BALDEV SINGH

v.

SHINDER PAL SINGH AND ANR.

OCTOBER 19, 2006

[S.B. SINHA AND DALVEER BHANDARI, JJ.]

Punjab Panchayati Election Rules, 1994: Rules 33(2)(e), 35 and 38.

Election petition—Procedure in case of tie—Recounting of votes—Gram Panchayat elections—Sarpanch and Panches—Two candidates polled equal number of votes—Allegedly, a recounting was done and the result of the recounting was the same as that of the first one—Returning Officer drew lots with the written consent of both the candidates—One of them was declared elected as Sarpanch—Defeated candidate filed election petition—Election Tribunal, ignoring the oral evidence of responsible officer, directed recounting—Upon recounting, defeated candidate was declared elected—High Court affirmed the decision of the Tribunal—Correctness of—Held: The verification of the election petition must be done strictly in terms of Order VI Rule 15 of CPC—A factual averment made in the election petition cannot be both true to the knowledge and belief of the deponent—A recounting should not ordinarily be directed to be made—There exists certain limitation in this behalf—Hence, decisions of Tribunal and High Court set aside—Punjab Panchayati Raj Act, 1994, S. 86—Code of Civil Procedure, 1908, O. VI R. 15.

An election for the post of Sarpanch and Panches of the Gram Panchayat was held. The Returning Officer found that both the appellant and respondent No. 1 had polled the same number of votes. Allegedly, a recounting was done and the result of the recounting was the same as that of the first one. The Returning Officer recorded the said statement in the statutory Form No. IX prescribed in terms of Rule 33(2)(e) of the Punjab Panchayati Election Rules, 1994 framed under the Punjab Panchayati Raj Act, 1994. The Returning Officer drew lots with the written consent of both the candidates. The appellant was declared elected as Sarpanch of the Gram Panchayat. However, immediately prior thereto, the supporters of respondent No. 1 allegedly raised a hue and cry, as a result whereof, the Returning Officer could not enforce his decision. He immediately sent a fax message to the Deputy Commissioner

A seeking his advice in the matter. The result of the election was thereafter declared.

An election petition was filed by respondent No. 1 before the Election Tribunal under Section 76 of the Act challenging the said election. In his deposition, the Returning Officer categorically stated that the consent paper B was torn. The Sub-Divisional Magistrate proved the fax message. The Presiding Officer supported the case of the appellant. The Tribunal, ignoring the aforementioned oral evidence of the responsible officers, directed recounting. Upon recounting respondent No. 1 was stated to have received more votes than the appellant and, therefore, respondent No. 1 was declared to have been elected. The High Court affirmed the decision of the Tribunal. C Hence the appeal.

Allowing the appeal, the Court

HELD: 1. The verification of the election petition, it was trite, must be done strictly in terms of Order VI Rule 15 of the Code of Civil Procedure, D 1908. It was, thus, incumbent on the part of the appellant to specifically state as to which statements made in the election petition were true to his knowledge and which were true to his belief. A factual averment made in the election petition cannot be both true to the knowledge and belief of the deponent.

[731-D]

E 2. Although, in the election petition, it has been contended that the first respondent had requested for recounting of votes, the officers who examined themselves were not cross-examined on that point. The said statement would, thus, be deemed to have been admitted. Even the purported illegalities which, according to the respondent, would lead to declaration of election of the F appellant to be void had not been put to the witness in cross-examination.

[731-E, F]

3. The officers had categorically stated that the consent paper was torn. The fax message which had been sent immediately to the Collector of the District was a contemporaneous document, the genuineness whereof has not G been questioned. Apart from the statutory Form, even in the said fax message the Returning Officer was categorical in his statement that both the candidates had received equal number of votes and thus, the result of the election to the post of Sarpanch was declared by draw of lots. It also mentioned about the tearing of the written paper on which consent had been given and, only in the aforementioned situation, sought for guidance as to what action should be H taken in the matter. The official act should be presumed to have been done in

the ordinary course of business. A recounting, as is well known, should not ordinarily be directed to be made. There exists certain limitation in this behalf. [731-G; 732-A]

M. Chinnasamy **v.** *K.C. Palanisamy,* **[2004] 6 SCC 341,** *T.A. Ahammed Kabeer* **v.** *A.A. Azeez,* **[2003] 5 SCC 650,** *Chandrika Parshad Yadav* **v.** *State of Bihar,* **[2004] 6 SCC 331,** *P.K.K. Shamsuddeen* **v.** *K.A.M. Mappillai Mohindeen,* **[1989] 1 SCC 526 and** *Gursewak Singh* **v.** *Avtar Singh,* **[2006] 4 SCC 542, referred to.**

Dr. Jigjig Singh **v.** *Gianni Karat Singh,* **AIR (1966) SC 773, cited.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4560 of 2006.

