

M. R. Gopalakrishnan

Vs

Thachady Prabhakaran and Others

Civil Appeal No. 3755 of 1992

(Dr. A. S. Anand, Faizanuddin JJ)

13.12.1994

JUDGMENT

FAIZAN UDDIN, J.

1. This appeal under Section 116-A of the Representation of the People Act, 1951 (hereinafter referred to as the Act) has been directed against the judgment of the High Court of Kerala dismissing the election petition of the appellant whereby he had challenged the election of Respondent 1 as a member of Kerala Legislative Assembly from Constituency No. 104 Kayamkulam, and for a further declaration that the appellant was duly elected for the said seat for which the election was held on 12-6-1991 and the result of which was declared on 16-6-1991.

2. In all there were eight candidates in the field i.e. the appellant and Respondents 1 to 7 who contested the said election for the Legislative Assembly seat from 104 Kayamkulam Constituency. The appellant was a candidate fielded by the Communist Party of India (Marxist). Respondent 1 herein was the candidate sponsored by the Indian National Congress which was a constituent party of the United Democratic Front. The total number of votes polled in the said election were 97,969 out of which 1375 were rejected as invalid votes and 96,594 votes were received as valid votes. At the end of the final counting which took place on 16-6-1991 the result was declared and Respondent 1 was returned as a successful candidate by a margin of 33 votes against his nearest rival, the petitioner/appellant herein. The main contest was between the appellant and Respondent 1. The appellant had polled 46,649 votes while Respondent 1 had polled 46,682 votes and thus Respondent 1 had won the election by a margin of 33 votes over his nearest rival, the petitioner/appellant herein and, therefore, he was declared elected.

3. The appellant challenged the election of the returned candidate Respondent 1 herein by filing an election petition under the relevant provisions of the Act, in the High Court of Kerala on several grounds. It was alleged by the appellant that the counting of votes for the Legislative Assembly Constituency as well as counting of votes for the Kayamkulam Segment of Mavelikara Parliamentary Constituency both took place simultaneously in the same hall which was of the size of 80 x 20 feet and as there were several tables and chairs in the said counting hall and the counting agents of all the candidates and other officials were present in the hall, it became crowded and the sorting out of bundles of ballot papers was done hastily and, therefore, it was not possible for the counting agents of the petitioner/appellant to carefully keep a track of the process of sorting out. It was, therefore, alleged that a reasonable opportunity was not given to the appellant's agents to note and satisfy themselves that the bundles were really of the candidates for whom the votes were cast or the correctness of the ballot papers in each bundle. It was alleged that the Returning Officer rejected the votes as invalid in spite of the protest by the petitioner/appellant's election agent. The

petitioner/appellant's election agent made an application for re-count alleging specific irregularities in the counting but the same was unreasonably rejected by the Returning Officer and Respondent 1 was declared elected. It has been further alleged that on 17-6-1991 the petitioner/appellant submitted an application to the District Collector, Alapuzha for re-counting and the election agent of the petitioner/appellant had also sent an application to the Chief Election Officer pointing out the irregularities in the counting. The petitioner/appellant further alleged that several postal ballots were rejected without valid reason and the votes cast in favour of the appellant were treated as invalid and in many polling stations the figure in the ballot paper account did not tally.

4. The petitioner/appellant further made allegations that several persons had cast their votes by committing acts of impersonation, in place of the real and genuine voters. The appellant also alleged that 32 voters had cast their votes twice in the same constituency as their names were entered in the electoral roll in more than one place and that 18 persons had voted in more than one constituency the details of which were given in Annexures IV and V annexed with the election petition. It was therefore alleged that the result of the election had been materially affected insofar as the returned candidate is concerned.

5. The petitioner/appellant also made allegations against Respondent 1 for committing corrupt practices in the said election by publishing news item in the Malayala Manorama Daily dated 18-8-1991 with a view to create an impression in the mind of the voters of the Constituency that the petitioner/appellant was indulging in undesirable activities to secure the release of convicts who were undergoing life imprisonment for the purpose of making use of their services in the election. The appellant also alleged that with a view to prejudice the election prospects of the appellant a pamphlet was published and circulated in the Constituency which contained false statement to the knowledge of Respondent 1 and his election agent. The petitioner/appellant alleged that a news item was published on 7-6-1991 in Malayala Manorama Daily followed by an election pamphlet which was widely circulated in the Kayamkulam Assembly Constituency the contents of which were false and designed to prejudice the minds of Muslim voters in the Constituency as there were a number of Muslim voters in Ward Nos. 7, 9 and 10. The petitioner/appellant alleged that due to the distribution of said pamphlet he lost large number of votes. The appellant also alleged that another pamphlet was also published after the death of Shri Rajiv Gandhi mentioning that the workers of the appellant had destroyed the photos of Shri Rajiv Gandhi and burnt the Bhagwad Gita, the Holy Quran and the Holy Bible. The petitioner/appellant alleged that this pamphlet was published after 23-5-1991 and prior to 12-6-1991 with the consent and knowledge of Respondent 1 with a view to prejudice the minds of the voters of the Constituency against the petitioner/appellant.

