

Ramdayal Prabhakar Vs Mahendra Baudh and Twelve Ors.

Court: Madhya Pradesh High Court (Gwalior Bench)

Date of Decision: May 7, 1992

Acts Referred: Conduct of Elections Rules, 1961 " Rule 63, 63(6)
Representation of the People Act, 1951 " Section 123, 123(2), 24

Hon'ble Judges: T.N. Singh, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

T.N. Singh, J.

As many as thirteen respondents are arrayed in this Election Petition of whom the returned candidate is respondent No. 1,

Mahendra Baudh. The other unsuccessful candidates besides the Election Petitioner, are impleaded as respondents 2 to 12. "Respondent No. 13

is the Returning Officer.

2. First respondent's election from 22, Seondha Vidhan Sabha constituency is challenged in this petition. It is the constituency reserved for

scheduled caste candidates. The polling had taken place on 27-2-1990 and counting of votes was done on 28-2-1990. The first respondent had

secured 21577 votes as against Election Petitioner 21197 and, therefore, was declared elected on 1-3-1990 by , Returning Officer on his having

secured the highest number of votes.

3. Although the petition was lodged on 16-4-1990, service on all respondents could not be effected until 9-11-1990 though the two contesting

respondents, Nos. 1 and 13, entered appearance as early as on 3-8-1990. Returns were filed on 19-11-1990 by respondent No. 13 and on 22-

11-1990 by respondent No. 1. However, before that, on 9-11-1990, I.A. No. 1, preferred by respondent No. 1 was heard and disposed of,

4. Counsel were heard on the contention agitated in I.A. No. 1 in terms of Sections 83(1) and 86, the Representation of the People Act, 1951, for

short, the "Act" and the prayer made for striking out clauses (i), (ii), (iii) and (iv) of para 11 and paras 12, 13 and 15 of the Election Petition was

disposed of on 9-11-1990. It was found that there was no scope to hold any part of para 11 as wanting in material facts. However, para 12 was

struck out on reaching a finding that two most material particulars of corrupt practice alleged therein were missing. Allegations were made in that

para against two persons, Sitaram and Banwari of their allegedly being paid some amount by respondent No. 1 with the object of influencing them

and also the result of the election. The date or dates of the alleged payment and the amount or amounts allegedly paid not being mentioned, the

allegation was regarded as vague and was found being fatally hit by Sections 83(1)(b) and 86(5) of the Act. Accordingly, that para was struck out.

Similarly, a part of para 13 was struck out, being found materially deficient because the names of all "workers and agents of respondent No. 1

who were referred to had not been given. Those words, herein extracted, figuring in the last part of first sentence of para 13, were struck out.

Although on the same ground of non-specification of the names of "large number of his workers and supporters as counting agents", who, as

alleged in para 15 had got admitted into the counting room by exercising undue influence, the prayer was pressed for striking out para 15 as well,

that was not accepted. It was held that by itself, para ,16 was incomplete and the succeeding paragraphs 16 to 22 had to be read together along

with para 15 to comprehend the scope and character of the challenge which assailed the conduct not of the returned candidate (respondent No.

1), but of the Returning Officer as that related to the counting of votes. In reaching that conclusion, Election Petitioner's counsel's contention was

accepted that the ground of the challenge to the election was to be determined with reference to clause (iv) of Section 100(1)(d) of the Act and the

provisions of Conduct of Election Rules, 1961, Rules 52 et. seq.

5. In the Election Petition, at para 9, is summed up and framed the broad outline of the challenge to the election. It is contended that the nomination

paper of respondent No. 1 was improperly and wrongfully accepted and that had materially affected the result of the election in so far as it

concerned the returned candidate. Secondly, corrupt practices were committed by respondent No. 1, his election agent and other persons, with

his consent; and thirdly, there was non-compliance with the provisions of the Act and the Rules and orders made thereunder. At this stage, I do not

propose to dilate upon the factual basis for the legal grounds for the challenge to avoid duplication. There will be ample scope to discuss rival

pleadings, in taking up discussion of issues framed for trial of the petition.

6. The following issues were tentatively framed on 8-1-1991 after hearing counsel on both sides:

(1) Whether the election of the respondent No. 1 is void on account of improper acceptance of his nomination paper because he did not belong

to any scheduled caste and was, as such, disqualified to contest the election from the Seondha Constituency, which is reserved for scheduled

caste?

(2) Whether appointment of Sughar Singh Patel, Sarju Prasad and Ramswarup Rajput who were belonging to the Kamaria, Yadav and Rajput

castes on the Bhar Sadhak Samiti of the Krishi Upaj Mandi, Seondha, was with the consent of respondent No. 1 and such appointments

amounted to commission by him of any corrupt practice to hold the election void on that ground?

(3) Whether respondent No. 1 organised a rally on 25-2-1990 at Seondha and in the public meeting in which the rally culminated any statement

was made by respondent No. 1 and his election agents in relation to personal conduct and character of the Election-petitioner?

(4) Whether Shriram Sharma was election agent of respondent No. 1 on 25-2-1990 and in that character and capacity he made the statement in

the public meeting on 25-2-1990 regarding the personal conduct and character, of the election-petitioner.

(5) (a) Whether the Returning Officer rightly entertained the complaint, Annexure P-8, and allowed the entire recount of votes as per order,

Annexure p-9?

(b) Whether the Returning Officer had no jurisdiction to review his order, Annexure P-9 by entertaining the application, Annexure P-10?

(c) Whether the order, Annexure P-11, is wholly without jurisdiction, illegal and void?

(d) Whether the order, Annexure P-12, is liable to be quashed and whether a recount of votes of all the remaining rounds deserves to be allowed?

(6) Whether the petition deserves to be dismissed for non-compliance of Sections 81, 82 and 83 of the Act?

(7) Whether the election of the Respondent No. 1, is liable to be set aside under Sub-section (1) of Section 123 read with Section 100(I)(b) of the

Representation of the People Act, 1951, as stated in para II of the petition?

(8) Whether the petitioner is entitled to be declared elected from the 22 Seondha Assembly Constituency in place of Respondent No. 1?

7. There was some controversy in regard to one issue pressed by Election Petitioner and on that, counsel were heard on 17-1-1991. That was as

follows :--

Whether the counting of the votes was not proper and according to law as the votes secured by the petitioner (were deliberately bundled up with

the votes secured by the Respondent No. 1 which) illegally inflated the number of votes of Respondent No. 1?

It was held that four issues already framed, Nos. 5(a), 5(b), 5(c) and 5(d) were sufficient to take care of the controversy projected in the

proposed issue and that there being a prayer made also in the Election Petition for recounting, in disposing of the Election Petition, that prayer will

have to be dealt with, albeit, with reference to the findings reached on the said four issues.

8. On and from 22-2-1991, witnesses were examined in course of trial though hearing could not proceed de die in diem for various reasons.

Petitioner examined himself and six other witnesses. His last witness, P.W. 7, gave evidence on 15-4-1991. The Returning Officer, respondent

No. 13. Smt. Amita Sharma, gave her evidence on 10-7-1991 and 11-7-1991. Thereafter, the returned candidate, respondent No. 1, examined

witnesses in support of his case and also gave his own evidence. His last witness, R. W. 9, gave evidence on 27-8-1991. From both sides,

documentary evidence was also adduced. Arguments were heard on and from 10-9-1991 and indeed, hearing again was intermittent because of

constraints of the roster. Finally, hearing of arguments of counsel for both sides was concluded on 17-2-1992. I proceed now to give my decision

issuewise.

Issue No. (1)

9. To deal with this issue, I would like to refer first to the constitutional and statutory provisions. The challenge agitated in the issue is related

evidently to Section 100(1)(d) of the Act, but, it is necessary to refer importantly to Sections 33 and 36 as well. In the course of scrutiny of

nominations, Returning Officer, as per Section 36(2), is required to deal with and decide any objection raised and he is authorised also to make a

summary enquiry in that regard if "he thinks necessary" to do so and he may reject any nomination on any of the grounds contemplated therein. In

the event of failure of the candidates in complying with any of the provisions of Section 33 or 34, his nomination is liable to be rejected as per

Clause (a) of Section 36(2). The requirement of Section 33(2) is that in a constituency where any seat is reserved, "a candidate shall not be

deemed to be qualified to be chosen to fill that seat unless his nomination paper contains a declaration by him specifying the particular caste or tribe

of which he is a member and the area in relation to which that caste or tribe is a Scheduled Caste or, as the case may be, a Scheduled Tribe of the

State". Thus, the only mandatory statutory requirement contemplated is of "declaration" of the candidate and in the instant case, admittedly, that is

not wanting. In regard to satisfaction of the Returning Officer about correctness of the declaration, it is also not disputed that along with the

nomination paper, a Caste Certificate, issued by the Tahsildar was attached. It is also not disputed that Tahsildar was the competent authority to

grant the certificate. Also undisputed is the fact that in the entire State of Madhya Pradesh, the "Ahirwar" caste is included in entry No. 14 of Part

IX of the Constitution (Scheduled Castes) Order, 1950, made under Article 341 of the Constitution. Under these circumstances, apparently

burden lay heavily on the Election petitioner to prove the allegation made by him that the "declaration" was false or that the "Caste Certificate" was

false and was procured by exercise of influence by respondent No. 1 in his capacity as the Deputy Minister in the Government of Madhya

Pradesh.

10. It is true, Article 332 provides for reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States

and, therefore, any person who does not belong to a Scheduled Caste cannot offer himself as a candidate for a seat reserved for the scheduled

Caste. But,, the Parliament being authorised under Article 327 to make by-law enacted "provision with respect to all matters relating to, or in

connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State", the issue is to be decided in

terms of the provisions of Sections 33 and 36 of the Act. The Election Petitioner having disputed the correctness of the declaration contemplated

u/s 33(2) and having challenged the decision of the Returning Officer made in exercise of powers vested in him u/s 36(2), he invited on himself the

burden to establish the facts alleged to sustain the challenge.

