
(1999) 10 OHC CK 0031

Orissa High Court

Case No: Election Petition No. 17 of 1995

Bhagabat Behera

APPELLANT

Vs

Sri Sitakanta Misra and
Others

RESPONDENT

Date of Decision: Oct. 1, 1999

Acts Referred:

- Representation of the People Act, 1951 - Section 100, 100(1), 107, 123, 123(1)

Citation: (1999) 10 OHC CK 0031

Hon'ble Judges: P.K. Misra, J

Bench: Single Bench

Advocate: Srinivas Mishra-I, Sarojanada Mishra, M.S. Panda, D.P. Sarangi, R.C. Praharaj, D.K. Roy and S.C. Mishra, for the Appellant; N.C. Panigrahi, S.C. Dash, Pitambar Acharya, A.C. Samantarai and A. Patnaik for R-1 and Mira Das, Addl. Gov. Advocate, for the Respondent

Final Decision: Dismissed

Judgement

P.K. Misra, J.

This petition has been filed under Sections 80 and 80-A of the Representation of the People Act, 1951 (hereinafter called the "Act") for declaring the election of Respondent No. 1 as void and for further declaration of the Petitioner as the duly elected candidate.

2. Certain undisputed facts are as follows: The election to the Orissa Legislative Assembly took place in the month of March, 1995. The Petitioner who was the sitting M.L.A. and Minister of the Government headed by Shri Biju Patnaik of the Janata Dal, contested from 62 - Nayagarh Assembly constituency as a candidate of the Janata Dal with "Wheel" as his symbol and Respondent No. 1 contested the election as a candidate of the Congress (1) with "Hand" as his symbol. Apart from these main contestants, Respondents 2 to 12 were the other contestants. The counting in respect of Nayagarh, Assembly Constituency took place in the first floor of the Library Hall of Nayagarh College

and the counting in respect of some other constituencies of Nayagarh district took place in other halls of the main College building. The counting began on 11th, March, 1995, and was concluded on 12th. March, 1999. Respondent No. 1 was declared elected having secured 53, 299 votes and the Petitioner secured the next highest number of votes, the margin of difference 6,614. All other candidates lost their security deposits and, in fact, none of them was able to secure more than one thousand votes. An application for recounting filed by the Petitioner was rejected by the Returning Officer as per Annexure-6.

3. The Petitioner has challenged the election and sought for a declaration that he should be declared elected mainly on the ground that corrupt practices had been adopted and the result of the election had been materially affected by the corrupt practices adopted in the process of counting. It is alleged that the Collector of the District was ill-disposed towards the Petitioner and at his behest the persons who were inimical towards the Petitioner had been appointed as Returning Officer and counting officials at the time of counting, thus facilitating the irregularities and illegalities at the time of actual counting. It is further alleged that the vehicle available for the purpose of total Literacy Campaign (hereinafter called the "T.L.C.") in Nayagarh district under the Chairmanship of the Collector had been illegally utilized by the election agent of Respondent No. 1 and many other Congress workers for the purpose of conducting election campaign on behalf of Respondent No. 1 and the objection of the Petitioner lodged before the Collector, Nayagarh, as well as the Chief Electoral Officer, Orissa, proved futile. It was further alleged that at the behest of the Collector, the police officials forcibly removed the various banners, placards and posters displayed on behalf of the Petitioner although they had allowed Respondent No. 1 to fix placards and banners. It is further alleged that the Petitioner was forcibly and unlawfully prevented from campaigning in four villages at the instance of Respondent No. 1 and his election agent. It is further alleged that Respondent No. 1 had entertained the villagers by hosting a dinner in the school premises of Pratap Prasad U.P. School (a Government School) and had requested the electors to vote in his favor. It is further alleged that during the process of counting, there was failure of electricity on several occasions. Taking advantage of which with the aid and active connivance of some of the counting supervisors and officials many votes meant for the Petitioner were illegally counted in favor of Respondent No. 1.

4. Only Respondent No. 1 contested the election petition by filing written statement and written statement has not been filed on behalf of any other Respondents. Respondent No. 1 has denied the allegations made in the election petition. Apart from taking other technical pleas, Respondent No. 1 has also pleaded that the election Petitioner had not served true copies of the election petition and had not given concise statement of material facts, nor given full particulars of the alleged corrupt practices.

5. On these pleadings the following Issues were framed by my predecessor D.M. Patnaik. J:

ISSUES 1. Is the petition maintainable for non-compliance of the provisions under Sections 81, 82, 83, 100 and 107 of the R.P. Act. ?

2. Is the petition barred by limitation?.

3. Whether the Respondent No. 1 or his Agents influenced the Voters by show of force and further they prevented the Petitioner from campaigning by door to door approach and if so, whether this act materially affected the result of the election?

4. Whether the result of the election so far as it relates to the Petitioner was materially affected on account of corrupt practice adopted by the Respondents as indicated in paragraph-21 of the petition?

5. Whether the process/mode or manner of counting was against the mandatory provisions of the Act and the Rules and if so, whether non-compliance of these provisions materially affected the result of the election so far as the Petitioner is concerned?

6. Whether there was recounting of the votes by the Election Officer to the utter disadvantage of the Petitioner?.

7. Whether there was illegal or improper acceptance and/or rejection of the ballot papers which affected the Petitioner's election?

8. Whether the Election Officer was justified in rejecting the Petitioner's prayer for recounting and if so, whether stitch rejection materially affected the result of the election so far as the Petitioner is concerned?

9. Whether the Petitioner should be declared to have been elected by majority of votes?

10. To what relief the Petitioner is entitled ?

6. Issue No. 1:

After the commencement of the trial and Examination of a few witnesses, Respondent No. 1 had filed an application on 3-3-1997, numbered as Misc. Case No. 13 of 1997, for dismissal of the election petition on the ground that the mandatory provisions under Sections 81, 82 and 83 of the Act have not been complied with, inasmuch as true copies of the election petition had not been filed, nor served on the Respondent No. 1. In particular, it was stated in the petition that the affidavit portion of the election petition was not complete and the copies served on Respondent No. 1 did not contain the endorsement of the Notary before whom the affidavit had been sworn. It was contended that in view of such defects, the election petition should be rejected or, at any rate, the allegations relating to the corrupt practices must be deleted.

