SUPREME COURT OF INDIA

T. A. Ahammed Kabeer

Vs.

A. A. Azeez

C.A.Nos.3531-3532 of 2002

(R. C. Lahoti and Brijesh Kumar, JJ.)

10.04.2003

JUDGEMENT

R. C. LAHOTI, J.:-

1. Unsuccessful as a candidate and also as an election petitioner, the appellant is in appeal, exercising his statutory right of appeal under Section 116 A of the Representation of the People Act, 1951, (hereinafter 'the Act', for short) against the decision of the High Court dismissing his election petition.

2. Elections for the Kerala Legislative Assembly Seat from No. 125 Eravipuram Legislative Assembly Constituency were held on 10-5-2001. There were five candidates in the fray including the appellant and the respondent No. 1. The result were announced on 13-5-2001. The candidates secured the votes as under :-

S. No.	Candidate	Votes secured
1.	Appellant, Ahammed Kabeer	55617
2.	Respondent No. 1, A.A. Azeez	55638
3.	Respondent No. 2	11108
4.	Respondent No. 4	531
5.	Respondent No. 5	2756

3. The first respondent was declared elected defeating his nearest rival, the appellant, by a margin of 21 votes.

4. The poll was held by using electronic voting machines.

5. An election petition was filed by the appellant laying challenge to the election of the respondent No. 1 on very many grounds. The appellant in his election petition submitted, inter alia, that there were three voters who had voted twice, that there were nine voters who were actually dead, thirty voters were actually abroad and twenty seven voters were actually out of station; and hence these forty voters were not available for voting on the date of polling and yet ballots in their names were cast by impersonators; that five voters who reached the polling station were told that impersonators had already cast ballots in their names and therefore they were permitted to cast tender ballots; that forty eight voters could not cast their ballot as the copy of the voter list supplied at booth No. 185 was defective and the relevant pages on which the names of these voters appeared were missing; that six voters entitled to exercise their franchise through postal ballots could not do so as some impersonators had exercised franchise in their place; that there were postal ballots attested by

incompetent officers and hence invalid and so on. There were other illegalities committed during polling and also at counting, alleged the election petition.

6. The relief sought for by the appellant was the setting aside of the election of the respondent No. 1 as also declaring the appellant as elected.

7. The respondent No. 1 filed his written statement and also delivered a recrimination notice as contemplated by proviso to Section 97(1) of the Act. Briefly stated the pleas raised by way of recrimination by the respondent No. 1 are: that there were four persons who had voted twice in favour of the appellant and therefore the votes were liable to be excluded from the votes counted in favour of the appellant; that five persons were dead and not available for casting the ballots yet impersonators cast ballots in the names of the dead persons in favour of the appellant; that seven persons whose names were deleted from the voters list were also permitted to vote by the Presiding Officer, which ballots were cast in favour of the petitioner. The recrimination petition was filed within the prescribed period of limitation, in the prescribed manner, and was accompanied by the security deposit as required by Section 117 of the Act.

8. It is not necessary for us to go into other details of the pleadings and it would suffice to state that both the appellant and the respondent No. 1 in their respective election petition and recrimination petition pleaded the material facts with relevant particulars and no deficiency was to be found in the pleadings.

9. The learned designated Election Judge framed all the relevant issues arising from the pleadings and set down the petition for trial. Both the parties adduced evidence and evidence in rebuttal. Vide order dated 9-1-2002, the learned designated Election Judge found that there was a narrow margin of twenty one votes between the votes secured by the appellant and the first respondent; while the appellant had made out a prima facie case for declaring twenty nine votes secured by the first respondent as invalid, the first respondent had made out a prima facie case for invalidating three votes cast in favour of the appellant. Prima facie the cases of double voting by two persons, thirteen votes cast by impersonation and nine votes cast by persons whose names were removed from the final electoral roll were made out. A case was also made out on evidence for counting a tendered vote which was ignored by the Returning Officer. On the abovesaid findings, the learned designated Election Judge held, vide his order dated 9-1-2002, that the case warranted recount and decoding of votes cast through electronic voting machines. The standing counsel for the Election Commission of India made available to the learned Judge a circular bearing No. 51/8/99-Vol. III dated 2-6-1999 issued to the Chief Electoral Officers of all States with regard to the procedure to be followed in the matter of decoding of votes cast through electronic voting machines. The learned Judge also called for a detailed report from the standing counsel for the Election Commission of India with regard to the procedure to be followed in the matter of decoding based on which directions would be given after hearing all the parties. On 17-1-2002, the responded No. 1 filed a special leave petition in this Court putting in issue the order dated 9-1-2002, which was dismissed by this Court, forming an

opinion that the matter was yet to be finally decided by the High Court and interference at an interim stage was uncalled for under Article 136 of the Constitution.