11. At para 10 of the Election Petition, the material fact stated is that, "respondent No. 1 does not, in fact, belong to any scheduled caste and is

"Baudh" by religion and caste as he professes the "Baudh" Religion and the "Baudhs" do not fall under any of the castes recognised as such in the

District of Datia". It is also averred that the said respondent has made a "false and incorrect declaration in his nomination forms that he belongs to

the Ahirwar Caste which is recognised as a scheduled caste in the district of Datia", and that he had "misused his influence as the Deputy Minister

in the Government of Madhya Pradesh for obtaining that certificate". In his return, respondent No. 1 denied those statements and asserted that he

was a "Hindu" and that he belonged to "Ahirwar caste". He averred that he did not make any incorrect declaration in his nomination paper by

stating that he belonged to Ahirwar caste and added that he "affixes the word "Bodh" with his name as a nick name having no bearing with his faith

or caste or creed". He further averred that he was married to the daughter of Parvat Singh Ahirwar and that his sister Vijay Laxmi was married to

Anant Ram Ahirwar. His elder brother Ram Sewak Ahirwar was married to Sohadevi Ahirwar. His mother was Brijrani Ahirwar. He also stated

that he had been granted the certificate of his belonging to Ahirwar caste by competent authority and "that it was not obtained by misuse of

influence as a Deputy Minister which Office he held for the first time for a few months between December, 1989 and March, 1990.

12. Election Petitioner, deposing as P.W. 5, made a simple statement at para 4 of his deposition that respondent Mahendra Baudh did not belong

to Scheduled Caste. He stated that the said respondent and his father both, professed the Buddhist Religion and regard themselves as Buddhist.

They had never availed any benefit to which person belonging to a Scheduled caste are entitled. In his cross-examination, he admitted that he

resided in a different village at a distance of 25 Kms. from Seondha proper; Mahendra Baudh's village was Sarwada and he was presently

residing at Datia. He admitted that he had no information about Mahendra Baudh's family, about his brothers and sisters. He knew Mahendra

Baudh for the last 5 or 6 years and he had no occasion to meet his father. He was familiar with his name because he was an influential person of

the area. He admitted that in the earlier election also, before 1990, Mahendra Baudh was a candidate from the Seondha reserved constituency and

was elected from that constituency. During the scrutiny of nomination papers pertaining to 1990 election, objection could not be taken by him as he

could not reach the place in time. He admitted also that during the entire course of election, he had never, at any time, raised any objection that the

respondent was not a member of Scheduled caste. He did not know if the respondent's brothers or sisters were married in Ahirwar families. He

new respondent to be a Buddhist because he professed that faith and no other faith. He also knew him to be Buddhist because he was known as

such among influential persons professing Buddhist religion in Datia district. He admitted that he had made no enquiry in the educational institution

in which the said respondent pursued studies. He had learnt from some teachers that respondent Mahendra Baudh, during his educational career,

had not availed any scholarship or other benefits meant for scheduled caste people. It is also his evidence that among Scheduled caste, one main

caste is of "Chamar" and the sub-castes are Jatav, Ahirwar etc. He was a Jatav and his Gotra was Prabhakaria. He used to write, therefore,

Prabhakar" as a suffix with his name.

13. The only other witness on this point whom he examined is his Election Agent, Chandra Prakash Pathak, who deposed as P.W. 4. His evidence

is that as and when there was any religious congregation of Buddhists in Datia district, respondent Mahendra Baudh played a prominent part in

organising the same. He further deposed that general public has not seen him participating in any festival or congregation of Hindu religion. His

acquaintance with Mahendra Baudh dated back to five or six years only. He also admitted that he did not know any other member of his family

and had no information about his brothers and sisters. Mahendra Baudh was Buddhist by religion because his father also professed Buddhist

religion. He also deposed that the respondent used to write ""Boudh"" with his name and both -- father and son -- professed Buddhist faith. He

knew Har Das, respondent's father since 1978. He knew him because he was a distinguished person of the area, but he had no knowledge where

he was born because he had started living in Datia before the witness was born. He knew that in the year 1985, Mahendra Baudh was elected

from Seondha reserved constituency, but denied knowledge of Har Das having contested from the same constituency in 1952. He could not say if in

Seondha there was any Buddhist temple or Stupa. In Datia also if there was any temple or Stupa of Buddhist he did not know. He did not know if

and how many Buddhist families were there either at Seondha or at Datia. He did not know when any religious congregation of Buddhists was held

in Datia. He has not attended or seen any such congregation.

14. Respondent, Mahendra Baudh, examined himself and his father-in-law, Parwat-singh Ahirwar (R.W.2) to establish that his Sub-caste was

Ahirwar and he professed Hindu religion. R. W. 2 deposed that he as also his son-in-law, Mahendra Baudh, were of ""Chamar"" caste and both had

Ahirwar"" as their Sub-caste. His gotra is Purwaiya while that of Mahendra Baudh was ""Bodhma-saiya"". They were both followers of Hindu

religion. Mahendra Baudh had not renounced his religion. In his cross-examination he denied that Har Das, Mahendra Baudh's father, professed

Buddhist religion. He deposed further in his cross-examination that he had not seen late Hardas participating in any religious meeting or

congregation of Buddhists or propagating Buddhism. In his evidence, Mahendra Baudh (R. W.4). deposed that he was Hindu and was Ahirwar by

caste; with his name he used as suffix ""Bodh"" which was a part of his gotra, "Bodhmasaiya" The word ""Bodh"", which he used was not meant to

indicate that he followed Buddhism. All members of his family -- his father, brother and sister -- are married with persons of Ahirwar caste and

they all professed, Hindu religion. He had done his B. A. and LL.B. As a student in the school and college, he had availed the scholarship meant

for the scheduled caste students. His father died in 1978 and his last rites were performed on the banks of river Sarayu. He worshiped in Hindu

temples and observed all Hindu Religious festivals. In 1985 he was elected from the some constituency; then also he had filed his caste-certificate.

He was neither holding any government post nor was he a Minister in 1985. During that election no objection was raised against his nomination. At

the time of scrutiny of the nominations of 1990 elections, Ram-dayal Prabhakar was represented by Sarva-shri Pathak, Harihar Niwas

Shrivastava, Atmanubhav singh of his party; they did not raise any objection. His father had also contested Assembly elections from the same

constituency and at that time too it was a constituency reserved for scheduled castes. He proved his own caste-certificate (Ex. R-6) and also those

of his sister, Vijaylaxmi Ahirwar (Ex. R-5); his brother, Ramsewak Patel (Ex. R-7); his mother, Brijrani (Ex. R-8) and of his wife Shobha Baudh

(Ex. R-9). He proved three photographs also, Exs. R-1, R-2 and R-3 and deposed that those were taken on the occasions of Hindu festivals in

the fairs organised at different places which he had inaugurated. Although in his cross-examination is stated that the photographs were taken at

different times between 1985 and 1988 the negatives have not been proved and the photographers have also not been examined. He also admitted

that he was either an M. L. A. or Parliamentary Secretary or a Minister when the fairs were inaugurated by him.

15. On the state of evidence, noticed above, I have no hesitation to hold that the election-petitioner not only failed to discharge his burden to

establish that the accompanying declaration and the caste-certificate were false, he failed also to demolish the case established on cogent evidence,

by the respondent, of his being a Hindu and belonging to Ahirwar caste. His statement that during student life, he had availed benefits meant for

scheduled castes remained unchallenged in cross-examination. So also the fact that his father and he himself had contested earlier from the same

constituency and their caste-entitlement remained unchallenged. Although P.Ws. 4 and 5 both deposed that they had seen respondent, Mahendra

Baudh, organising and participating in Buddhist religious congregation that fact is not established by cogent and reliable evidence. Indeed, both

witnesses on their own admission had no knowledge about the family circumstances and matrimonial connections of the respondent and the other

members of his family. They both admitted that they had known the respondent only for 5 years or so. Their evidence does not at all inspire

confidence because they could not even give any particulars of the Buddhist families or of the Shrines, whether at Datia or Seondha and indeed

they did not even depose that they had personally seen at any time the respondent visiting any Buddhist temple or shrine or of his worshipping there.

The conclusion which is irresistible is that the plea pertaining to this issue is baseless. Except bare assertion in the evidence of the election petitioner

and his election agent, not a scrap of paper and no cogent, reliable and independent evidence has come on record to sustain the plea.

16. Counsel have cited decisions which may be now examined to finally dispose of the issue. In Chaturbhuji Vidhaldas, AIR 1954 SC 234 the

question raised was of conversion of a Mahar (scheduled caste) to Mahanubhava Panth. At para 49 their Lordships referred to three secular

criteria and stressed importantly the intention of the individual himself. At para 51, in the context of sociological bearings, they held that the old

castemen may still regard the convert as one of themselves despite the conversion which for all practical purposes could only be ideological,

involving no change of status; they attached importance to matrimonial alliances as reflective of social view. S. Rajagopal Vs. C.M. Armugam and

Others, also relates to conversion. It is held that the Hindu who belonged to Adidraida caste and was converted to Christianity had to establish

that after conversion he again became member of the same caste. At para 22 it is held that ordinarily membership of a caste under the Hindu

religion is acquired by birth and therefore on reconversion it is necessary to establish recognition generally by members of the caste of the

reconvert being accepted within the fold of that caste. In Punjab Rao Vs. D.P. Meshram and Others, also of conversion, it is held that word

profess"" in the presidential order of 1950 is ""used in the sense of an open declaration of practice by the person of the Hindu (or the Sikh) religion"".

Candidate's signing along with others a declaration, at the time of his conversion, that he had embraced Buddhism, and his issuing an wedding

invitation with a picture of Lord Buddha and installation of image of Lord Buddha by him in Shiva temple near his house were regarded as strong

pieces of evidence of his ceasing to be a Hindu. In Ganpat Vs. Returning Officer and Others, failure to object at the time of scrutiny of nomination

papers was held to weaken the objection taken after election that the elected candidate had ceased to be a Hindu and had become a Buddhist.

Religion, it is held, ""is essentially a highly personal matter"" and that ""open assertion"" about the religion one professes should be given ""considerable

weight over the interested testimony of others based of stray instances"".