7. The Petitioner in his counter at that stage contended that the copies produced by Respondent No. 1 purported to have been served on him were not the actual copies of

the election petition which had been filed by the election Petitioner for issuing notice. Since there was dispute relating to the identity of the copies served and the evidence had already begun, it was directed that the petition for dismissal of the election petition shall be taken up along with other Issues. Though Respondent No. 1 filed SLP before the Supreme Court, since no stay order had been obtained the examination of witnesses continued. Subsequently, after conclusion of evidence and hearing of arguments from both the sides, when the matter had been reserved for judgment, Respondent No. 1 produced a copy of the order of the Supreme Court regarding stay. Accordingly, delivery of judgment was stayed and subsequently after disposal of the Special Leave Petition, the matter was Listed under the heading "To be mentioned". After hearing further arguments of both the sides, the matter was again reserved for judgment on 30-8-1999.

8. Section 81 provides the procedure relating to the presentation of the election petition. Section 81(3) which is material for the purpose of the present case envisages that every election petition shall be accompanied by attested true copies of the election petition and the number of such copies should be equivalent to the number of Respondents arrayed in the petition. The petition filed in Misc. Case No. 13 of 1997 is based on this provision. Section 86, inter alia, provides for dismissal of the election petition for non-compliance of Section 81. The sub-mission of the counsel for the Petitioner is based on the decisions of the Supreme Court reported in AIR 1996 SC 1691 Dr. (Smt.) Shipra etc. v. Shanti Lal Khoiwal etc.) followed in [Harcharan Singh Josh Vs. Hari Krishan](#) ; [Amar Prasad Satpathy Vs. Sitakanta Mohapatra and Another](#), and A.I.R 1998 Ori 41 Prafulla Chandra Ghadei v. Sarat Rout). However, the principles enunciated in the decision reported in A.I.R 1996 SC 1691 as followed in other decisions have been explained and to some extent whittled down by the decision of the Supreme Court reported in [T.M. Jacob Vs. C. Poulose and Others](#) . In view of the ratio laid down in this decision, if it is found that the copies filed by the election Petitioner are substantially true copies of the election petition, the same should not be dismissed merely because the copies are not the exact copies, line by line, or word per word. Omissions in the copies if insignificant or of no consequence, the election petition should not be dismissed by invoking the principles envisaged in section 81, read with Section 86. Where, on the other hand, the omissions are likely to prejudice the Respondent, the election petition should be dismissed on the ground of noncompliance with the provisions of Section 81, read with Section 86.

9. Before dealing with the aforesaid aspect, one factual aspect relating to the identity of the copies filed and subsequently served on Respondent No. 1 is to be considered. Respondent No. 1 at the time of filing of Misc. Case No. 13 of 1997 had produced two copies of the election petition apparently containing the signature of the election Petitioner and the seal of the High Court and such copies had been received by Respondent No. 1. But the Petitioner disputed such assertion and had submitted that the copies produced by Respondent No. 1 were not, in fact, the copies which had been filed by the election Petitioner. The true copies of the election petition purportedly received by Respondent No. 1 have been marked as Exits. A and B. The election Petitioner while

being confronted with those documents admitted that those documents contained his signature marked as Ext. A series and Ext. B series in various pages and also contained the signature of his advocate. He also admitted and it is otherwise apparent that such copies produced contained the seal of the High Court. The Petitioner has tried to explain away by stating that the copies of the election petition signed by the Petitioner and his advocate had been left with his election agent. Bhabani Sankar Dash and Respondent No. 1 might have manipulated the two exhibits in connivance with said Bhawani Sankar Dash, the election agent of the Petitioner. Such explanation does not bear scrutiny. The evidence of Respondent No. 1 to the effect that Exts. A and B had been served on him has not been shaken in any manner. The Petitioner has not chosen to examine the said Bhabani Sankar Dash to buttress his explanation. of course, he now claims in his evidence that Bhabani SanKar Dash, the election agent, has been gained over in the meantime by Respondent No. 1. Even assuming such statement to be correct, in the absence of other material supporting the stand of the Petitioner, Exts. A and B must be accepted to be the copies which had been filed and subsequently served on Respondent No. 1.

10. It is asserted that the copies served on the Respondent No. 1 do not contain the same endorsement by the Notary about the confirmation made before him and the dates on which the affidavits were sworn have not been indicated. After comparing Ext. A and Ext. B with the original election petition and keeping in view the ratio of the decision of the Supreme Court reported in [T.M. Jacob Vs. C. Poulose and Others](#), it cannot be said that the petitions served on Respondent No. 1 were not substantially the true copies of the election petition which had been filed. The omissions are insignificant and Respondent No. 1 has not been prejudiced in any manner by such omissions.

11. The learned Counsel for Respondent No. 1 as submitted that the election petition did not contain full particulars of the corrupt practices alleged to have been committed and as such there has been non-compliance of the provisions contained in Section 83(1)(b) of the Act. In view of the decision of the Supreme Court reported in [Quamarul Islam Vs. S.K. Kanta and others](#), I think it proper to examine the evidence on record relating to the alleged corrupt practices and if it is found that the allegations do not employ with the requirements u/s 83(1)(b), the evidence has to be strictly scrutinized. In view of the aforesaid discussion, the contentions raised by Respondent No. 1. are found to be untenable and the election petition is maintainable. This Issue is accordingly decided in favor of the Petitioner.

12. Issue No. 2:

Under Section 81(1) of the Act, an election petition has to be presented within forty five days from the date of election of the returned candidate. In the present case, the petition having been presented within such period, it is not barred by limitation. The Issue is accordingly decided in favor of the Petitioner.