10. The Election Commission of India submitted a report, rather a note, regarding the procedure to be followed in the matter of decoding. On 5-2-2002, thirty one votes were decoded and one tender ballot was opened. Decoding was carried out under the supervision of Shri A. A. Seshsai, Senior Technical Officer of the Electronic Corporation of India Ltd., Hyderabad. He was examined as a Court witness and the documents which came into existence during the process of decoding were marked as exhibits.

11. The learned Designated Election Judge heard the learned counsel for the parties in the light of the result of decoding as reported to the Court. Vide order dated 6th February, 2002, the High Court directed the Election Petition to be dismissed because in the light of the result of decoding and re-count it could not be said that the result of the election was materially affected insofar as the returned candidate is concerned. It will be useful to extract and reproduce the following findings from the judgment of the High Court : reported in 2002 (1) Ker LT 719, Paras 1 and 2

"The cumulative effect of Ext. C11 series is that out of the impugned 28 votes which had been taken into account by the Returning Officer 21 votes secured by the first respondent have to be ignored as void. That sets off the majority declared in favour of the first respondent.

The decoding also shows that out of the remaining 7 votes impugned by the petitioner, the vote relating to Ext. X34(b) (see Ext. C 11(h)) has gone in favour of candidate No. 3 (second respondent herein) and that the votes exercised by voters vide Exts. X32(g), X30(a), X46(b), X46(a), X25(a) and X38(a) entries in the Register of Voters which are indicated in Exts. C11 (a), C11, C11(b), C11(g) and C11(k) decoding reports had actually gone in favour of the petitioner himself. They are also void votes on the petitioner's own showing. But then Ext. X 18 tendered vote has gone in favour of the petitioner. If the aforesaid six votes are taken as void and credit is given for Ext. X18 vote, the consequence would be that the petitioner would lose the election by a margin of five votes."

12. On behalf of the election petitioner it was submitted that the 6 votes abovementioned could not be treated as void as they were not specifically impugned as void in the Recrimination petition filed by the first respondent. The learned Judge found such resistance on behalf of the election petitioner to be devoid of any merit and held - "I find no merit in the said contention of the petitioner. This Court had made clear in paragraphs 60, 71 and 83 of the judgment pronounced on 9-1-2002 that after recording necessary adjustments would be made regarding all the 28 votes. That includes the said 6 votes as well. Ext. X18 tendered vote has also to be given credit. There is no reason to take a different stand at this stage. Moreover the prohibition contained in Section 97 of the Representation of the Peoples Act, 1951 relied on by the petitioner is only against reception of evidence from the returned candidate in the absence of any recrimination petition. First of all, in the instant case there exists a valid recrimination petition filed by the first respondent. That apart, I find nothing in

Section 97 which stands in the way of ignoring the votes which are found to be void even on the showing of the petitioner himself, i.e., without the aid of any recrimination petition. On evidence I had already found in the relevant paragraph of the judgment, mentioned supra that the petitioner has established the fact that the votes covered by Exts. X32(g), X30(a), X46(b), X46(a), X25(a) and X38(a) are void. It necessarily follows that the petitioner cannot take shelter under Section 97 to contend that those votes are really valid. The petitioner cannot be allowed to blow hot and cold. He cannot wriggle out of the situation created by himself by pleading and proving that the aforesaid six votes are in fact void. A void vote means it was a vote that was never in existence at all. The petitioner cannot seek to resuscitate or resurrect the said 6 votes."

13. In conclusion the learned Judge held - "I shall now consider the merit of the recrimination petition filed by the first respondent which question will arise in case the finding of this Court regarding invalidity of the 6 votes is reversed in appeal by accepting the technical stand of the petitioner based on Section 97. In that case the petitioner will have a lead of one vote over the 1st respondent and the merit of the recrimination petition will assume significance. There was specific allegation therein with regard to the validity of votes of Naseem Beevi, Aliyar and George, which are covered by Exts. X75(a), 75(b) and 75 (c) entries in the Register of voters. In paragraphs 101 and 102 of the judgment of this Court dt. 9-1-2002 it was found that the said three votes were obviously received in an improper manner and that after decoding necessary adjustments would be made based on the details divulged therein as regards the correct number of votes. The contents of Ext. C11 (n) decoding report shows that all the said three votes have gone in favour of the present petitioner. They are void votes. The result then would be that the number of votes that the petitioner has obtained has to be reduced by 3 and then again the first respondent will have a lead of two votes."