6. The petitioner/appellant further alleged in the election petition that out of the total number of 1280 postal ballots, 246 postal ballots were rejected by violating Rule 27(1) and Rule 54-A of the Conduct of Election Rules. The petitioner/appellant alleged that his election agent requested the Returning Officer to count all the postal ballots but the Returning Officer illegally rejected 246 postal ballots and the request for re-count of those 246 ballot papers was also rejected without assigning any reason for such rejection. On these grounds the appellant prayed for declaration of the election of Respondent 1 as void and to declare the petitioner as duly elected candidate for the said Constituency.

7. The returned candidate Respondent 1 contested the election petition filed against him by controverting all the adverse allegations. Respondent 1 pleaded that the Returning Officer had afforded adequate opportunity to the election agents and counting agents of the candidates to carefully watch the sorting out of the ballot papers and the Chief Election Agent of the

petitioner/appellant was present throughout the process of counting. But as there were no irregularities nobody raised any objection regarding the sorting out or counting of votes. Respondent 1 pleaded that on the demand of the election agent of the appellant a second round of counting of votes of certain polling stations was done but no fault was noticed. He was pleaded that 246 postal ballots were rejected for valid reasons and no illegality was committed by the Returning Officer in the matter of dealing with postal ballots. Respondent 1 further pleaded that no person had cast any vote by committing acts of impersonation as alleged by the appellant in his election petition. Respondent 1 emphatically denied that Annexures VII and VIII were published by him or by anyone either with his consent and knowledge or that of his election agent. He asserted that his election agents were in no way concerned or associated with the alleged publication of Annexures VII and VIII. He also refuted the allegation of publication of Annexures IX and X either with his consent or knowledge or that of his election agent.

8. Respondent 1 while refuting the allegations made against him and his election agent filed a recrimination petition under Section 97 of the Act alleging that the petitioner/appellant himself was guilty of committing corrupt practice as defined in Section 123 of the Act. He alleged that one M. R. Rajasekharan was the election agent of the petitioner/appellant who was also the Secretary of the Election Committee and it was he who printed and published a notice under the caption (English version) "Elect the candidate of Left Front" the copies of which were distributed in various parts of the Constituency on 10-5-1991. He further alleged that another notice was published on 7-6-1991 by the election agent of the appellant under the caption (English version) "Let the devotees of Shri Narayana think". The said two notices were filed by Respondent 1 as Annexures 'A' and 'B' along with the recrimination petition. Annexure 'A' contained an appeal to the Muslim community to vote for LDF candidate and Annexure 'B' contained an appeal to voters belonging to Ezhuva community which according to Respondent 1 amounted to corrupt practice as defined under Section 100 read with sub-section (3) of Section 123 of the Act. Respondent 1 further made allegations of double-voting by some voters while names of some voters appeared in neighbouring constituency as well. On these allegations in the recrimination petition Respondent 1 submitted that even if the appellant had been declared elected his election would have been void on the aforesaid grounds.

9. The High Court framed necessary issues on the aforesaid pleadings and after the evaluation of the evidence adduced by the parties and taking into account the material on record held that there was no irregularity in the counting of votes which may have materially affected the result of the election; that the rejection of the postal ballot papers was for valid reasons; that it is clear from the evidence that as and when the petitioner's agent raised any objection regarding the counting there was checking and rechecking and according to the evidence of Returning Officer, PW 16 at least 40 per cent of the ballot papers were subjected to test-checking but no difference was found in such test-checking and, therefore, in the absence of any specific irregularity pointed out by the petitioner/appellant's agent regarding the counting, PW 16 was justified in rejecting the request for re-count and as such no case was made out for directing re-count; that the petitioner/appellant had failed to establish with the pamphlets Ext. P-158 and Ext. P-159 were printed and published with the consent and knowledge of Respondent 1 and that the alleged publication do not fall within the purview of corrupt practice as envisaged under sub-section (4) of Section 123 of the Act; that the petitioner/appellant had failed to prove that Annexures VIII, IX and X i.e. Ext. P-161, Ext. P-162 and Ext. P-157 were printed, published and circulated by Respondent 1 or his election agent or by any other person with their consent and knowledge; that the petitioner also failed to prove that four persons had cast votes by impersonation as alleged in para 4 of the election petition. However, the High Court on issue No. 8 with regard to the petitioner/appellant's allegation of double-voting by 32 voters recorded the finding that Seethabhai Sanjivan, PW 2 had cast two votes in respect of electoral