17. Three decisions reported in Kailash Sonkar Vs. Smt. Maya Devi, Kailash Sonkar, at page 905, S.R. Palanimuthu's case and at page 1513

Genuram's case are also cited. Social recognition according to Kailash Sonkar should be regarded as the dominant determinant. It was held that if

the person concerned has been elected to the State Assembly or the Parliament from a constituency reserved for a scheduled tribe or scheduled

castes the majority verdict of the electorate rendered in his favour ""was doubtless proof positive of the fact that his community had accepted him

back to his old fold"", In R. Palanimuthu, objection was taken at the scrutiny stage which was disallowed and the second respondent was eventually

declared elected after the poll having secured the highest number of votes. His closest rival in his election petition challenged correctness of the

certificate issued to the returned candidate by the Tahsildar. The unimpeachable documentary evidence, containing declarations in sale-deeds,

school-certificates, birth-certificates etc. of the returned candidate and members of his family as Hindus, was found to falsify his claim based on

Tehsildar's certificate. In Ganuram the fact that at the time of scrutiny no objection was taken and that the declaration in the nomination paper was

supported by the caste-certificate were held sufficient to sustain the validity of the nomination paper of the returned candidate; High Court's order

invalidating the election was accordingly set aside.

18. Applying the legal tests evolved in the decisions cited to the evidence on record, I have found it impossible to reach at any other conclusion

except that the election petitioner has failed miserably to prove that respondent Mahendra Baudh's nomination paper was invalid and that it was

wrongly accepted. It has not been proved that respondent Mahendra Baudh is a Buddhist or he had ever been a Buddhist and that he is not a

Hindu and is not a member of the scheduled caste. Accordingly, I decide the issue against the election-petitioner and in favour of respondent No.

1.

Issue No. (2)

19. Section 123 defines the term "Corrupt practices", the case pleaded and sought to be proved by the election-petitioner is referable to Sub-

section (2) contemplating "undue influence" on the free exercise of electorate's rights, "by any direct or indirect influence or attempt to interfere on

the part of the candidate or his agent or of any person with the consent of the candidate of the election agent", Clauses (iii), (iv) and (v) of para 11

of the election petition contain averments relating to this issue. The sum and substance of the plea, in the own words of the election-petitioner, is

that respondent No. 1 in order to gratify the electors of the Samaria, Yadav and Rajput castes misused his influence as Deputy Minister and got his

own men belonging to the aforesaid three castes appointed members of the Bhar Sadhak Committee of the Krishi Upaj Mandi Samiti. They were -

- Sarvashri Sugharsingh Patel (of Kamaria caste), Sarjoo Prasad (of Yadav caste), and Ram Swaroop (of Rajput caste) appointed on 19-2-1990

as per Ex. P-5. It is also his case that he had protested against the order to the Returning Officer and the Chief Electoral Officer, Madhya Pradesh.

Bhopal and that the Collector, Datia, most reluctantly, on the Polling date, directed the S. D. C. on 27-2-1990 by wireless message not to hand

over charge to the aforesaid Bhar Salhak Samiti. It was then too late and respondent No. 1 succeeded in gratifying the voters of Kamaria, Yadav

and Rajput castes and they were directly induced by him to vote for him.

20. Obviously, it will be necessary for the election-petitioner to establish that the order passed by the Director of Mandies at Bhopal proved as Ex.

P-5 was at the instance of either respondent No. 1 or his agent or that the order was passed either with his consent or with the consent of his

election --agent. Without that immutable requirement being satisfied there could be no scope for the election-petitioner to establish the charge of

corrupt practice alleged under this issue. But, neither the Director was examined nor any person in his office to prove the role played by the

respondent or his election agent to establish that they were really instrumental in the issuance of that order. It is true that on 12-2-1990 the same

Director had passed order appointing Senior Agricultural Extension Officer as Bhar Sadhak Adhikari by exercising his powers u/s 57, M. P. Krishi

Upaj Mandi Samiti Adhinyam 1972. But, his competence to modify that order statutorily under the same provision being insured, mala fide

exercise of power in passing the order, Ex. P-5, cannot be assumed. Nothing has come on record suggesting any role of any outsider in the

modification by the Director Of his earlier order dated 12-2-1990 (Ex. P-3) or of appointment of persons named in the subsequent order. It has

also not been established that any one of those persons, namely, Sugharsingh Patel, Sarjoo Prasad and Ram-swaroop Rajput (wrongly named as

Ramlal Rajput"" in the election petition) had given out to the electorate or to the members of their respective castes about the alleged role of

respondent No. 1 or about the object of their appointment. Indeed, it has even not been proved that the order was published or proclaimed in the

constituency in anywhere.

21. One of the members, Ramswaroop Rajput (P. W. 6) gave evidence that Mahendra Baudh did not offer any gratification or inducement to

work for him and that the State Government acting on its own made him a member of the committee. In the elected committee, which had

completed his 5 years" term of Office, he was a Vice-President and Sugharsingh was a member for the first half of the term. For the second half of

the term, Sugharsingh was elected President and he became member. He had been always holding some office in the Mandi Samiti during the

period of last 7 years. He had received after 15 days the order dated 19-2-1990 (Ex. P-5). He assumed office under that order in the meeting

which was held one month thereafter. It is also his evidence that Mahendra Baudh had not met him at any time though he knew him for the last 5

years. There was about 50 households of persons of Rajput caste in villages Mahanapura, Rampura, Chinadigva and Marsaina. At para 6 of his

evidence, R. W. 4, Mahendra Baudh gave break-up of population of persons belonging to Kamaria, Yadav and Rajput castes in different villages

of his constituency. At para 7 he stated that when election took place of the Mandi Samiti he was not even an M.L.A. He denied suggestion that

he had used his influence in any manner in getting nominated to the Bhar Sadhak Committee any person, and indeed, not Sugharsingh or

Sarjoooprasad or Ramswaroop. The Returning Officer, Smt. Anita Sharma, in her evidence confirmed the fact that a telegraphic message was

received from Atmanubhavasingh, President, Bharatiya Janata Party, Seondha on 26-2-1990 on which action was taken by her as per wireless

message (Ex. P-I). She had called for report by return signal from S.D.O., Seondha on the telegraphic complaint and also directed him to ""defer

action"" on the constitution of the new committee. That fact is well-established. However, nothing has been suggested even to her that respondent,

Mahendra Baudh, or his election agent or any person working for him had played any role in the constitution of Bhar Sadhak Samiti. In his own

evidence the election-petitioner did not say as to what enquiry he has made in regard to the constitution of the Bhar Sadhak Samiti and did not

even disclose the source of information about the alleged role of respondent No. 1. It is difficult to accept his bare assertion in para 4 of his

deposition that the respondent had misused his influence as Deputy Minister in securing appointment of Sugharsingh, Sarjoooprasad and

Ramswaroop with the object of interfering with free exercise of their electorate right by the members of Kamaria, Yadav and Rajput castes. It is,

therefore, not necessary to decide if the result was materially affected in any manner.

22. It is rightly contended by Shri Jain, appearing for respondent No. 1, that the concept of "corrupt practice" contemplated u/s 123(2) has to be

decided on the evidence of bargain with voters and if that is not established the plea must fail. In that connection, reliance on Om Prabha Jain Vs.

Abnash Chand and Another, is most appropriate. It has been held that a Minister in discharge of his duty will be required to act administrative ly in

granting money for uplift of certain com munities and such action of the Minister is not to be considered against him unless it can be established that

there was a bargain with the voters for getting their assistance at the election. In the same volume is reported the case of Ghasiram at page 1191. It

has been held that proof required to establish a corrupt practice must be almost of the character required to establish a criminal charge and grant

by the Minister from discretionary fund, in pursuance of general scheme was not held as a bribe to the voters because there was no evidence that

the respondent bargained directly or indirectly for votes.

23. There is no evidence in this case also of direct or indirect involvement of respondent, Mahendra Baudh, in the nomination of the three persons,

to the Bhar Sadhak Samiti and there is also no evidence of the same respondent making any bargain with the voters through those appointments.

Not even a single voter of Kamaria, Yadav and Rajput caste is examined in that regard. Accordingly, this issue is also decided against the election-

petitioner and in favour of respondent No. 1.

Issues No. (3) and (4)

24. These two issues are taken together as they relate to another allegation of corrupt practice committed allegedly on the same date 25-2-1991 at

the same place by respondent No. 1 and his so-called election agent, Shri-ram Sharma (R.W. 8). At para 13 of the election petition Shriram

Sharma is described as agent for respondent No. 1 and that allegation is denied in the return. In evidence it has not been established that R.W. 8,

Shriram Sharma was election agent of respondent, Mahendra Baudh. To prove that fact it was election petitioner's burden and indeed conclusively

that could be established by calling for the relevant records from Election-office because appointment of election-agents is to be notified in terms of

Rule 12(1) in Form No. 8 as per Conduct of Election Rules, 1961. It cannot be disputed that an election agent can be appointed only in the

manner statu-torily contemplated and therefore unless the appointment made in terms thereof is duly proved the allegation would remain not

proved. It is further to be noted that to R.W. 8 was not even suggested in the cross-examined that he had been duly appointed in the prescribed

manner election agent by respondent, Mahendra Baudh. The witness deposed that he knew Mahendra Baudh for the last 15 or 20 (years because

they were both lawyers and Mahendra Baudh was President of the Bar for some time. He had voluntarily done some Work for Mahendra Baudh

in the 1990 election and not at his request or with his consent. He worked part-time in his leisure, after finishing his Court work. He was Counting

Agent; he named Pritambabu Mitra as the Election-Agent. He was not contradicted.

25. At para 13 of the election-petition the allegation is that respondent No. 1 ""organised and took out a huge rally at Seondha at about 3.00 p.m.

which was terminated in Bus-stand, Seondha and converted in public meeting, which was addressed by respondent No. 1, his election agent

Shriram Sharma and workers and agent of respondent No. 1"". In their addresses they openly, inter alia, made the following statement :

(Matter in vernacular omiited -- Ed.)

It is averred that those who made the statement knew the same to be false and they were guilty of the charge of corrupt practice u/s 123(4) of the

Act. In his return the allegation was denied by respondent No. 1 who not only stated that Shriram Sharma was not his election agent but he stated

also that neither he nor Shriram Sharma had made the alleged statement. He averred that ground of challenge u/s 123(4) was imaginary and had

been concocted by the petitioner.