From the final Judgment and Order dated 25.10.2004 of the High Court of Punjab and Haryana at Chandigarh in F.A.O. No. 4251 of 2004 (O & M).

Salil Sagar and Yash Pal Dhingra for the Appellant.

S.K. Bagga, Mohan Lal Saggar, Seeraj Bagga and Sureshta Bagga for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. Leave granted.

An election for the post of Sarpanch and Panches of the Gram Panchayat, Village Ransih Khurd, District Moga was held on 29.6.2003. Total votes polled in both the elections were shown to be 836. The Returning Officer found that both Appellant and Respondent No.1 had polled 412 votes each. Respondent No.2 herein is said to have got 4 votes. 8 votes were rejected. Allegedly, a recounting was done. The result of recounting was same as that of the first one. Returning Officer recorded the said statement in the statutory Form No.IX prescribed in terms of Rule 33(2)(e) of the Punjab Panchayati Election Rules, 1994. The total number of votes polled was found to be 836 even in the election of the Panches. Indisputably, election was held under the Punjab Panchayati Raj Act, 1994. The State of Punjab in exercise of its power conferred upon it under the said Act, framed rules known as Punjab Panchayat Election Rules, 1994 (for short, 'the Rules'). The relevant provisions of 'the Rules' are as under :

> "33. *Counting of Votes* - (1) In a Sabha area where there is only one polling station, the Returning Officer shall follow the following

A procedure for the counting of votes and declaration of result for election to the Gram Panchayat.

(2) The Presiding Officer shall, as soon as practicable, after the close of the poll and in the presence of any candidate or polling agent who may be present:

B

(a) .....

(b) .....

(c) .....

(d) .....

C

(e) After the counting of ballot papers contained in all the ballot boxes has been completed, the Returning Officer shall record a statement in Form IX showing the total number of votes poled by each candidate."

D "35. *Procedure in case of tie* - If, after the counting of votes is completed, votes polled by two candidates are equal, and the addition of one vote will entitle any of these candidates to be declared elected. The Returning Officer shall forthwith decide between those candidates by draw of lots as the candidate in whose favour the lot falls has received an additional vote."

E

"38. *Election Papers to be forwarded to the District Election Officer.* —The Returning Officer shall put the election papers in separate packages on the outside of which shall be endorsed a description of their contents, and after sealing them in separate packets, forward to the District Election Officer :

F

(a) the ballot-papers counted as valid;

(b) the ballot-papers rejected as invalid;

(c) the unissued ballot-papers;

G (d) the issued tendered ballot-papers;

(e) the spoilt ballot-papers;

(f) the cancelled/returned ballot-papers;

(g) the tendered votes list;

H

(h) the list of challenged votes; A

(i) account of ballot-papers; and

(j) the marked copy of electoral roll."

The Returning Officer drew lots with written consent of both the candidates, i.e., Appellant and Respondent No. 1. Appellant was declared B elected as Sarpanch of the Gram Panchayat. However, immediately prior thereto, the supporters of 1st Respondent allegedly raised a hue and cry, as a result whereof, the Returning Officer could not enforce his decision. He immediately sent a fax message to the Deputy Commissioner, Moga seeking his advice in the matter stating :

C

> "Regarding Panchayat Elections, for the Panchayat Election of Village Ran Singh Kurd I was appointed R.O.I. for Nihal Singh Wala on 29.6.2003. Election was held and after counting the votes for Sarpanch, Sh. Shinder Pal & Sh. Baldev Singh received equal 412-412 votes. As both candidates received equal number of votes, therefore, D as per instructions result for Sarpanch was to be declared by draw of lots. Both the candidates were called and draw was conducted before them and one slip was drawn through another Returning Officer. As the slip in the name of Sh. Baldev Singh came out but another candidate Sh. Shinder Pal Singh refused to accept the decision and written paper was torn. Now this office does not have consent paper E of both candidates given for draw of lots. It is requested to you to inform what action should be taken in this matter."