roll No. 051419, Ext. P-7 and No. 048734 Ext. P-9 and, therefore, both were declared as void. The High Court also recorded the finding that voter No. 375 and voter No. 1271 in the electoral roll relate to the same person Achuthan Sukumaran, PW 3 and Achuthan had cast his vote in Kayamkulam Constituency against voter No. 1271 in Ext. P-5 and that someone else had cast his vote against voter No. 375 in Ext. P-8 which the High Court declared to be void. Similarly the High Court further recorded the finding that Pulikkandathil Sujatha Achuthan, voter No. 376 in Ext. P-8 is the same whose name appears in the polling station No. 43 as well as polling station No. 45 and, therefore, one vote has been declared as void. The High Court also held that voter No. 1221 in Ext. P-15 and voter No. 143 in Ext. P-16 is one and the same person Sagar Yunus Kunju, PW 5 and that someone had cast the vote on behalf of PW 5 against voter No. 143 in Ext. P-16 and, therefore, one vote against P-16 has also been declared void. The High Court also held that Madhavan Neelakanthan, PW 11 had cast two votes in the same constituency (Ext. P-43 and Ext. P-44) and, therefore, both have been declared void. The High Court also declared one vote of PW 12 to be void. It was also found that the name of Kunjumuthu @ Kunju, PW 13 and Anjali Siril Kunju Muthu @ Muthu is one and the same person whose name appeared in polling station No. 7 as well as in polling station No. 35, who had cast vote at both the places and, therefore, both the votes are declared void. The High Court also found that one vote of PW 27 cast against counterfoil No. 001475 (Ext. P-89) was liable to be declared void. Similarly it was found that Madhuradha Krishnan, PW 29 had cast his vote twice and, therefore, both the votes against counterfoil No. 041933 (Ext. P-97) and counterfoil No. 090465 (Ext. P-98) were also declared void. One vote of Radhakrishnan Kunju, PW 30 was also declared as void as his name appeared in two polling stations and he had cast his vote only in one polling station while someone else had cast the vote at the other polling station by impersonation. Similarly one vote of Suresh Kumar Dasspan Pillay, PW 31 was also declared void for the same reasons. The High Court also found that Abdul Rasheed Ayyar Kunju, PW 32 had cast his vote twice in the same constituency and, therefore, both the votes are declared void. Thus under issue No. 8 the High Court found in all 20 votes to be void. The High Court therefore, took the view that since the improper reception of 20 votes did not materially affect the result of election of the returned candidate as it only reduced the margin from 33 to 13 by reason of which the election of the returned candidate Respondent 1 herein cannot be declared to be void. Consequently, the question of declaration of the petitioner as the returned candidate did not arise. Since the High Court found that even after giving a discount of 20 improperly received votes, the election of Respondent 1 could not be cancelled or declared void and, therefore, it dismissed the election petition. The High Court did not consider it necessary to go into allegations and grounds raised by Respondent 1 against the petitioner/appellant in his recrimination application filed under Section 97 of the Act and the evidence adduced in support of the same.

10. Though Shri P. S. Poti, learned Senior Counsel appearing for the petitioner/appellant assailed all the findings recorded by the High Court in dismissing the election petition but his main attack was that :

- (i) The counting was not conducted legally and properly and in a congenial atmosphere by reason of which the Returning Officer ought not to have rejected the application for re-count and that in any case the prayer made to that effect in the election petition should not have been rejected by the High Court in view of the facts and circumstances mentioned in paras 4 and 7 of the election petition.
- (ii) Out of the total number of 1280 postal ballots, the Returning Officer rejected 246 ballot papers and, out of these 246, 24 postal ballots in Ext. P-54 series only were rejected giving reasons in accordance with Rule 54(A)(4) of the Conduct of Election

Rules, 1961 while 222 ballot papers of Ext. P-55 series were rejected without any endorsement for such rejection which is clearly repugnant to the mandatory provisions contained in Rule 54(A)(4) and, therefore, this reason alone was sufficient to hold that the result of the election was materially affected as according to the appellant there were valid postal ballots in favour of the appellant amongst those which were improperly rejected and;

(iii) That invalid votes were counted in favour of the returned candidate Respondent 1 and out of the total rejected votes of 1375 quite a large number of valid votes in favour of the appellant were rejected which materially affected result of the election.