13. Issue No. 2-A:

Though there was allegation in the election petition that Respondent No. 1 had entertained a large number of voters with the object of inducing them to vote in his favor and was thereby guilty of corrupt practice and such allegation had been denied by Respondent No. 1. specific Issue had been framed by my learned predecessor, D.M. Patilaik, J. However, evidence has been adduced on behalf of both sides relating to such allegation and counter allegation. It is necessary to frame an additional Issue as follows:

Issue No. 2-A:

Whether Respondent No. 1 committed corrupt practice as envisaged in section 123(1) of the Act by entertaining voters with the object of inducing them to vote in his favor?

14. Before considering this Issue and other allegations relating to alleged corrupt practices, it would be appropriate to notice the relevant provisions. Section 100(1)(b) of the Act envisages that the election of returned candidates can be declared as void if, it is found that any corrupt practice has been committed by the returned candidate or his election agent, or by any other person with the consent of the returned candidate or his election agent. On the other hand, Section 100(1)(d)(ii) envisages that where any corrupt practice has been committed in the interest of the returned candidate by an agent other than his election agent, such election can be declared to be void if it is found that the result of the election concerning the returned candidate has been materially affected. Chapter-I. Part- VII of the Act relates to corrupt practices. Various categories have been included in Section 123 laying down what constitutes corrupt practice. The Petitioner seeks to place his case within the ambit of corrupt practices as envisaged in Section 123(1)(A)(b), 123(2) and 123(7). A combined reading of Section 100 with Section 123 makes it clear that where corrupt practice is committed by the candidate or his election agent, or with the consent of the candidate or his election agent, as the case may be, the election of the returned candidate shall be declared void. Where, however, the corrupt practices have been committed by an agent other than the election agent, the election can be declared as void only if it is proved that the result of the election so far as the returned candidate is concerned has been materially affected.

15. In paragraph-8 of the election petition, it has been alleged that Respondent No. 1 held an election meeting in the premises of Pratap Prasad U.P. School and entertained the electors with dinner and requested the electors to vote in his favor. It is further stated that the Petitioner lodged, a complaint before the Chief Election Commissioner of India and Chief Electoral Officer through Fax message. The alleged Fax message, annexed as Annexure-2 to the election petition, has been proved as Ext. 33. The said message appears to have been sent by the election agent of the Petitioner, though in the election petition it is stated that the Petitioner lodged complaint through Fax message. In the said message it has been stated;

Congress (1) candidate for 62 Nayagarh Assembly Constituency (Orissa) held public meeting at Pratap Prasad U.P. School premises on 29-01-95 and utilized the school building for cooking and serving food to the people in clear violating the guidelines...

In paragraph-18 of the written statement, it has been stated by Respondent No. 1 that the allegations are baseless and false. It was specifically stated that no election meeting was held on 29-1-1995 by Respondent No. 1 in the premises of Pratap Prasad U.P. School and Respondent No. 1 had not entertained the villagers with dinner.

16. The Petitioner has examined p. ws: 10 and 14 in respect of such allegations. The Petitioner, of course, has stated about such allegations, but has frankly admitted that he had no personal knowledge. Therefore, the evidence of the Petitioner himself on this aspect is of no consequence. Respondent No. 1 while being examined as R.W. 17 has denied about such feast for the electors and he also stated that no election meeting was held at Pratap Prasad U.P. School or in the village.

P. w. 10, a villager of Pratap Prasad has stated that Respondent No. 1 had held an election meeting at Pratap Prasad U.P. School inside the school compound on 29-1-1995 and the meeting continued from 9 a. m. in the morning till night. He has further stated that arrangement had been made for providing food and Tiffin for the various persons who had attended the meeting. He has further stated that about two thousand persons belonging to Lathipada, Itamati, Baunsia, Sunduria and Notor had attended the meeting. It is further stated that Respondent No. 1 was present in the meeting. Similarly, Prafulla Kar, the election agent, and other supporters were present in the meeting. It has been further stated:

... The feast had been arranged so that the people will vote for Respondent No. 1 and it was promised that after success similar feast will be given....

In cross-examination, he has stated that the villagers had been called to the feast and he was one of the villagers who had participated in the feast.

P. w. 14 in his statement claimed that he was a member of the Congress Party from 1976 till 1996. Though he had filed nomination for contesting the election, subsequently he withdrew the same as the official ticket was not given to him. He has stated that election campaign for Congress Party was initiated on 29-1-1995 at the U.P. School of village Pratap Prasad and the meeting was called at 9 a. m. and continued till 8.30 p. m. in the evening. He has further stated:

...Many members of the Congress Party were called. In the said meeting arrangement had been made for providing Tiffin and meals to the persons attending the meeting. That meeting was called for the purpose of acquainting all the workers and also for introducing Respondent No. 1 who was new to that place. The arrangement for providing food was made with a view to attracting voters. In the said meeting, the speakers requested for voting in favor of Respondent No. 1. Respondent No. 1 who was present also requested

that all should vote for him....

Respondent No. 1 apart from examining himself has examined the Headmaster of Pratap Prasad U.P. School as R. w. 14 who has stated that no such feast was held in the Pratap Prasad U.P. School premises as alleged. From the evidence of p. w. 10 it is not clear if any elector was present and food was served to any electors exhorting them to vote for Respondent No. 1. On the other hand, the evidence of p. w. 14 lends credence to the submission of the learned Counsel for Respondent No. 1 that a meeting of the workers of the party had been held. P. w. 10 himself does not claim to be an elector or voter. Though p. w. 14 states that he is a voter, it is admitted by him that he was a Congress worker and had, in fact, filed nomination, but withdrew the same subsequently. There is no other evidence on record to indicate that, in fact, a meeting was held for the electors and food had been provided to the electors for the purpose of exhorting the electors to vote for Respondent No. 1. As observed in the decision reported in [S. Iqbal Singh Vs. S. Gurdas Singh and Others](#), providing food to the workers cannot be considered to be a corrupt practice within the meaning of Section 123(1) of the Act. The allegations of the Petitioner on this aspect are accepted. Moreover, the assertion of the Petitioner that he had complained to the Election Commissioner is not borne out from record. On the other hand, it is found that the alleged complaint was made by the election agent wherein the grievance seems to be regarding the fact that food had been cooked and served in the school in violation of the guidelines, but not on the ground that food was served to the electors for the purpose of exhorting the electors to vote for Respondent No. 1. In view of the discrepancy between the documents proved and the oral evidence and keeping in view the vague nature of evidence, the allegation on this score cannot be said to have been proved beyond all reasonable doubt. Thus, Issue No. 2-A is decided against the Petitioner.