26. Election-petitioner's election-agent P.W. 4, C, Pathak, deposed that the rally in question was taken out with tractors from Seondha Bus Stand

on 25-2-1990 which passed through the entire Seondha town and terminated at the Seondha Bus Stand in a general meeting. His further

deposition is that Shriram Sharma, Advocate, stated openly in that general meeting that Ram Dayal Pra-bhakar was a rapist and against him there

was a rape case pending trial at Ujjain. People should not vote for him. After him Ashok Sharma and Jayendrasingh alias Munna Sengar also made

the same allegation against Ramdayal Prabhakar. After they had spoken Mahendra. Baudh spoke and he too made allegation of rape against

Prabhakar and stated that rape case was pending against him at Ujjain. From where the rally started on that date he could not say and through

which places it passed also he could not say but he made the definite statement that at 2.00 p.m. the rally had reached Seondha Bus Stand and that

there were 25-30 tractors in that rally each carrying 4 or 5 persons. Slogans were being should in the rally like Mahendra Baudh Zindabad,

Congress Zindabad. Defeat the rapist etc. etc. Shriram Sharma and Munna singh Sengar (and some others too, whom he named) were shouting

the slogans. He was not following the rally but he saw the rally at the Bus-stand. There was no mike or loud-speaker on any tractor. Ramdayal

Prabhakar had not taken out any rally on that date but he has addressed a meeting attended by about 2,000 persons at the Bus Stand which

started at 1.00 p.m. and ended at 2.00 p.m. Later he said, contradicting himself, that Ramdayal had not attended that meeting. In Mahendra

Baudh's meeting also about 2,000 persons attended and that meeting started after an interval of half an hour or so. When Ramdayal came he

could not say but during the meeting of Mahendra Baudh he had come there and he had stayed there for about 5 minutes. At that time Mahendra

Baudh was speaking. He spoke for about 20 minutes. Before him Jayendrasingh Sengar alias Munna spoke for about 15-20 minutes. Before him

Shriram Sharma, Advocate spoke for half an hour. Another one or two persons spoke in the meeting, each for 5 minutes or so. The meeting ended

at quarter to 4.00 p.m. He did not make any complaint himself to anybody in respect to the defamatory statements made in the meeting but he had

informed Prabhakar on the 25th itself and had advised him to meet at Datia the Returning Officer. There was a police station in Seondha but no

complaint was lodged there by him. In Mahendra Baudh's meeting no speech was delivered on the plans and programmes of the Congress party

but speeches were made branding Ramdayal Prabhakar as being rapist and characterless person and of a rape case being pending trial against

him.

27. Election petitioner, P.W. 5, at para 5 of his evidence stated that the rally was taken out on 25-2-1992 by Mahendra Baudh according to pre-

arranged plan to defeat him and in that rally slogans were shouted of his being rapist. In the meeting at Seondha Bus Stand where the rally

terminated, Shriram Sharma, Advocate, who conducted the election propaganda of respondent Mahendra Baudh made first of all allegations

against him that Bharatiya Janata Party candidate Ramdayal Prabhakar was a characterless person and he was a rapist and was being prosecuted

at Ujjain in a rape case; no votes should be cast in his favour. Some of his Workers came from his office to call him and he went away from the

meeting for some time but returned again. It was about 3 or 3.30 then and Mahendra Baudh speaking, making the same allegations. The only other

witness who spoke about the rally and the meeting to support the case of the election-petitioner is P.W. 7, Bhagirath. He admitted that he had

hired a shop from Ramgopal who was uncle of P.W. Chandra Prakash and in that shop he was carrying on grocery business; the shop was at the

Seondha Bus Stand. His evidence is that at about 1.30 or 3.00 p.m. the meeting organised by the Congress Party for 1990 election at Seondha

Bus Stand started and it continued up to about 3.30 to 4.00 p.m. In that meeting Shriram Sharma, Advocate, Munna Sengar and Mahendra

Baudh spoke. Some others also spoke but he did not remember their names. First of all Shriram Sharma spoke alleging that Prabhakar was being

prosecuted in a rape case in Ujjain Court and none should vote for him. Munna Sengar spoke after him on the same lines; one or two other

persons also spoke whom he did not know. Mahendra Baudh spoke at the end and repeated the allegations. In Ramdayal's meeting which was

held two hours before Mahendra Baudh's meeting, Raj Chaddha spoke. That meeting continued for an hour and a quarter. The two meetings

were held within a distance of 100 or 200 paces of one another and separate platforms were erected. He informed Ramdayal 4 or 6 days after the

meeting that against him allegations were made by Mahendra Baudh, Shriram Sharma and Munna Sengar.

28. For the respondent, Gotiram deposed as R. W. 1 and stated that he had grocery shop near Seondha Bus Stand. He had heard speeches

delivered in the meetings of Mahendra Baudh and Ramdayal held at the Bus Stand during the 1990 election. In Mahendra Baudh's meeting the

candidate and also Shri-ram Sharma and Madhurisharan spoke. Others also spoke but nobody made any allegation against Ramdayal Prabhakar,

such as of his being either a rapist or of any rape case being pending trial against him. No personal allegation was made against Ram Dayal by any

speaker in the meeting. In his cross-examination he admitted that the shop of Bhagirath (P.W. 7) was 5 or 6 shops away from his shop. The

meeting started at about 2.00 p.m. on 25-2-1990 and ended at 4.00 p.m. Karamsingh Yadav spoke first in the meeting. Others who spoke were

Jayendrasingh alias Munna Sengar and Shriram Sharma, whom he personally knew. He was an Advocate. He had not heard Shriram Sharma

saying that Ramdayal Prabhakar was rapist and there was a rape case against him in Ujjain Court and he did not also hear Mahendra Baudh

saying any such thing. R.W. 3, Nanakchand Bhagwani, who had a General Store at Seon-dha Bus Stand, also gave evidence. He also deposed

about two meetings of Ramdayal and Mahendra Baudh held at Bus Stand during 1990 election. He stated that first of all Karansingh spoke and

then Shriram Sharma and at the end Mahendra Baudh spoke. None of the speakers in Mahendra Baudh's meeting made any statement that

Ramdayal Prabhakar was rapist or that at Ujjain there was a rape case pending against him in Court. All speakers in that meeting spoke generally

soliciting votes for Mahendra Baudh. He denied that there was any rally of Mahendra Baudh on that date which terminated" in the meeting or that

he had joined the rally.

29. In his own evidence, respondent stated at para 8 that on 25-2-1990, neither he nor his party had taken out any rally, but only one meeting was

held by him at the Bus Stand. He deposed that Shriram Sharma was not his election agent and also deposed that neither he nor the said Shriram

Sharma, nor anybody else who spoke in that meeting had made any allegations against Ramdayal Prabhakar being a rapist or being a characterless

person. It was also not stated by anybody in the meeting that against him, there was rape case pending. He was grilled extensively in the cross-

examination. He categorically denied the categorical suggestion made to him that on 25-2-1990, he had organised a rally with 15 to 20 tractors, 5

or 7 cars and 14 or 15 persons walking on foot. He stated that his meeting started at 2.00 p.m. sharp at Seondha Bus Stand and Shri Ashok

Dantre presided over the meeting. About 15 persons spoke in the meeting. For how long the different speakers gave speeches, he also could not

say. R.W. 7, Jagdish Angal, gave evidence that in Mahendra Baudh's meeting, 10 to 12 persons spoke. He had attended that meeting. No

speaker stated that Ramdayal Prabhakar was characterless or that he was a rapist and there was a rape case pending against him. He admitted

that he was election-agent of another candidate, Jalim Jatav and on 25-2-1990, he was doing publicity work for that candidate up to 1.30 or 2.00

p.m. He had not seen any rally of Mahendra Baudh passing through Seondha when he was meeting people and doing publicity in the town or that

rally terminating at the Bus Stand. He did not remember who among the 10 to 12 persons spoke first or who spoke when. He named some :

Karam Singh Yadav, Shriram Sharma, Advocate, Munna Sengar and Mahendra Baudh.

30. Shriram Sharma and Munna Sengar, who admittedly spoke in the meeting, gave evidence as R.Ws. 8 and 9. Shriram deposed that 2 or 3

persons besides him, Mahendra Baudh, Karam Singh Patel and Munna Sengar, spoke in the meeting; none made any allegation against Ramdayal

Prabhakar's personal character or conduct. Neither he nor any other speaker stated in the meeting that Ramdayal Prabhakar was rapist or

characterless person. From his court-work he was free at about 2.00 p.m. on 25-2-1990. He came from Seondha Court to the Bus Stand and

between the two places, the distance was one kilometer. The meeting had started when he reached the Bus Stand and he saw that Shri Ashok

Dantre was presiding. One of two other persons spoke after him and then Munna Sengar spoke aulogising the services of respondent and the

work done by him in the constituency like establishing schools, sinking tube-wells, constructing roads etc. After him, another two persons spoke

and then the meeting dispersed. About his own speech he stated that he warned people against voting in the name of religion. After him, Mahendra

Baudh spoke for about 15 minutes about Congress party's policies and development plans concerning the region. He spoke also about removal of

untouchability, protection needed by the exploited section of the society and the women folk. He denied categorically that on 25-2-1990, with

tractors and car" rally was taken out by Mahendra Baudh. At para 10, he stated that he did not remember when the President spoke, before or

after Mahendra Baudh. He denied that he or Munna Sengar or Karam Singh or Mahendra Baudh or any other person had said in their speeches in

the meeting that Bharatiya Janata Party's candidate Ramdayal Prabhakar was rapist and characterless person and against him there was a case

pending at Ujjain.

31. R.W. 9, Munna Sengar, also stated like R.W. 8 that no announcement about the meeting was made over loudspeaker. At about 2.00 p.m., the

speakers had collected at the meeting place, but no rally was organised by Mahendra Baudh. He did not remember exactly how many persons had

given speeches, but they may be 6 or 7. Ashok Dantre had presided and the first speaker in the meeting was Karam Singh who spoke for 10

minutes about programmes of Congress party. About his own speech he said that he spoke mainly about the work done by Mahendra Baudh and

that he did not say anything about Ramdayal or any other candidate of any other party. After him, one or two persons gave speeches, but their

names; he did not know. Then, Shriram Sharma spoke for about 10 to 15 minutes. After Shriram Sharma, one or two persons spoke, but he did

not remember what speeches they gave. Then, Mahendra Baudh spoke about his plans and programmes to be implemented by him if elected.

After Mahendra Baudh, none spoke and he did not remember if the President gave any speech. He was in the meeting from beginning to the end.