11. In order to appreciate the first contention advanced by the learned counsel for the appellant and referred to above it has to be seen whether the appellant has pleaded material facts and laid adequate foundation for a direction for inspection and re-count. In this regard learned counsel for the appellant submitted that the pleadings with regard to the material facts for a direction for re-count are contained in paras 4 and 7 of the election petition. Briefly stated the allegations made in para 4 of the election petition are that the counting of 104, Kayamkulam Assembly Constituency as well as the counting a Parliamentary election was simultaneously done in a hall which had a length of 80 feet and width of 20 feet which was insufficient to properly accommodate the stage (sic platform) of the Returning Officer and the assistants as well as the counting staff, candidates and their counting agents by reason of which various irregularities were either consciously committed by the counting staff or occurred on account of the hurried sorting out and putting the ballot papers into different compartments of the candidates or the compartments meant for the doubtful votes while bundling up the ballot papers of respective candidates into bundles of 50 each. It is stated that it was difficult for the agents of the petitioners/appellant to carefully keep track of the sorting out or identifying the voter's mark on the ballot papers before they were put into different compartments. It has been further alleged that a partisan attitude of the counting officers and supervisors was visible. The counting agents of the petitioner raised objection on several occasions and Shri M. R. Rajasekharan, election agent of the petitioner/appellant mentioned these facts to the Returning Officer who told him that it was up to the counting agents to watch the process and the whole counting is to be done without delay as the result has to be declared as early as possible. It is further alleged in the same para 4 of the petition that as the petitioner was aware of several specific irregularities at the counting and the fact that the Returning Officer himself had rejected several votes as invalid overruling the protest of the petitioner's election agent that they were the votes polled by the petitioner, so the petitioner's election agent made an application for re-count of the votes but the Returning Officer rejected the application without any justification and unilaterally declared the first respondent as elected by a margin of 33 votes despite vehement protest of the petitioner's election agent. His pleadings contained in para 7 of the election petition relate to the allegation about casting of several votes by impersonation giving the names of four persons who were alleged to have voted for the persons whose names appeared in the electoral roll in polling booth Nos. 15, 30 and 3. According to the learned counsel for the appellant these facts in addition to the fact that 222 postal ballots were rejected contrary to the mandatory rule constituted material facts for direction for inspection and re-count of all the ballot papers. But on a careful and critical examination of the facts and the evidence on record we find that they speak contrary to the allegations referred to above in the petition which shall be discussed in the paras hereinafter.

12. We shall first discuss the evidence relating to the alleged irregularities said to have been committed during the counting. Shri M. Siraj Kunju, PW 16, District Planning Officer was the Returning Officer of 104, Kayamkulam Assembly Constituency for the general election held on 12-

6-1991. He deposed that the Chief Election Agents of various candidates were witting near him (Returning Officer). There were two independent observers deputed by the Election Commission who visited the counting hall. He also stated that the election agent of the petitioners/appellant wanted re-counting of the entire ballot papers but as he had not specifically requested in respect of rejection of any ballot paper in particular polling station he did not allow the application for re-count. But on demand by the Chief Election Agent of the petitioner the entire ballot papers of polling booth Nos. 96 to 111 were counted twice. He also stated that he himself had supervised the second counting in respect of some of the tables and his Assistant Returning Officers supervised in respect of other tables. He further deposed that before a final decision was taken in the application for counting, he consulted the officials who were in charge of the preparation of the final sheets whether there was any mistake and he himself checked the result sheets. He stated that during the time of counting the actual number of votes secured by each candidate was shown on the Display Board and this was being done till the counting was over but nobody raised any objection. A perusal of the evidence of the Returning Officer, PW 16 will go to show that no question in cross-examination on behalf of the appellant was directed against the alleged uncongenial atmosphere in the counting hall or any difficulty in the sorting out or putting the ballot papers in different compartments or in the bundles of different candidates. No question was also directed that the agents felt any difficulty in carefully keeping the track on the sorting out or identifying process or regarding the indifferent attitude of the counting staff. No question was also put to the Returning Officer that proper opportunity to the appellant's agents was not afforded with regard to the verification of marks made by the voters on the ballot papers.

13. It is no doubt true that M. R. Rajasekharan, PW 98, election agent of the petitioner/appellant made an application on 16-6-1991 purporting to have been made at 10.35 p.m. to the Returning Officer for re-count. The said application which is Ext. P-207 reads as under :

Ext. P-207 From, M. R. Rajasekharan, Election Agent of Shri M. R. Gopalakrishnan, 104, Kayamkulam Assembly Constituency. To, The Returning Officer, 104, Kayamkulam Assembly Constituency. Respected Sir, It is understood by me that there are irregularities in the counting of votes, which began from 8.15, today morning, in many polling stations of 104, Kayamkulam Assembly Constituency and also I have doubt about the counting of postal ballots and also votes are not tallying with the records. In addition to this that many number of votes have been unauthorisedly and illegally declared invalid and so that entire votes of this station may be subjected to re-count, otherwise it will cause irreparable loss to me and to my candidate. Hence it is requested that the result of this station may be announced only after the re-count is conducted. Yours faithfully,

Sd/-10.35 p.m. M. R. Rajasekharan Haripad, 16-6-1991. ##

A plain reading of this application will go to show that it is written in most vague terms without specifying any irregularities whatsoever which according to the petitioner/appellant were committed during the course of counting.