17. Issue No3:

The learned Counsel for the Petitioner has Submitted that Respondent No. 1 has also committed corrupt practices as envisaged in Sub-section (2) of Section 123 of the Act, which reads as follows:

2. Undue influence, that is to say, any direct or indirect interference, or attempt to interfere on the part of the candidate or his agent, or of any other person with the consent of the candidate or his election agent with the free exercise of any electoral right:

Provided that-

(a) without prejudice to the generality of the provisions of this clause any such person as is referred to therein who-

(i) threatens any candidate or any elector, or any person in whom a candidate or an elector interested with injury of any kind including social ostracism and ex-communication or explosion from any caste or community; or

(ii)...shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause.

(b)...It is contended that there has been interference on the part of the agent of Respondent No. 1 with free exercise of electoral right. "Electoral right" has been defined in Section 79 of the Act, as extracted hereunder:

79. Definitions.

In this Part and in Part VII unless the context other-wise requires,-....

(d) "electoral right" means the right of a person to stand or not to stand, as, or to withdraw or not to withdraw from being, a candidate, or to vote or refrain from voting at an election;

...It is submitted that the threatening given by the agent of Respondent No. 1 and other supporters come directly within Section 123(2) read with Proviso (a)(i) thereof.

18. It is contended by learned Counsel for Respondent No. 1 that unless there has been direct or indirect interference by the candidate or his agent with the free exercise of any electoral right, it cannot be said that any corrupt practice as envisaged in Section 123(2) has been committed. In this connection, it is pointed out that the expression "electoral right" as used in Section 123(2) must have the same meaning as indicated in Section 79(d) which defines "electoral right" to mean, inter alia, the right of a person to stand or not to stand as a candidate. It is, therefore, submitted that since there was no interference with the right of the Petitioner to stand as a candidate, the question of committing corrupt practice as envisaged in Section 123(2) does not arise.

19. The submission of the learned Counsel for Respondent No. 1 is without any substance. Firstly, such submission ignores the provision contained in the Proviso to Section 123(2). Proviso(a)(i) makes it clear that if any such person as is referred to in Section 123(2) threatens any candidate with any injury of any kind, it shall be deemed to interfere with the free exercise of the "electoral right" of such candidate. The contention of the counsel for Respondent No. 1 that the allegation to the effect that the candidate or his supporters were prevented home campaigning would not come within the scope of corrupt practice as envisaged in Section 123(2) is not tenable in view of the provision contained in Proviso (a)(i) of Section 123(2). Secondly, right to stand as a candidate includes within its fold the right/liberty to campaign. If a candidate would be prevented from campaigning by use of force by the rival candidate, definitely such action would come within the ambit of corrupt practice, as envisaged in section 123(2). This basic concept has been only reinforced by the inclusion of the Proviso (a)(i) to Section 123(2).

20. In paragraph-10 of the election petition it had been stated that on 6-2-1995, 14-2-1995, 18-2-1995 and 19-2-1995 the Petitioner was prevented from entering into the villages Kaithgadia, Natugaon, Deuli and Lathipara respectively at the instance to Respondent No. 1 and his election agent Shri Prafulla Kar. The Petitioner's election

campaign and his door to door approach were thus prevented and he was not allowed to meet his electors. It is further stated that complaints were lodged on behalf of the Petitioner for the incidents dated 6-2-1995, 14-2-1995 and 18-2-1995. It is further stated that infirmities had been lodged with the police with regard to the incident dated 19-2-1995. The denial of Respondent No. 1 to the above allegations is contained in paragraph 20 of the written statement.

21. The alleged incident relating to village Kaithagadia on 6-2-1995 is sought to be proved through the mouth of Petitioner himself as p. w. 18. The F.I. R. relating to the incident is proved as Ext. 29 and the protests lodged by the election agent have been proved as Exts. 20 and 40. Besides p. w. 14 has stated generally about all such incidents. Respondent No. 1 has adduced negative evidence as R.W.17. The election agent of Respondent No. 1 examined as R.W. 16 has stated that he had not gone to the village for campaigning.

22. It is to be noticed that though in the election petition it is stated that such violence occurred at the instance of Respondent No. 1 and his election agent, in the evidence it is not claimed that Respondent No. 1 was himself present. It is to be further noticed that in Ext. 40, copy of which had been filed as Annexure-3 as a part of the election petition, it is not stated that the violence has been done by Prafulla Kar. Similarly there is no such allegation regarding the involvement of the Respondent No. 1 or Pratulla Kar, the election agent, in the F.I. R. (Ext. 29) or Ext. 26, the other complaint by Bhabani Shankar Dash, p. w. 14, the disgruntled aspirant from the Congress Party who failed to get the nominator has stated in a general manner that it had been decided as an election strategy to obstruct the Petitioner and his supporters. He has stated that he was not present at the time of the alleged incident, but heard about such incidents. The Petitioner himself while being examined as p. w. 18 has stated in paragraph-7:

In village Kaithagadia while I was going for door to door campaign along with my supporters, many Congress workers such as Sankhamani Mohapatra, Chaitan Pradhan, Subas Pradhan and Ors. did not allow us to enter inside the village and assaulted my supporters. My election agent lodged F.I. R. with Nayagarh Police Station relating to aforesaid incident.