The Deputy Commissioner forwarded the said fax message to the Sub-Divisional Magistrate, Moga for necessary action, who, in turn informed him that the decision taken should be enforced. An endorsement to that effect F was also made by him. The result of the election was thereafter declared.

An election petition was filed by the First Respondent herein challenging the said election, wherein it was, *inter alia*, contended that only 821 votes had been polled and Appellant herein had secured only 397 votes whereas he had secured 412 votes. It was averred : G

(1) two votes were kept aside illegally and unjustly by the Presiding Officer;

(2) votes in respect of serial No. 471 and 614 were initially counted as H

A valid votes but the same were later on declared invalid;

(3) rejection of 8 votes was improper.

An averment moreover was made that he had requested for recounting of votes, but the Returning Officer/Polling Officer did not pay any heed B thereto and, thus, mandatory requirement of Rule 35 had not been complied with.

It is of some significance to notice the averments made in Sub-para (v) of paragraph (3) of the election petition, which reads as under :

C "(v) That Rule 35 read with Rule 33 of the Punjab Panchayat Election Rules 1994 provides that the Presiding Officer shall as soon as practicable after the close of the poll and in the presence of any candidate or polling agent who may be present shall start counting of votes and if 2 candidates poll equal number of votes, draw of lots is to decide the winning candidate. The Returning Officer on 30.6.2003 D requested the Deputy Commissioner Moga seeking his advice regarding the manner in which the result to be declared. It is also alleged by the Returning Officer that written paper was allegedly torn by the petitioner which fact is vehemently denied. The petitioner was not present when the alleged draw of lots took place. The alleged E procedure followed by the Returning Officer for drawing of lots by asking another Returning Officer to take out the lot is illegal. The mandatory provisions of Rule 35 is that Returning Officer himself shall forthwith decide between those candidates securing equal number of votes by draw of lots. This power of drawing of lots cannot be delegated to another person. This objection is without prejudice to F the fact that in fact petitioner secured 412 votes. Respondent no.1, 397 votes and respondent no .2, 4 votes. 8 votes were allegedly rejected. The result prepared is wrong at the instance of the respondent no. 1."

The election petition was verified by Respondent in the following terms:

G

"Verified that the contents of paras Nos. 1 to 6 and 9 of the petition are true and correct to the best of my knowledge and belief and contents of paras Nos. 7 and 8 are believed to be correct from the knowledge derived from others."

H

Before the learned Election Tribunal, the Returning Officer, the Sub-Divisional Magistrate, the Presiding Officer, as also the Assistant Returning Officer were examined as R.W.2, R.W.3, R.W.4 and R.W.5.

In his deposition, the Returning Officer, Krishan Bhagwan Kansal categorically stated that the consent paper was torn and, thus, he had no proof to say that chit was drawn with the consent of both the candidates. He was candid enough to admit that the chits drawn by him were not with him stating :

> "I do not have paper chit declaring winner because that was torn I cannot tell who had torn that chit for making toss chits bearing names of both candidates were drawn. I do not know who torn the consent paper."

R.W.3, Shri Gurnam Singh Gill, the Sub-Divisional Magistrate proved the fax message, notice whereof has been taken by us hereinbefore. R.W.4, Shri Jaswinder Singh was the Presiding Officer. He supported the case of the Appellant. In his cross-examination, he stated :

> "The counting of votes started at about 9-10 at night and finished at 11-11-1/4 at night. The counting of votes was done twice. I cannot tell how many votes were counted first time and how many after. Self stated whatever result is. 8 votes were rejected. Cannot tell that how many votes were rejected during first counting, second time 8 were rejected. I submitted result on form 9 in Nihal Singh Wala. At that time it was submitted at 12/12.15. I do not know what action was taken after that.
>
> Q.Do you have any objection if recounting is conducted ?
>
> Ans. It is for the administration to see what has to be done."

He had proved Form No.IX. He reiterated before the Tribunal the contents thereof.

R.W.5, Ranjit Singh, was the Assistant Returning Officer. He also stated that both the candidates had polled equal number of votes and thereafter two slips were prepared for drawing lots. The same were mixed up at the consent of both the candidates. As per instructions of R.W.2, he took out the slips and when it was opened, the name of Appellant was found who was then declared elected. The learned Tribunal ignoring the aforementioned oral

A evidence of the responsible officers, directed recounting opining :

> "There is no documentary evidence regarding conducting of toss. Neither is there consent of the parties nor any 'parchi' which shows that toss was conducted. Both the petitioner and the respondent no.1 allegedly secured 412 votes conclusive evidence and satisfaction of
B the petitioner. Therefore, in the circumstances it has become necessary to have recounting of votes in the presence of both the parties, to put the issue beyond doubt as also to meet the ends of justice."

