly that the respondent wanted a recount. Now, when he wants a recount for the purpose of setting aside the appellant's election he necessarily has got to have not merely the benefits of votes which would have originally gone to him but which had been wrongly given to the appellant but F also all votes which had been cast in his favour (the respondent) but had been rejected wrongly on one or other of the grounds mentioned in Rule 56(2) clauses (a) to (h). So, it was necessary for the purpose of the respondent's case not merely that votes which were held invalid should be re-scrutinised but also votes which had been held to have been cast in favour of the appellant. The G improper reception or rejection, therefore, would include not merely cases where a voter appears before the presiding officer at the time of polling and his vote is received where it should not have been received and his vote rejected where it should not have been rejected. The improper rejection or reception contemplated under s. 100(1)(d)(iii) would include mistakes or wrong judgments made by the returning officer while counting and H exercising his powers under Rule 56(2) clauses (a) to (h). The fact, therefore, that the respondent asked for recounting of all the votes does not mean that he wanted also that votes which had

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

It was then urged that when all the material was before the court it was unnecessary for him to have done so. As we have already pointed out this is not an action at law or a suit in equity but one under the provisions of the statute which has specifically created that right. If the appellant wanted an opportunity to question the respondent's claim that he should be declared elected he should have followed the procedure laid down in s. 97. In this connection it is interesting to note that in the decision in *Jabar Singh* v. *Genda Lal* (supra) the successful candidate in his own petition had pleaded that many votes cast in favour of himself had been wrongly rejected, in regard to which details were given,

A and that similarly several votes were wrongly accepted in favour of the election petitioner and in regard to which also details were given, and it ended with the prayer that if a proper scrutiny and recount were made of the valid votes received by each, it would be found that he—the returned candidate—had in fact, obtained a larger number of votes than the election petitioner and for this B reason he submitted that the election petition ought to be dismissed. In spite of this it was held that he had to fail because he had not filed a recrimination petition under s. 97. So it is not enough to say that what ought to be looked into is the substance and not the form. If a relief provided under a statute could be obtained only by following a certain procedure laid therein for that purpose, that C procedure must be followed if he is to obtain that relief.

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

Point 3 raised by the appellant has no substance because it was E not necessary to lead evidence in respect of any individual vote about improper reception or improper rejection. The decision about improper reception or improper rejection has been given in this case mostly on concessions by both the parties and in a few cases by the Judge himself scrutinising and deciding about all disputed cases. Indeed, there was no need for any evidence except F a proper scrutiny of the votes and a correct decision based on such scrutiny as to the candidate for whom it was cast or whether it was invalid. We may at the risk of repetition point out that the process of recounting included decision regarding the question of improper reception or improper rejection and there is no such thing as a general recount and there is no authority in law for G suggesting that all that the respondent could have asked for was either a general recount or none at all. Indeed there is no provision in the Act for a petition to be filed alleging "Let all votes be recounted and whoever gets more votes be declared elected." Nor do we think that any question of estoppel arises. Estoppel may arise in respect of each individual vote conceded by one party H or the other as valid and given in favour of the other in the sense that having conceded that a disputed vote should have gone to one or other of the parties the party who made that concession cannot go back on it. But where the law provides that no evidence

can be given about the improper reception of votes in favour of the defeated candidate who had claimed a seat for himself unless the successful candidate had complied with s.97, no question of estoppel arises. Concession is akin to admission and the use of such an admission would be evidence. What is barred under the proviso to s.97 is the giving of evidence by the appellant. Appellant can give evidence either by relying on the respondent's admissions or leading independent evidence. In either case it would be giving evidence. And since giving of evidence is barred, the concessions cannot be used as evidence in favour of the appellant. This is what the learned Judge has very clearly pointed out in his order. We have earlier quoted from the decision in *Bhim Sen* v. *Gopali* (supra) where the provisions of s. 97 had not been complied with. Even though as a matter of fact the valid as well as the invalid votes in favour of both the petitioner as well as the respondent might have been counted, the evidence furnished by such votes, was not a admissible must because of failure to comply with the provisions of section 97.

Finally, we must deal with the appeal made to us that the justice should be done irrespective of technicalities. Justice has got to be done according to law. A Tribunal with limited jurisdiction cannot go beyond the procedure laid down by the statute for its functioning. If it does so it would be acting without jurisdiction.

We are, therefore, satisfied that the learned Judge was right in holding that though a general recount had been ordered and an account taken of the valid votes given for both the candidates, it was not possible to take into account any vote in favour of the appellant because of his failure to comply with section 97. Nor are we satisfied that we would be justified in ordering that this case should be reconsidered by a larger Bench.

This appeal is, therefore, dismissed. The appellant will pay the first respondent's costs. Special Leave petition 1347/72 preferred against Application No. 648/72 in Election Petition O.S. No. 2/1971 is dismissed.

S.B.W. *Appeal dismissed.*