14. The appellant M. R. Gopalakrishnan who appeared as PW 100 himself made an application Ext. P-211 on 19-6-1991 three days after the declaration of result to the Chief Electoral Officer, Trivandrum for re-count which is reproduced hereunder :

EXT. P-211 From, M. R. Gopalakrishnan, Candidate, 104, Kayamkulam Assembly

Constituency, Kayamkulam.To, The Chief Electoral Officer, 1991 Assembly Elections, Trivandrum.Sub : Rejection of application for re-counting and re-verification of postal ballot papers. Request for re-counting and re-verification.Sir,I was a candidate for the Assembly Election in 104 KayamkulamConstituency. My opposite candidate Shri Thachady Prabhakaran was declared for 33 votes by the Returning Officer.Knowing that there were irregularities and illegality in the matter of counting, my chief agent has placed an application for re-counting.The Returning Officer has declared hundreds of invalid votes as valid in favour of Shri Thachady Prabhakaran. My valid votes have been declared as invalid.About 300 postal ballot papers have been declared by the Returning Officer as invalid votes.For the reasons stated above, I request you to be good enough to take urgent steps to re-count the ballots as soon as possible. Yours faithfully, Sd/- (M. R. Gopalakrishnan)Kayamkulam,19-6-1991 Copy to : Chief Election Commission, New Delhi.##

A cursory look at this application will go to show that no specific allegation with regard to any particular irregularity in the counting was made but vague application for re-counting was submitted. Not only this but M. R. Rajasekharan, PW 98 the election agent of the appellant again made an application on 21-6-1991 to the Chief Electoral Officer, Thiruvanthapuram requesting for re-count of the votes of 104, Kayamkulam Assembly Constituency. The said application Ext. P-208 is reproduced herein below.

#From, M. R. Rajasekharan, Election Agent of M. R. Gopalakrishnan, Kayamkulam.To, The Chief Electoral Officer State of Kerala, Thiruvananthapuram.Sub : Assembly Election - Counting of votes of 104, Kayamkulam Assembly Constituency at Haripad - Irregularities re-counting and verification request regarding.##

Sir,

I was election agent of Shri M. R. Gopalakrishnan, a candidate of 104, Kayamkulam Assembly Constituency. The counting of the votes of the Constituency was held at Govt. H.S. for Girls, Haripad on 16-6-1991. After the counting of votes, having doubts and having noticed specific irregularities in the counting, before the declaration of the results I gave in writing a request to the Returning Officer for re-counting of votes on reasonable grounds. But, to the surprise of all present, the Returning Officer, unilaterally declared Shri Thachady Prabhakaran elected by 33 votes, under our vehement protest. Against this arbitrary decision of the Returning Officer the candidate filed a petition to the District Collector, Alleppey.

The immediate rejection of our demand for re-counting of votes was illegal and against rules. Our demand for re-counting was based on the following grounds :

1. A good number of postal ballots were rejected without valid reason.
2. Votes which were valid in our favour were counted as invalid.
3. In many booths, the ballots in the box did not tally with the statement.
4. Many counting officers were the relatives and partymen of the UDF candidate and they purposefully helped the UDF candidate.

5. The congestion of the counting hall, the frequent outbursts of impatience and protest of the counting officers prevented the peaceful counting.

For the above reasons I request you to be good enough to take steps for the re-counting of votes of 104, Kayamkulam, for which I shall be grateful to you.

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Yours faithfully,

Sd/- M. R. Rajasekharan Kayamkulam,

21-6-1991

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In this application it may be noted that the irregularities pointed out in paras 1 to 5 of the application were not mentioned in the earlier two applications Ext. P-207 and Ext. P-211. This clearly goes to show that the irregularities pointed out in this latter application are only an afterthought and not based on any true facts. If in fact any of the irregularities of the kind alleged in paras 4 and 7 of the election petition or those mentioned in the applications dated 21-6-1991 were in fact committed, then why these irregularities were not pointed out to the Returning Officer or to any of the observers when they visited the counting hall when counting was going on. No complaint about any irregularity or about the uncongenial atmosphere of the hall was reported either orally or in writing to the Returning Officer or to any official connected with the affairs of the counting during the course of counting on 16-6-1991. In these facts and circumstances it is difficult to accept the allegations that the atmosphere of counting hall was not congenial or there was any difficulty in the counting due to the size of the hall or any irregularities were committed as alleged by the appellant in the election petition. In these facts and circumstances the High Court is fully justified in taking the view that no case for a direction for re-count was made out.