Upon recounting, First Respondent was stated to have received 412 votes, whereas Appellant was said to have 398 votes. First Respondent was
C declared to have been elected, directing :

> "In view of the above circumstances, the election staff on duty had not prepared the result correctly on the basis of valid votes polled in favour of the candidates. On recounting of the votes by the undersigned, it has been found that Sh. Shinder Palsingh, petitioner
D had got 412 votes, whereas Respondent No.1 Baldev Singh had polled 398 votes and Sh. Bhola Singh Respondent No. 2 had got 4 votes and 8 votes had been cancelled. Thus Sh. Shinder Palsingh, petitioner has got 14 votes more than Sh. Baldev Singh, Respondent No. 1. Therefore, Sh. Shinder Palsingh, petitioner is declared as elected Sarpanch of
E Gram Panchayat in lieu of Sh. Baldev Singh, Respondent No.1, who had earlier been declared as Sarpanch of village Ransih Khurd. The head of the department of Presiding Officer may be asked to take strict departmental action against the Presiding Officer, who with *malafide* intention and for his personal motive, prepared the result in favour of respondent no.1 against the result of actual votes polled and due to
F this reason the parties had to indulge in unnecessary litigation and harassment. A copy of the order is forwarded to the District Development and Panchayat Officer, Moga and Block Development and Panchayat Officer, Nihal Singh Wala for necessary action. After compliance, the file be consigned to the record room."

G The appeal preferred by Appellant herein was dismissed by the High Court merely stating :

> "Applying the above principles to the present case, it is sent that there was specific averment in the election petition that even though,
H 821 votes were polled, the staff wrongly counted the same to be 836.

It was also clearly stated that the result was not declared on the same day and there was no document showing draw of lots. The Tribunal was satisfied that recount was necessary. On summoning of record, the averments in the election petition stood proved. Result of recount being different does not necessarily mean that the recount was justified but it is not possible to hold that there was no material before the Tribunal to hold that there was prima facie case or that recount was not validly ordered. Since the recount was validly ordered, the result thereof could be taken into account. The contention on behalf of the appellant that due opportunity was not given to the appellant to prove that 14 votes which were found to be less had been lost, cannot be accepted. The appellant did not raise any such point when sealed cover was opened or even thereafter before the Tribunal."

Mr. Salil Sagar, learned counsel appearing on behalf of Appellant contended that the Tribunal as also the High Court acted illegally and without jurisdiction in passing the impugned judgment in so far as they failed to take into consideration that no case for recounting has been made out. It was pointed out that First Respondent, at no point of time, raised any objection in regard to the correctness of counting of votes before the Presiding Officer. He did not file any application for recounting. The Tribunal, although, proceeded to determine the question on the basis of the purported violation of the Rules, it would appear from the depositions of the witnesses that they had not been cross-examined on that question. The High Court as also the Tribunal, it was contended, without finding any *prima facie* case in favour of Respondent for a recounting, directed so and that too in utter disregard of the evidences on record.

Mr. S.K. Bagga, learned Senior Counsel appearing on behalf of the Respondents, on the other hand, urged that the votes were incorrectly counted as would be evident from the result of the recounting. The Presiding Officer, Mr. Bagga, submitted, merely deposed about the drawing of lots, but in doing so, he had delegated his power to the Assistant Returning Officer and thus, the entire process was illegal. The Tribunal, keeping in view the materials on record, thus, had rightly directed recounting of votes with a view to determine the issue. The order of recounting was passed, it was submitted, to meet the ends of justice and only on the basis of the result of recounting.

"

Election for the post of Sarpanch and Panches are, indisputably, governed by the Punjab State Election Commission Act, 1994.

A Sections 66, 68 and 69 of the said Act read as under :

"66. *Counting of votes.*- At every election where a poll is taken, votes shall be counted by or under the supervision and direction of, the Returning Officer, and each contesting candidate, his election agent and his counting agents, shall have a right to be present at the time
B of counting."