In cross-examination he has stated that he does not remember which of the persons were injured. Though in cross-examination he has sought to add the name of Prafulla Kar as one of the assailants, in view of Annexure-3 (Ext. 40) which is considered to be a part of the election petition and Exts. 26 and 29, such assertion cannot be accepted. None of the injured persons in the said incident has been examined as a witness. Assuming that such an incident had occurred and some of the Congress workers were the culprits, there is nothing to show that the alleged threatening or undue influence was by Respondent No. 1 himself or his election agent, or with the consent of Respondent No. 1 or his election agent. Even if it is accepted that such disturbance was created by the Congress workers and further assuming that they were the agents of Respondent No. 1, in the absence of

any assertion or evidence to the effect that the result of the election so far as the returned candidate is concerned has been materially affected, the Petitioner cannot succeed on these allegations. This is so, keeping in view the language of Section 100(1)(b) and Section 100(1)(d)(ii) of the Act.

23. The alleged incident relating to village Natugaon had occurred on 14-2-1995. Apart from the evidence of p. w. 18, the Petitioner himself, and the general evidence of p. w. 14 relating to the alleged policy of Congress Party to create such violence, the Petitioner has examined p. w. 7 and p. w. 17 in support of such allegation. He has proved the protest of his election agent as per Ext. 18, copy whereof was filed as Annexure-4. He has also proved Ext. 31, the F.I. R. lodged by Durjyodhan Sahu. The Petitioner has stated in evidence:

In village Natugaon while I was going along with my supporters for door to door campaign we were prevented by many supporters of Congress Party from entering inside the village by placing, bullock carts on the middle of the road. They were armed with lathis etc. Nitha Baral, his son, Prafulla Kar, the election agent of Respondent No. I was part of the said unruly mob. Some of my supporters were injured during the said incident. F.I. R. had been lodge about the aforesaid incident.

1 In cross- examination he has stated:

...As far as I remember, I went to Natugaon village on 14th February, 1995 during morning hours. About 5 to 7 workers of my Party were injured in the incident which occurred on that day, but I do not remember their names now. The supporters of the Congress such as Biswanath Barad, his son, Kailash Barad and some others were the assailants. They had put bullock cart on the road to obstruct us and when we reached there, they assaulted some of my supporters. One Duryodhan Sahu lodged the F.I. R. relating to the said incident in Nayagarh Police Station, but no action was taken as the Collector and S.P. had already been gained over by the Congress.....

It is to be noticed that neither the informant, nor the injured has been examined. Though in examination-in-chief the name of Prafulla Kar, the election agent, has been uttered, in cross-examination the Petitioner has omitted the name of Prafulla Kar to be a member of the unruly mob. In Annexure-4 (Ext. 18) which is considered to be a part of the election petition, Prafulla Kar is not named to be one of the assailants. P.w. 7 who also spoke about the alleged incident, has named several, persons as the culprits but has not named Prafulla Kar to be one of the culprits. As such, even assuming that any such incident had occurred, there is material to indicate that the alleged practices had been committed by the Petitioner himself or his election agent.

24. The incident dated 18-2-1995 is alleged to have occurred in village Deuli. The protest of the election agent of the Petitioner relating to this incident is Annexure-5. In the said protest petition it has been stated:

It has come to my notice that last night while Janata Dal workers of Malisahi of Dankana Grama Panchayat were making arrangements for preparation of reception to Sri Bhagabat of Janata Dal candidate.....at village Deuli Sri Prafulla Kar of village Benudhar Parida and Nibasi Sahoo of village Deuli with help of some local goondas armed with deadly weapons attacked the Janata Dal workers and prevented them to make arrangements for reception....."" It has to be noticed that in the election petition it had been stated that the Petitioner was prevented from entering into the village in question i. e. Deuli, on 18-2-1995. It is further stated that Annexure-5 is the complaint relating to the Incident dated 18-2-1995. From Annexure-5 it is apparent that the protest which is dated 18-2-1995 relates to the incident "of the last night". Thus apart from anything else, the document filed by the Petitioner himself belies the allegations made in the election petition. Even assuming that this discrepancy relating to the date of incident can be ignored, the evidence on this aspect is also not creditworthy. The Petitioner as p. w. 18 had stated in his examination-in-chief that he and his supporters were obstructed by Prafulla Kar and many others in village Deuli. It is further stated that F.I. R. was lodged relating to the aforesaid incident. In cross-examination it has been stated:

...I had gone to village Deuli once on 18th February,1995 during the afternoon....My supporters including Jogendra Pradhan, the ex-Sarpanch of Dhenkana Grama Panchayat. Aminta Pradhan and few other supporters of mine had gone. Those persons are now living. Prafulla Kar had fired a blank shot and Jaya Barad, Nibasi Sahu, Benudhar Parida and some others had thrown brickbats and also assaulted my supporters....The injured who belongs to village Malisahi had lodged the F.I. R., but no action was taken by the police. He was injured and hospitalized in Nayagarh Hospital....

The statement to the effect that Prafulla Kar had fired a blank shot is a development from what was stated in the examination-in-chief. The injured has not been examined. Similarly, the supporters of the Petitioner including the ex-Sarpanch have not been examined. Though the F.I. R. has been proved as Ext. 30, the informant has not been examined.

25. The last incident is dated 19-2-1995 relating to village Lathipada. P. ws 5, 15 and 18 are the witnesses examined on behalf of the Petitioner on this aspect, whereas negative evidence has been adduced through R. Ws. 2, 8,16 and 17. The F.I.R. has been marked as Ext. 32. The Petitioner as p. w. 18 has stated:

In village Lathipada we were prevented by Prafulla Kar, Bhagirathi Sahu, Bharat Patra, Braja Badtia and many other Congress supporters, who forcibly obstructed us from entering inside the village for door to door campaign. They assaulted us and there was brick-batting. However, since the police came to the place of incident, those members of the unruly mob went away. F.I. R. was lodged in respect of the said incident. Some of my supporters had been injured in the said incident and had been hospitalized.

P. w. 5 who was campaigning on behalf of the Petitioner has stated that Prafulla Kar, Braja Badtia, Bhagirathi Sahu and fifty to sixty supporters of Respondent No. 1 obstructed the Petitioner and other campaigners from entering inside the village and they had pelted brick- bats. He has further stated:

...One person throttled the neck of Banchhanidhi Bhanja, who had gone along with us. He had also sustained swelling injury on the head.....