15. It may be pointed out here that the true legal position in the matter of allowing or disallowing a request for re-count is no longer in doubt but well settled. That the tribunal or the court trying an election petition has power to direct inspection and re-count of votes if the material facts and particulars are pleaded and adequate grounds are found to exist for directing such re-count in the interest of justice is now well settled. While doing so, however, the provisions contained in Section 94 of the Act may not be ignored but the same be given due weight and consideration before directing inspection and re-count. Section 94 of the Act directs that 'secrecy' of voting not to be 'infringed'. It directs that no witness or other person shall be required to disclose for whom he has voted at an election particularly in view of the statutory rules which provide adequate safeguard for proper conduct of the counting and for testing the validity or invalidity of the ballot papers. The rules relating to counting of votes in Parliamentary and Assembly Constituencies are contained in Part IV of the Conduct of Election Rules, 1961 hereinafter referred to as the Election Rules. Rule 51 provides for the time and place for the counting of votes. Rule 52 relates to the appointment of counting agents and revocation of such appointments while Rule 53 makes provision for admission of counting officers and counting assistants as may be appointed to assist the Returning Officer in the counting; persons authorised by the Election Commission; public servants on duty in connection with the election and; candidates, their election agents and counting agents; fixing the place for counting. Further Rule 54 contemplates that the Returning Officer shall apprise all persons present

in the counting hall the provisions of Section 128 which relate to the maintenance of secrecy of voting. Rule 55 deals with scrutiny and opening of the ballot boxes after the same are inspected by the counting agents present at the particular table with regard to the seal which may be affixed thereon to satisfy themselves that they are intact. In addition to this the Returning Officer himself has to satisfy that none of the ballot boxes have been tampered with and in the event the Returning Officer is satisfied that any ballot box has in fact been tampered with he shall refrain from counting the ballot papers contained in that box and take steps in accordance with Rule 58 of the Act. Further Rule 56 provides the mode of counting, scrutiny and rejection of the ballot papers if found to be invalid for any reasons pointed out in the said rule. Rule 56, also makes provisions for raising of objections with regard to any ballot paper and deal with it in accordance with law. From this elaborate procedure right from the point of opening of the ballot box up to the stage of sealing the ballot papers after the counting is over, it is evidently clear that the rule and procedure of counting provide the candidates and their counting agents sufficient and adequate opportunity to see and examine and raise objections, if any, in respect of any ballot paper with regard to its validity or otherwise and it is only after objections, if any, the ballot paper is admitted as valid or invalid as the case may be. Not only this but even after the completion of the process of counting a provision is made in Rule 63 to make a demand to the Returning Officers for re-count of the votes either wholly or in part stating the grounds on which the demand for such re-count is made. It is only after the compliance of this elaborate procedure that the Returning Officer prepares the result sheet in Form 20 and declares the result.

16. After a cursory glance of the relevant provisions discussed above it is thus abundantly clear that the rules provide adequate opportunity to a candidate, his election agent and counting agent to have a watch over the counting process before the result is declared and if they raise any objection as to the validity or otherwise of any ballot paper and if the said objection is improperly rejected, the candidate, his counting and election agent are well informed of the nature of the objection that was raised with regard to the ballot papers and make a concise statement of material facts in the election petition in relation thereto. It is for these reasons that this Court has repeatedly held that the secrecy of the vote has to be maintained and a demand of re-count should not ordinarily be granted unless the election petitioner makes out a prima facie case with regard to the errors in the counting and is able to show that the errors are of such magnitude that the result of the election of the returned candidate is materially affected. The election petitioner, in order to seek an order of re-count, has to place material and make out a prima facie case on the threshold and before an order of re-count is actually made. The demand of a defeated candidate for re-count of votes has to be considered keeping in view that secrecy of the ballot is sacrosanct in a democracy and, therefore, unless the election petitioner is able not only to plead and disclose the material facts but also substantiate the same by means of evidence of reliable character that there existed a prima facie case for the re-count, no tribunals or court would be justified in directing the re-count.

17. This Court in *Bhabhi v. Sheo Govind* ((1976) 1 SCC 687) while dealing with the question of direction for inspection and re-count, on a close and careful consideration of various authorities of this Court laid down certain guidelines and conditions which are imperative before a court can grant inspection of the ballot papers. The said conditions and guidelines are set out below : SCC pp. 693-94, para 15)

"(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;

(2) That before inspection is allowed, the allegations made against the elected

candidate must be clear and specific and must be supported by adequate statements of material facts;

(3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a re-count;

(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;

(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and

(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a re-count, and not for purpose of fishing out materials."