"68. *Equality of votes.*- If, after the counting of the votes is completed, and the addition of one vote will entitle any of those candidates to be declared elected, the Returning Officer shall forthwith decide between those candidates by lot, and proceed as if the candidates on
C whom the lot falls had received an additional vote."

"69. *Declaration of results.*- When the counting of the votes has been completed, the Returning Officer shall, in the absence of any direction by the Election Commission to the contrary, forthwith declare the result of the election in the manner provided by this Act or the rules
D made thereunder."

Section 76 of the Act provides for presentation of an election petition on one or more grounds specified in Sub-Section (1) of Section 89 to the Election Tribunal. Section 78 provides for the contents of the election petition. Clauses (a), (b) and (c) of Sub-Section (1) of the said provision
E readsthus :

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

(b) set forth full particulars of any corrupt practice that the petitioner
F alleges, including a statement as possible, of the names of the parties alleged to have committed such corrupt practice or practices and the date and place of the commission of such practice; and

(c) be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleadings;"

G

Section 83 provides for secrecy of voting not to be infringed. Sub-Clauses (iii) and (iv) of Clause (d) under Sub-Section (2) of Section 89 provide that subject to the provisions of Sub-Section (2), the Election Tribunal is of the opinion that the result of the election, in so far as it concerns a returned
H candidate, has been materially affected by the improper reception, refusal or

rejection of any vote or the reception of any vote which is void or by any non-compliance with the provisions of the Constitution of India or of the said Act or of any rules or orders made under the said Act, the Election Tribunal shall declare the election of the returned candidate to be void. A

The Election Petition was required to be verified in terms of Order VI Rule 15 of the Code of Civil Procedure, 1908. It provides : B

> "15. *Verification of pleadings.* (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case. C
>
> (2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and "

The verification of an election petition, it was trite, must be done strictly in terms of Order VI Rule 15 of the Code of Civil Procedure. It was, thus, incumbent on the part of Appellant herein to specifically state as to which statements made in the election petition were true to his knowledge and which were true to his belief. A factual averment made in the election petition cannot be both true to the knowledge and belief of the deponent. D E

We may furthermore notice that although in the election petition it has been contended that First Respondent had requested for recounting of votes, the officers who examined themselves were not cross-examined on that point. The said statement would, thus, be deemed to have been admitted. Even the purported illegalities which, according to Respondents, would lead to declaration of election of Appellant herein to be void had not been put to the witness in cross-examination. F

The question which, therefore, would arise is 'as to whether the learned Tribunal was correct in directing recounting?' The officers had categorically stated that consent paper was torn. The fax message which has been sent immediately to the Collector of the District was a contemporaneous document, the genuineness whereof has not been questioned. Apart from the statutory Form, even in the said fax message the Returning Officer was categorical in his statement that both the candidates have received equal number of votes and thus, the result of the election to the post of Sarpanch was declared by G H

A draw of lots. It also mentioned about the tearing of the written paper on which consent had been given and only in the aforementioned situation, sought for guidance as to what action should be taken in the matter. The official act should be presumed to have been done in the ordinary course of business. A recounting, as is well known, should not ordinarily be directed to be made. There exists certain limitation in this behalf.

B

The question came up before this Court in *M. Chinnasamy* v. *K.C. Palanisamy & Ors.*, [2004] 6 SCC 341, wherein this Court opined:

> "The question as to what would constitute material facts would, however, depend upon the facts and circumstances of each case. It
> C is trite that an order of re-counting of votes can be passed when the following ingredients are satisfied: (1) if there is a *prima facie* case; (2) material facts therefor are pleaded; (3) the court shall not direct re-counting by way of roving or fishing inquiry; and (4) such an objection had been taken recourse to.
>
> D The necessity of "maintaining the secrecy of ballot papers" should be kept in view before a re-counting is directed to be made. A direction for re-counting shall not be issued only because the margin of votes between the returned candidate and the election petitioner is narrow."