32. It is true that there are minor discrepancies in regard to sequence of the speakers or the number of speakers who had addressed Mahendra

Baudh's meeting on 25-2-1990. Those, I would regard as aberration at the fringes, not touching the core of the testimony of any witness who gave

evidence for respondent Mahendra Baudh. It should be recalled that besides the election petitioner and his election agent P.W. 4, there is only

P.W. 7 who gave evidence about rally and about the defamatory statement in Mahendra Baudh's meeting. He cannot be regarded however as an

independent or wholly non-partisan and disinterested witness because he admitted that he was tenant of uncle of Pathak, P.W. 4. His obligation to

the election-petitioner's election-agent apart, from his evidence, the election-petitioner cannot derive any support in regard to the allegation, about

the rally. The very fact that in the petition it is not even whispered that there was any slogan shouting in the rally makes the embellished version of

this witness in line with election-petitioner's and his election-agents" wholly unreliable. He stated that he had informed Ramdayal 4 or 6 days after

the meeting about the allegations which were made against him in the meeting by Mahendra Baudh, Shriram Sharma and Munna Sengar. But, he is

not corroborated in that regard by the election-petitioner. Indeed, about the rally, no credible and cogent evidence, worth its name, has come on

record. Two other witnesses, Chandra Prakash Pathak (P.W. 4), the election-petitioner's agent and the election-petitioner himself (P.W. 5) made

bald and bare assertions that tractors and cars were parading the streets of Seondha and of slogans being shouted in the rally and surprisingly yet,

no report about that was made to anybody. That the story about the rally is false and cooked up is evident from the very fact that in the election

petition, at para 13, the allegation is that ""the respondent organised and took out a huge rally at Seondha at about 3.00 p.m. which was terminated

at the Bus Stand, Seondha and converted in public meeting"" while in the evidence the case proved is that Mahendra Baudh's meeting started at

2.00 p.m. and ended at 4.00 p.m. Indeed, P.W. 4 categorically admitted in his evidence at 2.00 p.m., the rally had reached the Bus Stand and he

could not give the time when the rally started from the Bus Stand to make a round of the town. The registration number or owner's name or

driver's name even of a single tractor or car could not be given in evidence and in the petition no particular, except that it was a "huge rally" is

given. A rally with tractors and cars is a big affair and there could be no dearth of evidence to prove the episode if that was true. The evidence of

the election petitioner and his election-agent is wholly worthless. They both admittedly did not follow the rally and did not see the rally.

33. However, it is to be examined if in the meeting held at the Seondha Bus Stand addressed admittedly by respondent Mahendra Baudh, one

Karam Sirigh, Shriram Sharma (R.W. 8) and Munna Singh Sengar (P.W.9) any speaker made any statement attributed to them in para 13 of the

election petition casting aspersion on the personal character and conduct of election petitioner Ramdayal Prabhakar alleging that he was a rapist

and a rape case was pending trial against him at Ujjain. About that also, there is no convincing evidence at all. The only so-called independent

witness P.W. 7, is held to be unreliable and the interested testimony of the election petitioner and his election agent is also far below the required

standard of proof. It is settled law that the charge of corrupt practice is to be proved like a criminal charge and that the same standard of proof as

is required in a criminal case is to be applied in the testing the evidence of corrupt practice in an election petition. The charge has to be proved by

cogent, clear and reliable evidence and it is to be proved beyond reasonable doubt. Unless the evidence adduced by the election petitioner is

satisfactory on the mere weakness of the rebuttal evidence the charge cannot be held proved. On the balance of probabilities, the charge of

corrupt practice cannot be held proved. It is surprising that not only against the "rally", no complaint was lodged any here at any forum, about the

meeting and about the gravity offensive statement also at no place and at, no time, any complaint was lodged with anybody. As noted at the outset,

minor discrepancies only are brought out in the rebuttal evidence adduced by respondent No. 1 about duration of the speeches delivered and about

sequence of the speakers taking the platform. I have seen no reason to discard the testimony of P.Ws. 1, 3, 7 and 9 who have deposed in a

natural manner. In an extraordinary manner, on the other hand, the election petitioner and his election agent deposed quite unnaturally that in the

meeting of Mahendra Baudh nothing else was spoken, but for two hours continuously, all the speakers simply incanted one Mantra denigrating the

respondent's character and conduct, branding him a rapist.

34. On the pleadings and evidence, for the reasons aforesaid, I have no hesitation to conclude that corrupt practice alleged against respondent

No. 1, Mahendra Baudh and R.W. 8, Shriram Sharma that there was a rally and in that rally, and later also in the meeting, on 25-2-1990, at

Seondha, attacks were made on the personal conduct and character of the election petitioner, has not been proved. Indeed, I hold that the said

Shriram Sharma was not the election agent of respondent No. 1 and I hold further that neither he nor respondent No. 1 had made the statement

attributed to them (in para 13 of the election petition) concerning the personal character and conduct of election petitioner in the public meeting at

the Seondha Bus Stand on 25-2-1990. Thus, both issues Nos. (3) and (4) are decided against the election petitioner and in favour of respondent

No. 1.

Issues Nos. 5(a) to 5((i)

35. These four issues are taken together because they are inter-related; they deal with the common question relating to prayer of recount vocalised

in issue No. 5(d) and in that context the Returning Officer's lapse, if any, as per complaint specified in the other two issues, Nos. 5(b) and 5(c).

Pertaining to above issues, statements made in paras 15 to 23 of the petition are relevant. The allegation is that when the counting of votes took

place on 28-2-1990, the workers and supporters of the respondent No. 1 interfered with the counting process and it was not done according to

the ""provisions of the Act and the rules/orders framed/passed thereunder"". The votes secured by the petitioner were, it is alleged, deliberately

bundled up with those secured by respondent No. 1 and though counting agents of the petitioner protested, they were not heard and that the votes

secured by respondent No. 1 were illegally inflated. Reference is made to the written complaint of petitioner's election agent and to order passed

thereon by the Returning Officer. Under that order, a sample re-counting was done of votes cast at the Polling Station Nos. 125, 129, 137 and

147 which formed part of the specified rounds (Nos. 8, 9, 10, 11 and 12) in regard to which complaint was made. Reference also is made to

another order of the Returning Officer directing complete recount, after sample recounting was over. It is admitted in para 19 that, ""immediately

thereafter, the election agent of the respondent No. 1 made an application to the Returning Officer that a recount of votes of the (Round Nos. 8, 9,

10, 11 and 12) only may be done as earlier demanded by the workers of the Bharatiya Janata Party""; and recount of those rounds was conceded

in that application. In para 20, it is stated that election petitioner had ""promptly and duly objected"" to the order passed then by the Returning

Officer reviewing her earlier order. In para 21, it is stated that Returning Officer was requested to order complete recount of all rounds because on

sample recount ""Large discrepancies were "found"" and that was reflected in the ""corrections made in the result sheet"".

36. In her return, at para 20, the Returning Officer denied that the election petitioner had objected to the order passed for partial recount and

averred that he was present when the order was passed and read over Public Address System but no objection was filed by the election-

petitioner. In para 21, she stated further that ""large discrepancies"" as alleged, were not found and that would be evident from the result-sheet. Her

order was made ""as per rules"" and it was ""just, proper and above all self-speaking"" order and it was within her jurisdiction to pass that order. She

had, it is stated in para 20, ordered ""partial recount"" of ballot papers as per rules. In para 16, she stated categorically that ""none else was allowed

in the counting hall except the counting agents of the candidates and candidates themselves and the persons authorised under the Representation of

the People Act, 1951"". Respondent No. 1, in his return, also denied that the counting process was influenced by him in any manner or that he had

managed to get admitted in counting hall his workers and supporters in large number. The allegation being vague, it was contended, the complaint

merited no attention and no enquiry and it had to be struck out. He also contended that the election-petitioner's agent having demanded in his

application recount of round Nos. 8, 9, 10, 11 and 12 only, there could be no question of ordering general or complete recount and, therefore,

finally, the order for partial recount was correctly passed superseding the tentative/provisional order, earlier passed. There was a difference of 3

and 2 votes respectively in the recounting of Polling Station Nos. 137 and 148 and 6 votes were found not counted but no mistake in the counting

at Polling Stations Nos. 126 and 129 was detected.

37. In her evidence, the Returning Officer stated that only those persons who had been issued any ""authorised pass"" were allowed entry into the

counting hall; she denied that any person attending the counting of Datia constituency had infiltrated (after counting of that constituency was over)

to create disturbance in the counting of the Seondha constituency. She stated that she had made an endorsement A to A on the application (Ex.

P/9) filed during counting by election agent of the election petitioner and that a ""detailed order"" was passed by her subsequently as per Ex. P/10

against which an objection was filed as per application (Ex. P/11). On that, she made an endorsement that the application was presented by

Mahendra Baudh submitting that there was no objection of any side to the counting in " respect of any round other than the round Nos. 8 to 12

and, therefore, recount be done only of those rounds. She deposed further that she passed order (Ex. P/12) thereafter; but to that order, she

received no objection. She denied that for passing the order (Ex. P/12), she was coerced and she was unduly influenced by any person. She stated

that the only objection she received against the counting was Ex. P/9 and thereafter, she received application (Ex. P/11); but no other application.

She deposed that on completion of counting of each round, result was declared on Public Address System.

38. In para 9 of her deposition, she denied that when bundles were made during counting, those were not shown to the counting agents of election

petitioner Ramdayal Prabhakar. She stated that in that regard, neither the candidate nor his election-agent, Chandra Prakash Pathak, made any

complaint. She was present in the counting hall till the completion of the counting. She admitted that when counting was in progress in respect of

Round Nos. 11 and 12, Pathak had submitted to her the written complaint (Ex. P/9). Mahendra Baudh and his election agent, Shriram Sharma,

had objected after she had passed order (Ex. P/10) on the application (Ex.. P/9); they did not file objections before that when she was still

considering the complaint, Ex. P/9. Before passing order Ex. P/10, sample counting was done of four Polling Stations (Nos. 125, 129 137 and

147) by picking out one ballot box of each of the rounds in respect to which complaint was made. She admitted that she did not pass the order Ex.