"I find that the correct number of votes secured by the first respondent as a result of the implementation of the result of decoding would be 55617 and the correct number of votes secured by the petitioner is only 55612. In case the plea of the petitioner regarding validity of the 6 votes is accepted and the recrimination is also taken into account, then also the election of the first respondent is not liable to be declared invalid. Found accordingly."

14. In the backdrop of the above facts, two questions arise for consideration which only have been seriously pressed by Shri V. R. Reddy, the learned senior counsel appearing for the appellant. The same are stated and dealt with hereunder.

15. Firstly, it was submitted that in the matter of decoding and thereafter re-count of the votes, the High Court could not have travelled beyond the pleadings specifically raised in the Recrimination Petition and validity or invalidity of votes beyond the one specifically pleaded in the Recrimination Petition could not have been taken into consideration by the High Court even if it had come to its notice; for, the rule of divergence between pleadings and evidence applied with all force and rigour to the trial of an election dispute and any evidence contrary to the pleadings is liable to be ignored.

Implicit reliance was placed on behalf of the appellant on a Constitution Bench decision of this Court in Jabar Singh v. Genda Lal, 1964 (6) SCR 54. The majority opinion in Jabar Singh's case is that in the absence of recriminatory petition the High Court had no jurisdiction to reconsider the rejected votes qua the returned candidate. However, as we will presently show Jabar Singh's case does not help the appellant at all, since the law laid down by the Constitution Bench does not cause any dent in the view of the law taken by the High Court. AIR 1964 SC 1200

16. In Jabar Singh's case Constitution Bench drew a distinction between the election petitions claiming a single relief and those claiming a double, composite or additional relief. Under Section 100 (1) of the Act the election petitioner claims a single relief that the election of the returned candidate be declared by the High Court to be void. If such a relief is founded on the ground of the improper reception, refusal or rejection of any vote or the reception of any vote which is void as contemplated by Section 100 (1)(d)(iii), in such a case the scope of the enquiry shall be limited to finding out the infirmities specified in Section 100(1)(d)(iii), i.e., whether the result of the returned candidate has been materially affected by (a) any vote having been improperly cast in favour of the returned candidate or (b) any votes having been improperly refused or rejected in regard to any other candidate. The scope of enquiry is limited by force of Section 100(1)(d)(iii) which concentrates on a pure and simple issue - whether the election of the returned candidate has been materially affected - and nothing else. It cannot be said that the enquiry is limited because the returned candidate has not recriminated under Section 97 (1). Section 97(1) has no application to the case falling under Section 100(1)(d)(iii). If the result of the enquiry confined within the scope laid down by Section 100(1)(d)(iii) is in favour of the petitioner the High Court shall declare the election of the returned candidate to be void and that is an end of the proceedings AIR 1964 SC 1200 in the election petition. Those cases will be different where not only the election of the returned candidate is sought to be declared void but a declaration is also asked for that the petitioner himself or some other person has been duly elected within the meaning of Section 100 (1) of the Act. In such case Section 100 shall have to be read along with Section 100 (1) and Section 97 would also come into play. The returned candidate can recriminate and raise pleas in support of his case that the candidate who is sought to be declared as elected cannot be so declared and an enquiry would be held under Section 100(1)(d)(iii) as to the votes received by the candidate recriminated against. The recrimination petition under Section 97(1) would give an opportunity to the returned candidate to dispute the validity of any of the votes cast in favour of the alternative candidate or to plead for the validity of any vote cast in his favour which has been rejected. These pleas will not be available to be raised by the returned candidate in the absence of a recrimination petition. In the absence of a recrimination petition, the High Court can proceed on the basis that the other votes counted by the returning officer were valid votes and that the votes in favour of the returned candidate, if any, which were rejected, were invalid. In the case of a relief of the nature contemplated by Section 101 having been sought for in the election petition and a recrimination petition having been preferred by the returned candidate, the scope of enquiry is widened and proceeds beyond the limitation imposed by Section 100(1)(d)(iii). Whether the petitioner or some other person has received a majority of the valid votes, is an enquiry which would be possible only if the returned candidate had recriminated. Absence of recrimination by the returned candidate deprives him of the right to challenge the validity of votes cast in favour of the candidate sought to be declared elected, or to contend that any of his votes were improperly rejected. Clearly, in an enquiry whether under Section 100(1)(d)(iii) or under Section 101, in the absence of recrimination a general re-count of the votes preceded by a scrutiny about their validity cannot be ordered. How far the law so laid down by the Constitution Bench applies to the facts of the present case, we shall see a little later. We shall now proceed to

take up for consideration a few subsequent decisions of this Court wherein the ratio of Jabar Singh's case came up for consideration and was sought to be applied.