E

The Court furthermore emphasized the requirements of pleadings containing material facts which are salutary in nature. In that case also it was found that no material had been brought on record to show that the factual findings of the Returning Officer were incorrect. This Court rejected the 'doctrine of prejudice', in such a matter, as being not a relevant factor, having
F regard to the constitutional and statutory scheme involving holding of election and the consequences emanating from the direction of recounting which could lead to identification of voters as the same would not be desirable. It was reiterated that pleadings of material fact would include disclosure of all such information which if not rebutted would result in allowing the petition.
G It was opined :

> "Had the election petitioner in his pleadings, as noticed hereinbefore, disclosed the details of the names of polling stations, counting centres, tables, particulars of round of the counting of votes in relation whereto alleged irregularities had taken place under all the
> H four categories and basis of material facts and particulars, the High

Court, if finds that the election petitioner has made out a prima facie case for scrutiny of ballot papers and re-count, may direct re-count of ballot papers in respect of the said votes only and not the entire votes. The High Court further failed to notice that in para 12 of the election petition it has merely been pointed out that irregularities in respect of counting had materially affected the election and in that view of the matter, the High Court should not have directed re-counting of all the votes which would amount to going beyond the said election." A B

This Court in arriving at the said decision took into consideration various decisions, including *T.A. Ahammed Kabeer* v. *A.A. Azeez & Ors.*, [2003] 5 SCC 650, whereupon Mr. Bagga has relied. Therein it has been held: C

"It is true that a re-count is not to be ordered merely for the asking or merely because the court is inclined to hold a re-count. In order to protect the secrecy of ballots the court would permit a re-count only upon a clear case in that regard having been made out. To permit or not to permit a re-count is a question involving jurisdiction of the court. Once a re-count has been allowed the court cannot shut its eyes on the result of re-count on the ground that the result of re-count as found is at variance with the pleadings. Once the court has permitted re-count within the well-settled parameters of exercising jurisdiction in this regard, it is the result of the re-count which has to be given effect to." D E

This Court did not agree with the said judgment in *M. Chinnasamy* (supra) stating:

"With respect, we are not in a position to endorse the views taken therein in their entirety. Unfortunately, the decision of a larger Bench of this Court in *Dr. Jagjit Singh* v. *Giani Kartar Singh,* AIR (1966) SC 773 had not been noticed therein. Apart from the clear legal position as laid down in several decisions, as noticed hereinbefore, there cannot be any doubt or dispute that only because a re-counting has been directed, it would not be held to be sacrosanct to the effect that although in a given case the court may find such evidence to be at variance with the pleadings, the same must be taken into consideration. It is now well-settled principle of law that evidence adduced beyond the pleadings would not be admissible nor can any evidence be permitted to be adduced which is at variance with the F G H

A pleadings. The court at a later stage of the trial as also the appellate court having regard to the rule of pleadings would be entitled to reject the evidence wherefor there does not exist any pleading."

We may also notice that in *Chandrika Parshad Yadav* v. *State of Bihar & Ors.*, reported in [2004] 6 SCC 331, this Court dealing with the provisions B of Bihar Panchayat Election Rules, stated the law in the following terms :

"Rule 79 as noticed hereinbefore enables a candidate to file an appropriate application for re-counting of votes. Rule 79 unlike rules framed by other States does not say that such an application would not be maintainable after declaration of the votes polled by the parties C or prior thereto. Such an application, therefore, can be filed at any point of time. The very fact that sub-rule (3) of Rule 79 provides for amendment of the result relating to the votes polled by the respective candidates and as such amended result is required to be announced in the prescribed form under sub-rule (2) of Rule 79, the same itself D is a pointer to the fact that even after announcement of result an application for re-counting would be maintainable. It may be true that only because such an application had not been filed before the Returning Officer by itself may not preclude the Election Tribunal to go into the question of requirement of issuing a direction for re-counting but there cannot be any doubt whatsoever that Rule 79 E serves a salutary purpose. Counting of ballot papers in terms of the rules takes place in presence of the candidate or his counting agent. When an agent or a counting agent or the candidate himself notices improper acceptance or rejection of the ballot papers, he may bring the same to the notice of the prescribed authority. As noticed F hereinbefore, in a given case, an application for re-counting either before announcement of the result or thereafter, would be maintainable. Once an application is filed by an agent or a counting agent or the candidate himself pointing out the irregularities committed by the officers appointed for counting the ballot papers, immediate redressal of grievances would be possible. As indicated hereinbefore, while G filing such an application the basis for making a request for re-counting of votes is required to be disclosed. The Returning Officer is statutorily enjoined with a duty to entertain such an application, make an inquiry and pass an appropriate order in terms of sub-rule (2) of Rule 79 either accepting in whole or in part such requests or H rejecting the same wherefor he is required to assign sufficient or

cogent reasons. In the event such an application is allowed either in whole or in part, he is statutorily empowered to amend the results also. A