P/10 in the counting hall, but she passed that order in her chamber and had announced that on the mike in the counting hall. She also announced on

the mike about application Ex. P/11 filed by Mahendra Baudh and his election agent Shriram Sharma and stated that if there was any objection,

that could be made. But, she received no objection and she passed order Ex.P/12. She ordered recount, therefore, only of round Nos. 8 to 12

when she was satisfied that no candidate wanted recount of any other round. She passed the order Ex. P/12 in terms of Rule 63 allowing partial

recount which was prayed in respect of round Nos. 8 to 12,

39. In his evidence, P.W. 4, Chandra Prakash Pathak, election petitioner's election agent, admitted that he had not made any written complaint in

regard to other seven rounds of counting. He stated that order Ex. P/10 was passed in his presence and he noticed then the presence thereof

Ramdayal Prabhakar. Recounting was done of round Nos. 8 to 12. That continued for three hours. After declaring the result, at about 5.00 a.m. in

the morning, Returning Officer left the place and she was not available thereafter though he tried to contact her. He had no knowledge of the

application Ex. P/11 or of the order Ex. P/12 which was not passed in his presence. He also deposed that Mahendra Baudh was talking to many

persons that if there was total recount, he would take the Collector to task. He admitted that in the counting hall where the Collector (Returning

Officer) was supervising the counting there was no typewriter and the order Ex. P/10 was typed in a room where it was dictated by the Collector.

In his evidence, the election-petitioner stated that he had come to the counting hall when his election agent was making submissions in respect of

prayer for recount and order Ex. P/10 was yet to be passed, he also denied any knowledge of Ex. P/11 and stated that order Ex. P/12 was not

passed after hearing him or his election-agent. He admitted, however, that he had made no complaint to any officer in respect of partial recounting.

40. The evidence of respondent No. 1 is that after counting of round No. 10 was completed and that of rounds 11 and 12 was in progress,

objection was preferred on behalf of Ramdayal Prabhakar as per Ex. P/9. When the Collector passed order Ex. P/10, for a complete recount, on

his behalf, the application Ex. P/11 was filed objecting to that and submitting that recount be ordered only for those rounds for which complaint

was made. To that application, objections were invited by the Collector, but nobody objected and order Ex. P/12 was passed for recount of

rounds Nos. 8 to 12. He stated also that the Returning Officer had made announcement on mike of both orders, one recorded on the body of the

objection (Ex. P/9) from A to A and the other separately as per Ex. P/10; that order was dictated in chamber and when that was announced, the

application Ex. P/11 was filed and order Ex. P/12 was passed on that 5 to 7 minutes later when no objection was received. He stated also that

when objection to his application Ex. P/11 was invited, election-petitioner and his election-agent were present but they did not make any protest.

His counting agent Shriram Sharma (R.W. 8) deposed that he had filed the application Ex. P/11 in consultation with the candidate/respondent No.

1, Mahendra Baudh. He stated that he had heard the Returning Officer declaring on the mike that B.J.P. candidate Ramdayal Prabhakar had filed

an application praying recount of votes of round Nos. 8 to 12. He also heard her declaring that she would direct sample recount of four polling

stations and thereafter full recount shall be ordered if there was any difference. A sample recount was done in his presence and only slight

difference was found.

41. Reference may be made now to documentary evidence pertaining to these issues. In the application dated 28-2-1990, proved at Ex. P/9,

submitted by Chandra Prakash Pathak in his capacity as election-agent for Ramdayal Prabhakar, the statement made is that during the counting of

round Nos. 8, 9, 10, 11 and 12, the counting agents of Bharatiya Janata Party were not allowed to verify the packets and ballot papers of its

candidates were mixed up with those of congress candidate; therefore recounting be done of rounds 8 to 12. On that application, there is an

endorsement in the handwriting of, and under the signature of, the Returning Officer that on behalf of the candidate of Bharatiya Janata Party it was

finally submitted that on table Nos. 1, 5, 9 and 13, recounting be done of rounds 8 to 12. It was decided that before ordering recount test

recounting be done in respect of votes counted of one polling station on each of these tables. On the basis of result obtained, final order shall be

passed for recount. The second order, Ex. P/10, passed by the Collector-cum-Returning Officer is a typewritten order. There is reference to the

application of Chandra Prakash Pathak and of complaint made therein in respect of faulty counting in rounds 8, 9, 10, 11 and 12, expressing

likelihood of result of the candidate of Bharatiya Janata Party being affected. There is reference also, to the tentative decision taken, as projected in

her endorsement above-referred. It is further stated that accordingly recounting was done of votes polled in four polling stations, No. 125, 129,

137 and 147. No difference was found in respect of 125 and 129, but, a difference of 3 votes was found in respect of 137 and 2 votes in respect

of 147. It is further stated that because the difference between the votes polled by Congress candidate, Mahendra Baudh, and Bharatiya Janata

Party candidate, Ramdayal Prabhakar, was small, of only 373 votes, there was likelihood of the result of the election as a whole being affected.

Therefore, complete recount be made of the votes polled of No. 22, Seondha Assembly Constituency.

42. In the application, Ex. P/11, filed on behalf of Mahendra Baudh, it is stated that prayer was made on behalf of Bharatiya Janata Party for

recount of round Nos. 8 to 12, but order was passed for complete recount which was not justified. It was prayed that recount be made only of

rounds 8 to 12. On that application there is endorsement in the hand-writing of and under the signature of the Returning Officer that it was

presented by Shri Mahendra Baudh submitting that no objection was raised for recount of round Nos. 8 to 12 and, therefore, recount be ordered

only of those rounds. The typed order is Ex. p/12 recording that decision was taken for a complete recount of all rounds on application made on

behalf of Bharatiya Janata Party. To that, objection was taken verbally and also in writing by Congress candidate Mahendra Baudh and his

election-agent, submitting that prayer being made for recount of 8 to 12 rounds and not for a complete recount, order should be passed

accordingly for recount of 8 to 12 rounds. The contention pressed by Congress (I) was not opposed by any other candidate including Bharatiya

Janata Party candidate, who was present. From this, it was clear that there was no objection of any candidate for recounting to be done of only

rounds 2 to 12. The previous order of complete recount was recalled and it was ordered that recount be done only of rounds 8 to 12.

43. After screening and sifting the evidence, documentary and oral, I find it established beyond dispute that no objection was ever raised in respect

of the counting done in round Nos. 1 to 7. Equally, the sample recounting of votes polled in four polling stations was without any protest as no

objection was raised when order in that regard was passed. At no stage, any prayer was made by any candidate for a complete recount of all

rounds and the only prayer made as per Ex. P/9 was for partial recount of rounds No. 8 to 12 by the Bharatiya Janata Party candidate Ramdayal

Prabhakar to which no objection was taken by the Congress candidate, Mahendra Baudh. The order for complete recount, as per Annexure P/10,

was passed by the Returning Officer suo motu; she dictated the order in her chamber where it was typed and signed and it was announced outside

in the Counting Hall subsequently on Public Address System. Hearing that decision for complete recount, the application, Ex. P/11, was filed

objecting to complete recount. Till then, the recounting process had not started. The objection taken in Ex. P/11 was upheld and the earlier order

passed as per Ex. P/10 was recalled and substituted by a fresh order, Ex. P/12, which was passed finally for partial recount in respect of round

Nos. 8 to 12. To the subsequent order, no objection was taken by any candidate and accordingly recount was done only of round Nos.8 to 12

before the final result of the election was declared.

44. It is necessary to record also the finding that no clear, cogent and credible evidence has been adduced by the election-petitioner to substantiate

the allegation that in passing subsequent and final order, Ex. P/12, the Returning Officer was in any way unduly influenced by anybody and any

threat was held out to her by respondent No. 1 or his counting agent coercing her to pass that order. There is also no evidence that as a whole or

even partially the counting process had been influenced by respondent No. 1 or his supporters, as alleged. There is also no reliable evidence that

there was a pandemonium in the Counting Hall after the counting of Datia constituency was over and supporters of respondent No. 1 thereafter

infiltrated in large number into the area where counting was in progress in respect of the Seondha Assembly Constituency.

45. To the rival contentions of law made on the issues, I may refer now. Before I do so, I would like to clarify as below the position in regard to

the vital documents proved in relation to these issues because in the petition, those are referred to in terms of annexures and later in evidence, they

were differently marked as exhibits :

Annexure P/8 is proved as Exhibit P/9, Annexure P/9 -do- P/10, Annexure P/10 is proved as Exhibit P/11, Annexure P/11 -do- P/12.

(Note: Through mistake, in issue No. 5(d), Annexure P/11 is mentioned as P/12 due to confusion. Originally, it was typed as P/II, but on 26-8-91,

after evidence was recorded on 18-3-91, the exhibit's No. P/12 was substituted for the Annexure No. P/11 through mistake, due to confusion).

46. Obviously, the election-petitioner is interested in this Court's upholding as valid and final the order Ex. P/10 and in nullifying the subsequent

order, Ex. P/12 so that he is able to take an order from this Court of recount of votes of all the remaining rounds, Nos. 1 to 7. That is relief

claimed in issue No. 5(d). A two-fold submission is made by Shri Shinde in this context contending firstly that although the election-petitioner's

election-agent had made a prayer of recounting of votes of round Nos. 8 to 12 only, it was well within the jurisdiction of the Returning Officer to

order a complete recount and that order she had passed as per Ex. P/10. Counsel relied on Section 24 of the Act which, he submitted, has to be

read conjointly with para 20 of Chapter IX of the ""Handbook for Returning Officers"", published in 1979 by the Election Commission of India.

His second contention is that the Returning Officer had no jurisdiction to pass the order Ex. P/12 whereby she purported to review the earlier

order Ex. P/10 because the Act and Rules do not vest in her the jurisdiction of review. On the other hand, learned counsel for respondent No. 1,

Shri R.D. Jain, contended that the order Ex. P/10 was illegal and without jurisdiction because the only provision for recount contemplated under

Rule 63 of Conduct of Election Rules, 1961 does not contemplate passing such an order; on the other hand, the subsequent order Ex. P/12 is an

order passed in terms of the said Rule and that is a legal and valid order allowing partial recount in terms of the said provision. He further

contended that because the earlier order was non est in law, there was no question of review of that order and the only question to be determined

is if subsequent order was legal and validly passed in terms of the statutory provision of Rule 63 contemplating recount of votes on satisfaction of

conditions precedent contemplated thereunder. He further submitted that the provisions of the ""Handbook"" have no statutory force and those

cannot be invoked to nullify the clear and categorical statutory provision of Rule 63.

