**(1992) 05 MP CK 0002**

**Madhya Pradesh High Court (Gwalior Bench)**

**Case No:** Election Petition No. 47 of 1990

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| Ramdayal Prabhakar | | APPELLANT |
| | Vs | |
| Mahendra Baudh and Twelve Ors. | | RESPONDENT |

**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 9ounting 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. I, 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 amouts 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-ll, 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 deait 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. Hie 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 "Ahiruar" 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 electin 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 an time, raised any objection that the respondent was not a member of Scheduled caste. Hedid 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 knowlege 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 Buddists 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 govrnment post nor was he a Minister in 1985. During that election no objection was raised agaist 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 constitutency 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 worshiping 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 electio''n 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 Chaturbhuj 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 tressed 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 Adidravida 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 hud 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 Stale 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 told", 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 oi" 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, 1 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 graniifying 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 Adhiniyam 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 Sarjooprasad 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-l). 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, Sarjooprasad 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 unlift 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 Sangar (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 Prabahkar 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 calf 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 [hat 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 againt 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 Sen-gar, 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 streels 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. I 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, 1 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 respondentNo. 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 typerwriter 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 prefered 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 compile 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. I 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/ll, 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/ll, 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 Commmission 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 voles" 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 recounl even if here 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 Shivlal 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 Shivlal 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 I 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 negativing 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, I 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.