Banchhanidhi Bhanja had lodged F.I. R. in Nayagarh Police Station.

In cross-examination it appears that Banchhanidhi Bhanja was a worker of Janata Dal. Non-examination of said Banchhanidi 856 Bhanja, the informant, who was allegedly injured creates doubt about the incident. The denial evidence of Prafulla Kar cannot be altogether ignored. Merely by producing the F.I. R. it cannot be said that the incident has been proved, as the F.I. R. can be utilized for the purpose of corroborating or contradicting the maker thereof. P. w. 15 had made similar statement. The Petitioner himself had not stated that p. w. 5 and, p. w. 15 had accompanied him to the village on the date of incident. P.w.5 does not speak about the presence of p. w. 15 and similarly p. w.15 does not speak about the presence of p. w. 5. In such a state of affairs and keeping in view the negative evidence adduced on behalf of Respondent No1, it is difficult to come to a conclusion that the allegations on this score have been proved beyond all reasonable doubt against Respondent No. 1.

26. (Thus, an analysis of the various materials on record relating to the various incidents, it is apparent that the Petitioner has failed to prove that Respondent No. 1 and/or his election agent were involved in the alleged threatening or show of force. Even assuming that such incidents had occurred, there is nothing to indicate that either Respondent No. 1 or his election agent was in any way involved, nor there any evidence on record to indicate that such overt acts had been committed with the consent of Respondent No. 1 or with the consent of his election agent. Even if it is assumed that such illegal overt acts had been committed by the supporters of Congress Party and even if it is further assumed that such supporters can be taken to be the agents of Respondent No. 1, there is no allegation nor material on record to indicate that the result of the election so far as it relates to the returned candidate has been materially affected. For the aforesaid reasons, Issue No. 3 is answered against the Petitioner.

27: Issue No. 4:

As originally framed, is; as follows:

Whether the result of the election so far as it relates to the Petitioner was materially affected on account of corrupt practice adopted by the Respondents as indicated in paragraph-21 of the petition? There is reference to paragraph-21 in the said Issue Paragraph-21 of the election petition in turn refers to paragraphs-3, 7, 9, 12,13,14, 16, 17, 18 and 19. It is alleged in paragraph-21 that Respondent No. 1 had obtained, procured,

abetted assistance by himself or with his consent or with the consent of his election agent for the furtherance of the prospects of his election, and it is further alleged that he is guilty of corrupt practice as defined in Section 123(7) of the Act. Paragraphs-12 to 14 and 16 to 19 relate to the alleged irregularities and illegalities in the process of counting and paragraphs-3 to 6 are general allegations indicating about the alleged prejudice of the Collector against the Petitioner and the alleged prejudicial manner of selection of Returning Officer and other counting officials. Paragraph-7 relates to the use of the vehicle hired for the purpose of T.L. C for the furtherance of the election prospect of Respondent No. 1. Paragraph-9 relates to forcibly pulling down of banners and placards of the Petitioner. The allegations contained in paragraphs-7 and 9 are relatable to corrupt practice as envisaged u/s 123(7) of the Act. The allegations contained in other paragraphs, particularly, paragraphs-14 and 16 to 19 referred to in paragraph-21 of the election petition, though characterized as corrupt practices are relatable to the alleged illegalities / irregularities in the manner of counting. It appears that such averments are covered under other Issues, namely Issues Nos. 5, 7,8 and 9. Keeping in view the above aspect, it is necessary to recast Issue No. 4 as follows:

4. Whether Respondent No. 1 is guilty of corrupt practice as envisaged u/s 123(7) of the Act and whether the result of the election so far as the election of Respondent No. 1 is concerned, has been materially affected by corrupt practice adopted by Respondent No. 1. or his agent by obtaining/procuring assistance of Gazette Officers or police officials for furtherance of the election prospect of Respondent No. 1. ?

28. These allegations are to be examined in the light of Section 123(7) of the Act, the relevant portion of which is extracted hereunder:

7. The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person with the consent of a candidate or his election agent, any assistance (other than the giving of vote) for the furtherance of the prospects of that candidate's election, from any person in the service of the Government and belonging to any of the following classes, namely:

(a) gazette officers;

(b)....

(c)....

(d) members of the police forces;

(e)....

(f)....

(g)....

Provided that where any person, in the service of the Government and belonging to any of the classes aforesaid, in the discharge or purported discharge of his official duty, makes any arrangements or provides any facilities or does any other act or thing, for, to or in relation to, any candidate or his agent or any other person acting with the consent of the candidate or his election agent (whether by reason of the office held by the candidate or for any other reason), such arrangements, facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate's election.

A careful perusal of the provisions contained in Section 123(7) makes it clear that before holding a person guilty of corrupt practice as envisaged in Section 123(7), the Court must come to the following conclusions:

(i) the candidate or his agent or any other person with the consent of the candidate or his election agent has obtained or procured any assistance from the class of persons envisaged in Sub-clauses (a) to (g) or such candidate or the agent, or any other person with the consent of the candidate or his election agent, abetted or attempted to obtain or procure such assistance;

(ii) such action was done for the furtherance of the election prospects of the candidate.

The Proviso to Section 123(7) which had been introduced by the Amendment Act, 40 of 1975, with retrospective effect, makes it clear that if anything is done by a person enumerated in Clauses (a) to (g) makes any arrangement or provides any facilities or does any other act or thing, such arrangement, facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of the candidate's election. Even where the Proviso is not applicable, it has to be established that the candidate or his agent or any other person acting with the consent of the candidate or his election agent had obtained or procured any assistance from the class of persons envisaged for the furtherance of election prospect. The expression "obtaining" or "procuring" is definitely different from the expression "giving" or "providing". The obtaining or procuring must be by the candidate, whereas giving or providing assistance may be by the official concerned. Mere giving of assistance by any official may not amount to "obtaining" or "procuring" the assistance of the official.