47. Section 34 of the Act provides :

It shall be the general duty of the returning officer at any election to do all such acts and things as may be necessary for effectually conducting the

election in the manner provided by this Act and rules or orders made thereunder"".

The material portion of para 20 of the ""Handbook"" on which Shri Shinde relied is extracted below :

When an application for recount is made, you should consider the grounds urged and decide the matter. You may allow the application in whole

or in part if it is reasonable or you may reject it in toto if it appears to you to be frivolous or unreasonable. Your decision will be final but in every

case you should record a brief statement of your reasons for your decision. If, in any case, you allow an application/applications for

recount/recounts either wholly or in part, you should have the ballot papers counted over again in accordance with your decision.....

As Returning Officer your duty is to count accurately the votes and you have therefore always the right to order your staff to recount the votes. But

the right of a candidate to demand a recount under Rule 63(2) does not mean that recount can be granted for mere asking. The party demanding

recount has to make out a prima facie case that the return was not accurate and recount is necessary in the interests of justice"".

In the Rules, Rule 56 prescribes the procedure for ""counting of votes"" and as per Sub-rule (7), Form No. 16 shall be signed by the counting

Supervisor and also by the Returning Officer wherein shall be filled the result of counting of ballot papers contained in all the ballot boxes used at a

polling station and thereafter, entries are to be made by the Returning Officer in the result sheet in Form No. 20 before final result is announced.

The provision of Rule 63 is, however, extracted in extenso:

63. Recount of votes.-- (1) After the completion of the counting, the returning officer shall record in the result sheet in Form 20 the total number of

votes polled by each candidate and announce the same.

(2) After such announcement has been made, a candidate or, in his absence, his election agent or any of his counting agents may apply in writing to

the returning officer to re-count the votes either wholly or in part stating the grounds on which he demands such re-count.

(3) On such an application being made the returning officer shall decide the matter and may allow the application in whole or in part or may reject it

in toto if it appears to him to be frivolous or unreasonable.

(4) Every decision of the returning officer under Sub-rule (3) shall be in writing and contain the reasons therefor.

(5) If the returning officer decides under Sub-rule (3) to allow a re-count of the votes either wholly or in part, he shall -

(a) do the re-counting in accordance with Rule 54A, Rule 56 or Rule 56A, as the case may be;

(b) amend the result sheet in Form 20 to the extent necessary after such re-count; and

(c) announce the amendments so made by him.

(6) After the total number of votes polled by each candidate has been announced under Sub-rule (1) or Sub-rule (5), the returning officer shall

complete and sign the result sheet in Form 20 and no application for a re-count shall be entertained thereafter :

Provided that no step under this sub-rule shall be taken on the completion of the counting until the candidates and election agents present at the

completion thereof have been given a reasonable opportunity to exercise the right conferred by Sub-rule (2).

48. Reference may be made now to other two Rules, 64 and 66. The Returning Officer is required to declare in Form No. 21C or 21D, as the

case may be, the candidate to whom largest number of valid votes have been given, as elected, u/s 66; and send copies thereof to the Election

Commission and the Chief Electoral Officer. In Form No. 21E, a return is to be completed, signed and certified by him to be sent to Election

Commission and the Chief Electoral Officer. In Form No. 22, a certificate is to be granted by the Returning Officer to the elected candidate from

whom he is to obtain an acknowledgment of his receipt thereof duly signed by him and that is required to be sent immediately by registered post to

the Secretary of the House of People or the Legislative Assembly, as the case may be.

49. The first question to be determined, therefore, is if the order Ex. P/10 was a valid order because if that was not so, the question of reviewing it

and substituting it by another order would not arise; the subsequent order would then be the only order which can be said to have been passed in

respect of the application for recount to be disposed of in accordance with the provisions of Rule 63. Obviously, the Rule provides that recounting

is not to be made for mere asking or suo motu because an application in writing is to be made stating not only the ""grounds"" but also specifying

clearly if the prayer is made to ""recount the votes either wholly or in part"". A decision is to be taken by the Returning Officer when such an

application is made ""allowing the application in whole or in part"" and the prayer may even be rejected in toto. However, the decision must manifest

the ""reason"" for the order which is to be rendered in writing and after recounting is done, result entered in Form No. 20 is to be modified to the

extent necessary and amendment made is to be announced. After recounting has taken place and result thereof is entered in the result sheet, no

further application for another recount is to be entertained from the same candidate. As per proviso, the candidate is to be given a ""reasonable

opportunity"" to exercise his right to demand a recount. In the instant case, the election-petitioner did exercise that right by filing the application as

per Ex. P/9 and the only question is which decision on his application Ex. P/9 is legal and valid, Ex. P/10 or Ex. P/12,

50. In my view, there is sufficient force in the contention of Shri Jain that the right of recount conceded to a candidate can be enforced by him in

terms of prayer made and the Returning Officer has no jurisdiction to , act suo motu to expand the scope of the prayer. The candidate is required

to justify by setting out ""grounds"" for the prayer made for recount, ""either wholly or in part"". It is with respect to the ""ground"" stated that the

decision is to be taken by Returning Officer giving reasons therefore while allowing either in whole or in part the prayer or disallowing the prayer in

toto. In his application, Ex. P/9, the election-petitioner stated that the counting of round Nos. 8, 9, 10, 11 and 12 as faulty because during that

period, the counting agents of the Bharatiya Janata Party were not allowed to verify the packets made during counting and votes polled by the

Bharatiya Janata Party candidate were mixed up with the votes polled by the Congress candidate. Admittedly, there was no complaint in regard to

counting done in round Nos. 1 to 7. On that application, a tentative decision was taken by the Returning Officer ordering a sample recounting and

holding that final order would be passed on the basis of result thereof. Surprisingly, in rendering the order Ex. P/10, she took the view that because

there was an overall difference of 373 votes between the two candidates, there was likelihood of the final result of the election being affected and

on that ground total recounting was necessary. She obviously acted without jurisdiction in taking that view as that ground was not set out in the

application Ex. P/9. Besides, she also ignored that during sample recounting, a negligible difference was noticed in respect of two polling stations of

three votes and two votes respectively and there was no difference in recounting of votes of the two polling stations. The reason given by her for

the order Ex. P/10 are neither reasonable nor rational. Nor indeed are those countenanced by Rule 63 which expressly circumscribes Returning

Officer's jurisdiction to order recount only in terms of the application made.

51. I have not been able to appreciate reliance of Shri Shinde on Section 24 which is a general provision dealing with the ""general duty"" of the

Returning Officer requiring him to effectually conduct the election ""in the manner provided by the Act and the rules or orders made thereunder"".

That makes the Returning Officer, in clear terms, fully subservient to the statutory rules, those made under the Act. In ordering recount, the

Returning Officer is, therefore, bound to strictly follow provisions of Rule 63. In her evidence in Court, in the instant case, the Returning Officer has

deposed that she passed the subsequent order Ex. P/19 in terms of the provisions of Rule 63 as she discovered that the earlier order was not

countenanced by the said provision and objection to that order was rightly taken by respondent No. 1 which had to be upheld.

52. In so far as the provision of para 20 of the Handbook is concerned, I do not think if that conflicts directly in any manner with Rule 63. That is

explanatory merely of Rule 63 urging the Returning Officer to ""consider the grounds"" in deciding the matter. In the first part, there is a clear

reference to the ""application in whole or in part"" to be allowed or disallowed. In the second part, though there is some ambiguity, that is to be

resolved by reading the first sentence of the second part as merely stressing the Returning Officer's "duty" to ensure accurate counting and

distinguishing that from the right of a candidate to demand a recount under Rule 63, and that duty is not to be confused with the jurisdiction the

officer has to exercise when an application under Rule 63 is made. That imperative is rather stressed in second part requiring the candidate to

make out a "prima facie case" for recount "in the interest of justice". The question obviously is, if in disposing of the application, Ex. P/9. the

Returning Officer could act outside the purview of Rule 63 because she had not obviously acted suo motu in terms of para 20. Had she been

acting pursuant to the mandate of Para 20, she would have deposed so and indeed that would have been manifested in the order Ex. P/10. She

would have given reason in the order as to why, in her opinion, a recount of Round Nos. 1 to 7 was necessary and in that regard it was necessary

for her to record that counting of Round Nos. 1 to 7 was not accurate. In her evidence, and also in the evidence of other witnesses, it is

established beyond doubt that there was no ground for recount of other rounds, Nos. 1 to 7. Indeed, no complaint was made by any candidate

with respect to those rounds. What cannot, in any case, be disputed is that the "duty" to count accurately votes contemplated under second part of

para 20 does not vest in the Returning Officer the right to act arbitrarily of ordering a total recount even if there was no valid ground for that. Unless

it is so held, para 20 would be unconstitutional.

53. Taking another view of the matter, as contended by Shri Jain, it is to be held that para 20 of the Handbook does not invest in the Returning

Officer the "right" to order his or her staff to recount votes in any manner ignoring what is claimed by candidate in terms of Rule 63 because

jurisdiction has to be exercised on the application, albeit within the limits of Rule 63. Neither under the Constitution nor under the Act, the Election

Commission is invested with any law-making power. Section 169 authorises the Central Government to make Rules for carrying out the purpose

of the Act in consultation with the Election Commission and rule-making power is not vested in the election Commission. Article 324 of the

Constitution contains provision for superintendence, direction and control of election and the role of the Election Commission in that regard is

earmarked. Power to make statutory provision in regard to election to the Central or the State Legislature is vested respectively in them under

Articles 327 and 328 of the Constitution. It has been held in Shri Baburao Patel and Others Vs. Dr. Zakir Husain and Others, at para 14, that in

virtue of Article 324, the Election Commission does not possess law-making power of prescribing the form of oath to be taken by candidate for

the Office of the President and Vice President. Reliance by Shri Jain also placed on Jyoti Basu and Others Vs. Debi Ghosal and Others, to submit

that an electoral right is to be decided in terms of the election law as right to elect their representative, of the citizens, is a statutory right. In the Act

and the Rules, must be found any right claimed in relation to election or an election dispute. In Lakshmi Charan Sen, AIR 1985 SC 1233 at para

21, the point decided in the same manner was that election laws are self-contained codes and a direction given by the Election Commissioner to

the Chief Electoral Officer has no force of law so as to furnish any cause of action to either a voter or a candidate for non-compliance therewith.