In a recent decision in *Satyanarain Dudhani v. Uday Kumar Singh* (1993 Supp (2) SCC 82) this Court again reiterated the similar view by observing that the secrecy of the ballot papers cannot be permitted to be tinkered with lightly and an order of re-count cannot be granted as a matter of course. It is only when the High Court is satisfied on the basis of material facts pleaded in the petition and supported by the contemporaneous evidence that re-count can be ordered. When there is no contemporaneous evidence to show any irregularity or illegality in the counting, ordinarily it would not be proper to order re-count on the basis of bare allegations in the election petition.

18. As discussed in the foregoing paras, in the present case, there is no specific instance or allegation in the petition with regard to any particular irregularity and the meagre and vague allegations that have been made are not supported by any contemporaneous evidence making out a prima facie case for re-count and, therefore, the Returning Officer as well as the High Court were fully justified in rejecting the demand for re-count.

19. This brings us to the second ground of attack advanced by the learned counsel for the appellant with regard to the rejection of 146 postal ballot papers of Ext. P-55 series which are alleged to have been rejected without any endorsement and without assigning any reason for such rejection in violation of the mandatory provisions contained in Rule 54(A)(4) of the Election Rules which according to the learned counsel for the appellant materially affected the result of the election. It was submitted that since the rejection of postal ballot papers was improper, keeping in view the low margin between the appellant and the returned candidate Respondent 1 herein, the High Court should have allowed the prayer of re-count. As against this Shri Joseph, learned counsel appearing for Respondent 1 submitted that the mere fact of non-recording of reasons could not lead to the inference that the result of the election has been materially affected not could it justify re-count, without proper pleadings and material facts being furnished in the election petition. He submitted that the case of the petitioner/appellant was not that his valid postal ballots had been wrongly rejected or that the invalid postal ballots of the returned candidate had been improperly accepted from Ext. P-55 series and, therefore, the omission on the part of the Returning Officer to endorse the reasons for rejecting the postal ballots on the grounds which were otherwise valid, would be of no consequence. However, after very lengthy arguments advanced by the learned counsel for the parties on this point, Shri Poti, learned Senior Counsel for the appellant made an application on 13-9-1994 in this Court which was taken on board, praying that the postal ballot papers (Ex. P-55 series) be

subjected to inspection by this Court in view of the narrow margin of votes between the appellant and the returned candidate Respondent 1. Learned counsel for Respondent 1 was good enough and fairly recorded his "No Objection" to the prayer made on behalf of the appellant in the aforesaid application. We, therefore, with a view to do complete justice between the parties and to satisfy our judicial conscience, since the finding of the High Court was not clear as to whether or not the rejected postal ballot papers Ext. P-55 series had been subjected to any inspection or scrutiny when the Returning Officer PW 16 was being examined in the Court, granted the prayer of the counsel for the appellant and the inspection of the postal ballot papers, Ext. P-55 series was conducted by us in the Court in the presence of learned counsel for the parties who also participated in the process of inspection. On inspection of the postal ballot papers Ext. P-55 series we found that except a few postal ballot papers from the said series where incomplete declaration forms had been filed, the details whereof are given, the other postal ballot papers did not include any declaration form at all as required by Rule 54-A, in the outer cover. The longer outer cover contained only a small cover containing the ballot paper itself. After inspecting more than half of the ballot papers we did not deem it necessary to inspect all the 246 ballot papers as the learned counsel for the parties conceded that no further exercise was necessary to inspect the postal ballot papers of Ext. P-55 series because the rejection of the ballot papers by the Returning Officer were found to be in order by us in the Court in the presence of the counsel for the parties in the random sample inspection of more than 150 postal ballots of Ext. P-55 series and the same were found to have been rightly rejected. The postal ballot papers in which the declaration forms were found along with the smaller cover containing the ballot papers the following position :

1. P-55 (176) All the entries in the declaration form are totally blank.
2. P-55 (181) The entries in the declaration form are totally blank.
3. P-55 (165) The declaration form in the outer cover is totally blank.
4. P-55 (161) The declaration form is totally blank.
5. P-55 (160) The declaration form is totally blank.
6. P-55 (159) The declaration form is totally blank.
7. P-55 (154) and P-55 (156) The larger cover contains two small envelopes, containing ballot papers of Assembly and Parliamentary Constituencies but no declaration form at all.
8. P-55 (86) Does not even have a smaller cover containing the ballot paper, let alone the declaration form.
9. P-55 (92) There is no declaration form and instead along with the small cover, From 13-D, containing instructions for the guidance of electors has been enclosed in the outer cover.

Faced with the aforesaid situation, Shri Poti, learned counsel for the appellant candidly submitted that in view of the result of the inspection carried out by us in the Court he was not in a position to support his submissions that the postal ballot papers had been wrongly rejected by the Returning Officer. Thus this ground of attack also fails.