29. In paragraph-7 of the petition it has been stated that the Collector who was the District Election Officer was sparing no pains to harm the election prospects of the Petitioner. It is further alleged that with the consent and at the instance of Respondent No. 1, the District Magistrate and the Additional District Magistrate allowed Bhakta Ranjan Moharana, Headmaster of Nuagaon High School, who was one of the resource persons under the T.L.C. and had spared to use the vehicle bearing number ORB-4296 which had been hired for T.L.C. for the purpose of canvassing in favor of Respondent No. 1 during the election. It is further stated that the election agent of Respondent No. 1, Prafulla Kar and Pramod Patnaik, a leading member of the Congress Party, were also using the said vehicle for election campaign of Respondent No. 1. On 27-1-1995 this illegal practice was

detected by the workers of the Petitioner and the Petitioner lodged a complaint on 28-1-1995 to the District Magistrate with copy to the Chief Electoral Officer, Orissa, copy whereof has been filed as Annexure-1 to the election petition. In paragraph-21, it has been stated, inter alia:

...respondent No. 1 had obtained, procured, abetted assistance by himself or with his consent or with the consent of his Election Agent, for the furtherance of the prospects of his election ".Thus Respondent No. 1 is guilty of corrupt practice as defined in Section 123(7) of the Representation of the People Act, 1951 which has also materially affected the results of the election in question in so far as it concerns the election of the Respondent No. 1.."" Respondent No. 1 in paragraph-24 of his written statement has denied about these allegations.

30. The Petitioner has examined p. w. 12 who states that the vehicle meant for T.L.C. was being used for electoral campaigning by Prafulla Kar. Similarly p. w. 13 has stated that such vehicle was used for the purpose of campaigning. P. w. 16 Claims to be the driver of the vehicle and states that such vehicle was being used for the purpose of electioneering by members of the Congress Party. Similar evidence has been adduced by p. w. 14, p. w.17, the Collector, has stated that though such allegation was there, on enquiry he found such allegation to be unfounded. P. w. 18, the Petitioner himself, has proved various complaints regarding such illegal use of the vehicle by proving Exts. 27 and 39. Rebuttal evidence has been adduced by Respondent No. 1 through the mouth of R. W Section 5,6,16 and 17 (the Respondent No. 1 himself). R.W. 16, the election agent of Respondent No. 1 has denied the allegation that he had utilized the vehicle in question for the purpose of campaigning on behalf of Respondent No. 1. The Collector (p. w. 17) has denied that he had ever permitted Respondent No. 1 or his election agent or any other Congress worker to utilize the vehicle for the purpose of campaigning for and on behalf of Respondent No. 1. The evidence adduced on behalf of the Petitioner through the mouth of p. ws. 12, 13, 14,16 and 18 does not establish that, in fact, the vehicle had been permitted to be used for the purpose of election campaign of Respondent No. 1. It appears that Bhakta Ranjan Moharana was the person in charge of such Total Literacy, Campaign. Bhakta Ranjan Moharana was the Headmaster of an aided High School. Evidently, he was not a Gazette Officer. Even assuming that he had permitted the election agent of Respondent No. 1 to till the vehicle, it can not be said that the provision contained in Section 123(7) had been violated. Since there is no material on record to indicate that the election agent had "obtained or procured the assistance or had abetted any such action ", it cannot be said that any corrupt practice as envisaged in Section 123(7) had been committed. Similarly, in the absence of any acceptable evidence that such assistance had been obtained or procured from any "Gazette Officer", it cannot be said that any corrupt practice as envisaged in Section 123(7) had been committed. The evidence on this score being vague and indefinite, the allegations cannot be accepted.

31. It is also alleged in the election petition that posters, banner and placards displayed on behalf of the Petitioner had been forcibly removed by the police officials on the basis

of direction given by the Collector. The Petitioner has examined p. ws. 5, 6, 12, 17 and 18 relating to such removal of various placards, banners and posters et cetera. Rebuttal evidence has been adduced through the mouth of R. Ws. 9, 11, 12, 15 and 17. It is the case of the Petitioner that such removal was done by the police at the behest of the Collector. However, there is no material on record to prove that such alleged removal was done on the direction of Respondent No. 1 or with his consent. Assuming that such placards, banners, posters et cetera had been unauthorized removed by the police at the behest of the Collector, Respondent No. 1 cannot be held responsible for such action and the materials on record do not bring the case within the "corrupt practice" as envisaged in Section 123(7) of the Act. For the aforesaid reasons, the Issue No. 4 is decided against the Petitioner.

32. Issues Nos. 5, 7, 8 & 9:

These Issues being interrelated are taken up together.

33. The Petitioner has contended that at the time of counting of votes, there had been lot of illegalities and irregularities and he has sought for declaration that he should be declared as elected after recounting. It is unnecessary to refer to the catena of decisions on either side on this score as the law appears to be well settled. As a matter of fact, series of decisions have been noticed by Hon"ble Mr. Justice G.B. Patnaik (as his Lordship then was) in the decision reported in [Smt. Nakka Bhikhyamana Vs. Sri Aurovindo Dhali and Others](#), . The principle recognized in the aforesaid decision has been subsequently reiterated by several decisions of this Court including the decision reported in 1998 (2) O.L.R 214 Rabindra Kumar Millick v. Panchanan Kanugo and Ors.. In view of the various decisions noticed and analyzed in the decision reported in [Smt. Nakka Bhikhyamana Vs. Sri Aurovindo Dhali and Others](#), it must be now taken to be well-settled that ordinarily a Court does not direct for recounting of ballots unless material facts on the basis of which recounting is sought for are unambiguously and specifically pleaded and the Court is satisfied on evidence on record that it is necessary in the interest of justice to allow recounting of ballots. It is further clear that normally a Court should not permit a roving or fishing inquiry unless it is satisfied on the basis of materials on record that a recount is necessary.