17. In Janardan Dattuappa Bondre v. Govind Prasad Shivprasad Choudhari and others, 1979 (4) SCC 516 while holding a re-count it was found by the High Court that there were 250 votes cast in favour of the returned candidate, but they were placed in another candidate's packet. There was no recriminatory notice under Section 97. The two-judge Bench held that the claim of the returned candidate did not involve reconsideration of the validity of the votes and therefore the returned candidate could not be denied the benefit of 250 votes being counted for him even in the absence of a recriminatory petition. Jabar Singh's case was noticed and distinguished by holding that when the re-count was taken the High Court was still at the stage of concluding whether the election of the returned candidate was invalid, which was an enquiry confined to Section 100(1)(d). AIR 1979 SC 1617

AIR 1964 SC 1200

18. In Azmat Khan v. Khillan Singh and others, (1984) 1 SCC 143, a recrimination petition was filed by the winning candidate wherein one of the grounds taken was that errors were committed in the counting of votes of the candidate who was sought to be declared elected. All the parties agreed that the Court should order a recount. Jabar Singh's case was distinguished by the two-Judge Bench primarily on the ground that in Jabar Singh's case there was no recrimination petition filed while it was so filed in Azmat Khan's case. In Jabar Singh's case an attack against the alternative claim made by the election petitioner was not permissible but the same was permissible here. In addition the AIR 1984 SC 304

AIR 1964 SC 1200 appellant had also agreed to the recount of the votes secured by all the parties. For these reasons fault could not be found with the decision of the High Court.

19. In P. Malai Chami v. M. Andi Ambalam and others, (1973) 2 SCC 170 this Court held that the Election Judge could not have gone into the question of whether any wrong votes had been counted in favour of the election petitioner who had claimed the seat for himself, unless the successful candidate had filed a petition under Section 97. It was held that it was not a question of mere pleadings but a question of jurisdiction. AIR 1973 SC 2077

20. In Arun Kumar Bose v. Mohd. Furkan Ansari and others, (1984) 1 SCC 91, the successful candidate was held not entitled to combat the claim of the election petitioner on the ground that if the remaining rejected ballot papers of the successful candidates had been counted, the election petitioner would not have been found to have polled the majority of the votes for want of a recrimination petition confirming to the requirement of Section 97 of the Act. AIR 1983 SC 1311

21. In Bhag Mal v. Ch. Prabhu Ram and others, (1985) 1 SCC 61 in a recount held at the instance of the election petitioner it was noticed that there were eight more votes secured by the returned candidate but they were not counted in his favour. A three-Judge Bench by a majority of 2:1 held that in the absence of recrimination petition having been filed by the returned candidate the High Court, though justified in directing recount of the rejected ballot papers relating to the eight petitioner, was also justified in declining to take into account the either ballot papers relating to the returned candidate in the absence of a recrimination petition under Section 97 (1) of the Act. AIR 1985 SC 150

22. In N. E. Horo v. Leander Tiru and others, (1989) 4 SCC 364, not only there was no recrimination petition by the elected candidate, but on the other hand the plea was taken in the written statement and also during his statement recorded in the Court that there was no irregularity committed in the process of counting ballots. It was held that the High Court was justified in directing inspection of ballot papers polled in favour of elected and other candidates but refusing inspection of ballots polled in favour of election petitioner at the instance of the returned candidate so as to enter into the question whether the votes secured by the returned candidate were rightly so counted. AIR 1989 SC 2023