Ordinarily, thus, it is expected that the statutory remedies provided for shall be availed of. If such an opportunity is not availed of by the election petitioner; he has to state the reasons therefor. If no sufficient explanation is furnished by the election petitioner as to why such statutory remedy was not availed of, the Election Tribunal may consider the same as one of the factors for accepting or rejecting the prayer for re-counting. An order of the prescribed authority passed in such application would render great assistance to the Election Tribunal in arriving at a decision as to whether a prima facie case for issuance of direction for re-counting has been made out." B C

In *M. Chinnasamy* (supra), the decision *P.K.K. Shamsudeen* v. *K.A.M. Mappillai Mohindeen & Ors.*, [1989] 1 SCC 526 had been noticed. Referring to *Dr. Jagjit Singh* v. *Giani Kartar Singh,* it had been observed: D

"In *Jagjit Singh (Dr.)* v. *Giani Kartar Singh* before a three-Judge Bench of this Court, a contention was raised to the effect that when a Tribunal considering the evidence in the light of the allegations made by the election petitioner was satisfied that inspection should be ordered, the same should not ordinarily be reversed in appeal wherein this Court held: (AIR pp. 784-85, para 35) E

"35. We are not prepared to accept this contention. The order passed by the Tribunal clearly shows that the Tribunal did not apply its mind to the question as to whether sufficient particulars had been mentioned by the appellant in his application for inspection. All that the Tribunal has observed is that a prima facie case has been made out for examining the ballot papers; it has also referred to the fact that the appellant has in his own statement supported the contention and that the evidence led by him *prima facie* justifies his prayer for inspection of ballot papers. In dealing with this question, the Tribunal should have first enquired whether the application made by the appellant satisfied the requirements of Section 83(1) of the Act; and, in our opinion, on the allegations made, there can be only one answer and that is against the appellant. We have carefully considered the allegations made by the appellant in his election petition as well as F G H

A those made by him in his application for inspection, and we are satisfied that the said allegations are very vague and general, and the whole object of the appellant in asking for inspection was to make a fishing enquiry with a view to find out some material to support his case that Respondent 1 had received some invalid votes and that the appellant had been denied some valid votes. Unless an application for
B inspection of ballot papers makes out a proper case for such inspection, it would not be right for the Tribunal to open the ballot boxes and allow a party to inspect the ballot papers, and examine the validity or invalidity of the ballot papers contained in it. If such a course is adopted, it would inevitably lead to the opening of the ballot boxes
C almost in every case, and that would plainly be inconsistent with the scheme of the statutory rules and with the object of keeping the ballot papers secret."

Recently in *Gursewak Singh* v. *Avtar Singh & Ors.*, [2006] 4 SCC 542, this Court opined :

D

"While interfering with an order of the Election Tribunal, particularly, in view of the purport and object for which such Tribunal had been constituted, the High Court had an obligation to assign sufficient and cogent reasons. The High Court, as noticed hereinbefore, proceeded on the basis that the Appellant was responsible for the
E mess created in the matter of maintenance of records. There are items of evidence on record to show that ballot papers had not been properly kept. Some were kept in loose sheets. They had been counted separately. The Tribunal noticed how ballot paper envelopes were found in suspicious circumstances.

F Instead of breaking the seals at one end, large number of ballots were found in loose condition. 200 ballot papers of booth No. 41 were found in the bag of booth No. 43. The Tribunal, therefore, came to the conclusion:

"..... From a comparative analysis of the position (booth-wise) of
G the results after recounting, as given tabular form on page 13 above, it is apparent that there is no issue as pertaining to the counting process in Booth 42, as the total number of ballots polled (966) is same, and there is rather a decrease of 4 rejected votes, which have now been counted in the tally of the Respondent 1, thereby increasing
H his tally of booth 42 to 467 from 463. Similarly, in relation to Booth 43,

if one takes into account that 2-ballot papers in favour of the petitioner which pertained to Booth 41 have somehow managed to enter the packet containing ballot papers of Booth 43 then the matter is somewhat regular, as the total votes polled in the booth 43 is similar at 902, and there is only marginal difference of 1 extra vote which was polled in favour of petitioner being declared rejected..." A B

We, therefore, in view of the facts and circumstances of the case, are unable to uphold the findings of the Tribunal and the High Court. We set them aside accordingly. The appeal is allowed. The First Respondent shall bear costs of the Appellant, which is quantified at Rs.10,000/-.

V.S.S. Appeal allowed.