34. The Petitioner has alleged in a general manner that the library hall of the College building was selected for the purpose of counting with a view to help Respondent No. 1. It is further pleaded that many of the counting officials were inimical towards the Petitioner and some of the relations of Respondent No. 1 had been appointed as counting officials and such persons as counting officials had helped Respondent No. 1 during the process of counting. It is further alleged that the barricade provided on the counting tables made it impossible for the counting agents of the Petitioner to observe the process of counting. It is further stated that there was failure of electricity on several occasions and at one point of time there was failure of electricity for about ten minutes. Taking advantage of such situation, many ballots in favor of the Petitioner were counted in favor of Respondent No.

1. Respondent No. 1 in his written statement has denied about such allegations.

35. The Petitioner apart from examining the various officials as p. ws. 1,3, 4 and 17, has also examined other witnesses present at the time of counting as counting agents either of the Petitioner or of Respondent No. 1. P. ws. 11, 13 and 14 are such witnesses. Respondent No. 1 has adduced oral evidence through the mouth of p. ws. 13, 16 and 17 to rebut such evidence adduced on behalf of the Petitioner. The Petitioner was permitted to put several leading questions to the various official witnesses. All such witnesses have stoutly denied the allegations of the Petitioner relating to any illegality or irregularity in the process of counting. The selection of a particular hall as the place of counting without anything more cannot by itself be considered to be a material irregularity in the process of counting. Though there is some evidence relating to failure of electricity on several occasions, it has been established through the evidence of official witnesses and the witnesses on behalf of Respondent No. 1 that alternative arrangement had been made and at any rate, candle lights were available. Though there may be some misleading statements regarding the adequacy of alternative arrangement, there is no categorical, acceptable evidence on record to show that in fact, the counting officials taking advantage of the semidarkness had counted ballots in favor of the Petitioner for the benefit of Respondent No. 1. A perusal of the result sheet relating to the votes polled by the candidates at the end of each round of counting indicates that Respondent No. 1 was maintaining a consistent lead over the Petitioner in all the rounds of counting. Even if there was failure of electricity for about ten minutes during a particular round of counting, there is nothing on record to indicate that Respondent No. 1 got abnormally high number of votes during the said round of counting. One of the allegations of the Petitioner is that in respect of certain tables, persons inimical to the Petitioner, or persons favorable to Respondent No. 1 had been appointed as counting supervisors or counting assistants. No acceptable evidence has been adduced by the Petitioner to prove that in respect of any particular table there had been alarming disparity between the ballots counted in favor of the Petitioner and Respondent No. 1 so as to raise any reasonable suspicion regarding the conduct of the counting officials. If there would have been any illegality or irregularity in the process of counting in respect of a particular table, one would have normally expected contemporaneous objection in writing on behalf of the counting agents or the election agent of the Petitioner who were admittedly present throughout the process of counting. As is the wont, in such case the Petitioner and his witnesses have stated about the oral objection being raised regarding the various illegalities and irregularities, but in the absence of any contemporaneous document, it is very difficult to accept such oral evidence relating to oral objection being raised from time to time. The complaint now made regarding the difficulty in observing the process of counting due to the nature of barricade provided cannot be accepted in the absence of contemporaneous written objection. The general and nebulous evidence adduced on behalf of the Petitioner relating to the illegality or irregularity in the process of counting which has been sufficiently rebutted by the witnesses on behalf of Respondent No. 1 is not sufficient to hold that there has been any irregularity or illegality in the process of counting materially

affecting the result of the election so far as the returned candidate is concerned. The margin of votes polled by Respondent No. 1 and the Petitioner was in the vicinity of six thousand and above. In the absence of categorical and strong evidence, it is very difficult to come to a conclusion that there has been material irregularity or illegality in the process of counting requiring any recounting. The two written objections filed before the Returning Officer, marked as Exts. 34 and 35 do not corroborate the statements made in the election petition and the oral evidence. The gravamen of the objection of the Petitioner in the said applications was that in the absence of his counting agent in some tables, the counting agents of Respondent No. 1 in connivance with the counting officials had counted many votes of the Petitioner in favor of Respondent No. 1 and as such the Petitioner has serious doubt about the process of counting. The said application had been rejected by the Returning Officer. The main allegation that the packets containing votes in favor to the Petitioner had been illegally assimilated with the votes of Respondent No. 1 has remained a vague allegation without being substantiated. It is, of course, true that p w. 14. a former member of the Congress Party, has supported the Petitioner's case about the alleged irregularity or illegality in the process of counting. It is to be noticed that p. w. 14 after the election left the Congress party and joined the group known as "Tiwari Congress". He himself was an aspiring candidate, but had to withdraw in the absence of backing of the Congress Party. In the absence of specific corroboration, his evidence by itself cannot be treated to be strong enough to set at naught the result of the election.

36. In view of the aforesaid discussions, there is no escape from the conclusion that the Petitioner has failed to prove that mandatory provisions of the Act and the Rules made there under regarding counting had been violated. There is no evidence on record to show that there had not been non-compliance with the provisions of the Act and the Rules regarding counting, nor there had been any illegal or improper acceptance of ballot paper. The evidence or record does not establish that any ballot in favor of the Petitioner had been illegally rejected. In such view of the matter, the Returning Officer was justified in rejecting the application of the Petitioner for recounting. Since there is no justification for ordering a recounting, the prayer for declaring the Petitioner as elected cannot be accepted. All these Issues are accordingly decided against the Petitioner.

37. Issue No. 6:

The Issue had been framed by my learned predecessor D.M. Patnaik, J, as follows:

6. Whether there was recounting of the votes by the the Election Officer to the utter disadvantage of the Petitioner?" This Issue appears to be redundant. It is nobody's case that there had been recounting of votes by the Returning Officer. In fact, the specific allegation of the Petitioner was that the Returning Officer illegally rejected the Petitioner's prayer for recounting and this aspect has been considered under Issue No. 8 in the preceding paragraphs. Issue No. 6 being redundant is hereby disposed of as not pressed.

Issue No. 10:

In view of the conclusions reached above, the election petition is liable to be dismissed. It is accordingly dismissed with consolidated, but taken cost of rupees one hundred (Rs. 100/-).

Election petition dismissed.