He also relied on J.R. Raghupathy and Others Vs. State of A.P. and Others, for the proposition that ""breach of any guidelines which have no

statutory force can warrant no interference by the High Court as they do not give rise to any legal right which can be enforced to take a mandamus

from a Writ Court"".

54. I have no hesitation to hold that the order, Annexure P/10 travelled beyond Rule 63 and is to be treated, therefore, as non est in law. The

Returning Officer had no jurisdiction to order a total recount when in the application, such a ""demand"" was not made and indeed, the reasons she

gave for passing the said order also do not bear judicial scrutiny. Those reasons cannot be accepted as rational or valid so as to sustain the said

order in terms of Rule 63. On the other hand, she has categorically deposed that she acted under Rule 63 and not under para 20 in passing the

order Ex. P/10. It may be different thing if that order is found wanting in jurisdiction as that was not properly exercised. The order ex facie also

does not manifest that it was passed under Para 20 as it refers to the application Ex. P/9 of the election-petitioner.

55. Much stress Shri Shinde laid on the point that the subsequent order, Ex. P/12, is to be deemed invalid because by that order, the earlier order,

Ex. P/10, was reviewed and power in that regard was not conferred under the Act or the Rules on the Returning Officer. In support of that

submission, he cited Sukhad Raj Singh Vs. Ram Harsh Misra and Others, and the decision of a learned single Judge of Gauhati High Court in the

case of Barkatullah Vs. Rabindranath Malakar and Others, but I do not think if he can derive any benefit from those two decisions. Indeed,

Gauhati case is based on Apex Court's decision in Sukhad Raj Singh's case; both deal with the question of validity of agreement between parties

as to recounting of votes. It has been held that such an agreement is not unlawful and is binding on parties. I wonder how that holding can at all

help the election-petitioner in any manner in this case in the absence of any ""agreement"" between the election-petitioner and respondent No. 1 that

the order Ex. P/10 would be binding on them and that order was the consent order agreed to by both of them. 1 have held above that the order

Ex. P/10 was passed by the Collector suo motu; she dictated that without consent of parties, in her chamber; and it was announced outside in the

Counting Hall on Public Address System after it was made. That was not an order in terms of the prayer made by the election-petitioner and

indeed, after sample recounting none was heard before the order, Ex. P/10, was passed. Even if respondent No. 1 did not oppose to sample

recounting, it cannot be presumed that he had accepted also the order Ex. P/10. Because a small difference was found in the counting of votes cast

in some polling station, it was rather expected that recount, if ordered, would be in respect of only those five rounds for which recount was prayed.

In her return, as also in the evidence, the Returning Officer has stated that respondent No. 1 and his election-agent had ""immediately"" raised

objection on her announcing the order Ex. P/10. Where is, therefore, any scope of any ""agreement"" or even of estoppel although that doctrine too

is pushed in service?

56. Implicit reliance Shri Jain placed with great confidence on a Division Bench decision of this Court Shivalal v. Returning Officer reported in 1990

MPJR 162 , although that was in respect of an election held under the Panchayat Act. Speaking of the Court, in that case, I took the view,

construing a similar provision, that statutory provisions concerning any election are to be strictly adhered to and, therefore, if the Returning Officer

had made any mistake, it was open to him to correct the same until he had become functus officio having done everything that he was required to

do as per prescribed procedure. It was held: ""A statutory authority retains jurisdiction to deal with any particular matter till such time as he has to

exercise any function in regard to the powers conferred on him. He shall have also jurisdiction to correct mistakes committed in due discharge of

his duty, if by such correction what he does is only ensuring compliance of the statutory duties."" In preparing the statutory return, the Returning

Officer failed to include the figure of two polling stations and when the mistake was corrected by him, the result of the election took a different

complexion resulting in the complaint made to this Court against the result subsequently declared. But, this Court refused to interfere because the

final result sheet had not been sent yet to the Chief Electoral Officer as contemplated under relevant provision. The view taken in Shivalal receives

support from Krishna Ballabh Prasad Singh Vs. Sub-divisional Officer Hilsa-cum-returning Officer and Others, wherein under similar

circumstances, the result announced was cancelled by Returning Officer after discovering that ballot papers of one booth had not been counted

and those were taken into account subsequently in declaring in Form 21C the respondent as elected. It was held that because the declaration in

Form 21C had not been drawn up, the earlier declaration of petitioner as elected had no legal status and the certificate granted to him in Form 22

was of no avail. On facts, both decisions apply squarely to the instant case as R.O. had not become functus officio when she passed Order Ex.

P/12.

57. The other question to which I propose to address myself now appertains directly to issue No. 5(d) in that whether a case is made out for an

order in this petition for recounting of votes of the remaining 1 to 7 rounds though Returning Officer has held to the contrary while passing the final

order Ex. P/12. In Paokai Haokip Vs. Rishang and Others, it is held that the burden is on the election petitioner to show affirmatively that the result

of the election has been materially affected before the election is set aside by the Court. In P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen

and Others, there is a clear mandate of the Court to see that an order of recount of votes stands or falls on the nature of averments made and

evidence adduced before the order is made; its validity does not depend on the result emanating from the recount of votes. It was held that the

right of a defeated candidate to assail the validity of result of any election and seek recounting of votes has to be subject to the basic principle that

the secrecy of voting is sacrosanct: in democracy. In R. Narayanan Vs. S. Semmalai and Others, there was difference of only 19 votes between

the elected candidate and his nearest rival and it was held that the narrow margin was not sufficient per se to order a recount. High Court's order

ordering recount was set aside by referring to the catena of their own decisions by their Lordships. In Beliram Bhalaik Vs. Jai Beharilal Khachi and

Another, the mere allegation that petitioner suspected improper reception, refusal or rejection of votes or of irregularities committed in counting of

ballot papers was held insufficient to support an order of inspection and recount. High Court's order in rejecting the prayer for recount was

upheld. In Chanda Singh Vs. Choudhary Shiv Ram Verma and Others, it was held:

If the counting of the ballots is interfered with by too frequent and flippant recounts by Courts a new threat to the certainty of the poll system is

introduced through the judicial instrument. In that case, the difference was of 366 votes and High Court's order negating petitioner's plea for

recount was upheld. Bhabhi Vs. Sheo Govind and Others, enumerates the different criteria when the Court would be justified in allowing sample

inspection of ballot papers. A roving enquiry on flimsy ground is not contemplated; allegations against the elected candidate must be clear and

specific and must be supported by adequate statements and material. The Court must be satisfied on materials produced before it regarding truth

of allegations made for a recount.

58. In the instant case, the deficiency in pleadings is obvious. Nothing is stated anywhere in any part of paragraphs 15 to 23 as to how the result of

the election has been materially affected and recount was imperative. Nothing is pleaded or proved as to how the order Ex. P/12 denying total

recount and allowing partial recount has materially affected the result of the election. Indeed, it is occasion to reiterate that there is nothing in

pleadings, or in evidence to show that counting of round Nos. 1 to 7 was faulty in any manner or there was any complaint in regard to counting of

those rounds. The Returning Officer realised her mistake in passing the order Ex. P/10 on surmises and conjectures and justifiably she substituted

that order well in time by passing the order Ex. P/12 before recounting was taken up. For order of recount to be obtained from this Court, as held

in D.P. Sharma Vs. Commissioner and Returning Officer and Others, the election petitioner is required to satisfy the Court that ""there has been

either improper reception of invalid votes in favour of the elected candidate or improper rejection of valid votes in favour of the defeated candidate

or wrong counting of votes in favour of the elected candidate"". But, in the instant case, such materials are not placed before me and the required

facts are neither pleaded nor proved.

59. For all the aforesaid reasons, I have no hesitation to decide each of the issues Nos. 5(a), 5(b), 5(c) and 5(d) against the election petitioner. 1

hold that the Returning Officer had erroneously passed the order Ex. P/10 in allowing a total recount and she acted without jurisdiction in passing

that order contravening the provisions of Rule 63. I also hold that the Returning Officer acted within her jurisdiction in terms of the proviso to Sub-

rule (6) of Rule 63 in entertaining the application Ex. P/10 and disposing of that in terms of the order Ex. P/12. The order subsequently passed as

per Ex. P/12 was not review of the order Ex. P/10 because the earlier order Ex. P/10 had no legal status and that was non est in law. That was

nullity and had to be ignored; a proper and valid order had to be passed and that was done in passing the order Ex. P/12. I reiterate that the order

Ex. P/12 subsequently passed was the correct, valid and legal order passed in terms of Rule 63 and by that order, she had really disposed of

finally the application Ex. P/9 of the election petitioner. Consequently, I also hold that not only Returning Officer had rightly refused to make an

order of total recount, but before me in this Court, no ground is made out to pass an order of total recount.

Issue No. (6)

60. This issue was not pressed because all preliminary objections available to election petitioner in terms of Sections 81, 82 and 83, had been

heard and disposed of earlier while disposing of interlocutory applications on different dates. Indeed, I. A. No. 1 was pressed in terms of Sections

83 and 86(5) of the Act and that was heard and finally disposed of on 9-11-1990.

Issue No. (7)

61. I have already held in deciding issue Nos. (2), (3) and (4) that the allegations of corrupt practice made against respondent No. 1 and his

election agent are not established. Accordingly, this issue is decided, therefore, against the election petitioner.

Issue No. (8)

62. In regard to this issue, reference is to be made to the order passed on 9-11-1990. On that date, the recrimination petition was rejected

recording the finding that the petition was time-barred and it was riot in form. There was non-compliance with the provisions of Section 117 of the

Act because the security contemplated thereunder had not been deposited. However, even otherwise, in view of the conclusions reached on other

issues, I have no other option except to hold that the election petitioner is not entitled to be declared elected from the 22 Seondha Assembly

Constituency in place of respondent No. 1. Because, no ground is made out for setting aside the election of respondent No. 1. The issue is

accordingly decided against the election petitioner.

Conclusion

63. In the result, the petition fails and is dismissed. Respondent No. 1 is entitled to his costs which is quantified at Rs. 500/-.

64. As required by Section 103 of the Act, the Registry shall now take steps to intimate at once the substance of this order to the Election

Commission, New Delhi and the Speaker, Madhya Pradesh Legislative Assembly, Bhopal. In due course, an authenticated copy of this order shall

also be sent by the Registry to the Election Commission.