20. We now come to the third ground advanced by the learned counsel for the appellant that invalid votes were counted in favour of the returned candidate Respondent 1 and that out of the total rejected votes of 1375, quite a large number of valid votes in favour of the appellant were rejected, which materially affected the result of the election. Learned counsel for the respondent submitted that the appellant has not set forth the concise statement of material fact with regard to the allegation of counting invalid votes in favour of Respondent 1 nor has given any particulars of such invalid votes which are alleged to have been counted in favour of Respondent 1. He also submitted that similarly there are no particulars with regard to the rejection of valid votes in favour of the appellant nor number of such votes in order to support the allegation that such rejection of valid votes in favour of the appellant materially affected the result of the election. In our opinion there is no substance in these submissions made by the learned counsel for the appellant. In fact the appellant has neither pleaded the details and the number of such invalid votes which were counted in favour of Respondent 1 nor has given the particulars of the number of such valid votes in favour of the appellant which were wrongfully rejected during the course of counting. This apart, the Returning Officer, Supervisors and other officials were also present in the counting hall throughout the process of counting and the observers also visited the counting hall, but neither the appellant nor any of his counting agents pointed out or objected either orally or in writing that invalid votes were counted in favour of Respondent 1 or valid votes in favour of the appellant were rejected. The evidence of the Returning Officer, PW 16 clearly goes to show that no such complaint was made by anyone during the course of counting. In these facts and circumstances it is difficult to accept the allegations made by the appellant which seem to be only an afterthought and without any evidence or material to support the same.

21. Learned counsel for the appellant, however, submitted that having regard to the size of counting hall which was packed and uncongenial atmosphere prevailing therein as stated earlier it was not possible for the petitioner/appellant or his agents to watch, oversee and check the ballot papers so that they could take note of the particulars of ballot papers which were not correctly placed in the respective bundles of the candidates in whose favour the votes were cast or the particulars of those votes which were rejected as invalid though the same were otherwise valid and, therefore, it was not possible for the petitioner/appellant to make a mention or plead any more facts and particulars beyond those already stated in paras 4 and 7 of the petition. After giving our anxious consideration to the submissions made above, we are unable to persuade ourselves to accept the same. In the earlier part of this judgment, we have already discussed the evidence and material on record and found that there is absolutely no basis to show that there prevailed any kind of confusion or irregularity in the counting which could have disabled the appellant or his agents from watching the process of counting. As said above no such grievance was ever advanced by the appellant or his agents at the time of counting either orally or in writing to the Returning Officer or to the observers or to any member of the counting staff deputed for the purpose. The applications for recount were made only after the counting was over and the result was declared and that too with vague allegations. This submission has no merit and the same is accordingly rejected.

22. Learned counsel for the appellant lastly contended that the election of Respondent 1 was liable to be declared void and cancelled on the ground of corrupt practice under Sub-section (3-A) of Section 123 of the Act as Respondent 1 tried to promote the feeling of enmity and hatred between different communities of the Constituency by publication and distribution of the pamphlets Annexures VI, VII, VIII, IN and X which are marked as Ext. P-158, Ext. P-159, Ext. P-162, Ext. P-157. In this connection it may be pointed out that the High Court has minutely and critically examined the evidence adduced by the parties which has been discussed at length in paras 22 to 37 of judgment and the High Court has recorded the conclusion that the appellant had failed to

establish that these pamphlets were published or distributed by Respondent 1 or his agent or any other person with the consent of Respondent 1 or his election agent. Learned counsel for the parties took us through the entire evidence on the point and after analysing the same we find ourselves in agreement with the view taken by the High Court. It has been the consistent practice of this Court not to interfere with the findings on the questions of fact unless there is some grave or palpable error in the appreciation of evidence on the basis of which the findings were arrived at by the tribunal/High Court. In the present case after scrutinising the evidence adduced by the parties we find no error or infirmity much less grave or palpable which may call for any interference with the finding. We are, therefore, unable to accept the submissions made by the learned counsel for the appellant on this count also.

23. In view of the foregoing discussion and the conclusions recorded by us, even if we accept the submissions of learned counsel for the appellant that further 9 votes in favour of Respondent 1 should also have been rejected for double voting by the said nine voters as pointed out by him, although there is no sound basis for the same, yet it would only reduce the margin from 13 to 4 without materially affecting the result of the election.

24. Thus even after giving all the possible discounts the election of Respondent 1 cannot be set aside or declared void as he still remains a winner. In view of these facts and circumstances it would be a futile exercise to go into the question of recrimination petition made by Respondent 1 making certain allegations against the petitioner/appellant. We, therefore, decline to examine the same.

25. For the reasons stated above the appeal fails and is hereby dismissed with costs. Costs quantified at Rs. 5000.

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