23. Jabar Singh's case was decided by the Constitution Bench by majority of 4:1. N. Rajagopala Ayyangar, J. recorded a dissenting opinion. His Lordship analysed the scheme of the Act and the setting in which Sections 97, 100(1)(d)(iii) and 101(a) were placed, reading also the rules relating to counting of ballots, specially Rules 56 and 57, along with the provisions of the Act. Ayyangar, J. noticed the settled law that the petitioner is not as a matter of right entitled to have a scrutiny of ballot papers and recount merely because he prays for such a relief, but he has to allege, make out and prove the specific grounds to establish that the scrutiny or counting was improper and that the result was in consequence erroneous. If one reaches that stage and the Tribunal is satisfied that a case for scrutiny and recount is made out it would mean that the returning officer had not discharged his duties properly in the matter of the scrutiny of the ballot papers and their counting. The respondent, i.e., the returned candidate can allege similar failure on the AIR 1964 SC 1200 part of returning officer and on that being done it would be unjust to deprive him of the opportunity of proving his allegations and thus maintaining his seat unless of course the statutory provisions clearly precludes him from doing so. A narrow construction on Section 100(1)(d)(iii) cannot be placed because the expression employed by the Legislature is "by the improper reception, refusal or rejection of any vote or the reception of any vote which is void." The opening expression in clause (d) "insofar as it concern a returned candidate" cannot limit the width of sub-clause (iii). In the opinion of Ayyangar, J. unjust and anomalous results would follow which would be contradictory to the basic principles underlying the election law if the narrow view propounded by the majority was to be followed. The basic principles underlying election law are :(i) that apart from disqualification, corrupt practices etc. the election of a candidate who obtains the majority of valid votes shall not be set aside, and (ii) no candidate shall be declared duly elected who has not obtained the majority of valid votes. Giving hypothetical but practical illustrations, Ayyangar, J. in his dissenting opinion demonstrated that once an inspection and recount was carried out and yet narrow construction on the power of the Court was placed, then there may be cases (i) where the election of the returned candidate may be liable to be set aside notwithstanding that he had in fact obtained majority of valid votes, and (ii) where a seat is claimed by the election petitioner he may be declared elected

notwithstanding that as a fact he has not obtained the majority of lawful votes. In short, in the opinion of Ayyangar, J., once an inspection has been allowed, every vote which has been improperly received ought to be eliminated and every vote which has been improperly refused or rejected ought to be added so as to get the totality of valid votes and give effect to the result. That would meet the object of election law and aspirations of democracy.

24. In N. Gopal Reddy v. Bonala Krishnamurthy and Others, (1987) 2 SCC 58 a two-Judge Bench of this Court formed an opinion that the view of law taken by the majority in Jabar Singh's case is entailing apparently unjust and unreasonable consequences because in spite of the recount pointing out to the result of the election being sustained in favour of the returning candidate and in spite of variation in the exact number of votes polled by different candidates, the High Court was deprived of giving benefit of these votes to the returned candidate simply for want of recrimination petition, and the result was that the electors' will and desire was defeated. The Court opined for the majority view in Jabar Singh's case requiring reconsideration and sought for a reference to a larger bench, preferably a Bench of seven Judges. However, on 22-11-1995, it was reported to the Court that the appeal had become infructuous because the term for which the elected candidate was to hold office pursuant to impugned declaration of result had come to an end and therefore the Court directed the appeal to be dismissed without any adjudication on merits. The reference sought for in N. Gopal Reddy's case could not be answered and the majority view in Jabar Singh's case could not be reconsidered. AIR 1987 SC 831

AIR 1964 SC 1200

25. Earlier also an effort at seeking reconsideration of the majority opinion in Jabar Singh's case was made before a three-Judge Bench of this Court in Bhagmal v. Ch. Prabhu Ram and others (supra) and there too it did not succeed. Sabyasachi Mukharji, J. (as His Lordship then was) held in his minority opinion that the view taken by Ayyangar, J. (the minority opinion) in Jabar Singh's case was more correct as that view was in consonance with the purpose of the Act and would further the cause of the democratic process at which the Constitution aims. The Constitution and connected laws aim at ensuring true democracy functioning in the country, and the will of the people to prevail. AIR 1964 SC 1200, AIR 1985 SC 150 That can be achieved by allowing the one to represent the constituency who has obtained the majority of valid votes by proper and due process of law. It would really be a mockery of the procedure of law in a situation where it is demonstrated duly in the Court that a person who obtained four votes less than the other next candidates should be declared elected in preference to the others and allowed to represent the constituency. The failure on the part of the Parliament to amend the law suitably in view of the Jabar Singh's case was also regretted.

26. The task before an Election Judge is ticklish. It is often urged and also held that the success of a winning candidate should not be lightly set aside and the secrecy of ballot must be zealously guarded. On account of a rigid following of these principles the election Courts are inclined to lean in favour of the returned candidates and place the onus of proof on the person challenging the result of election, insisting on strict compliance with the rules of pleadings and excluding such evidence from consideration as is in divergence with the pleadings. However, what has so developed as a rule of practice should not be unduly stretched; for the purity of the election process needs to be

preserved unpolluted so as to achieve the predominant goal of democracy that only he should represent the constituency who has been chosen by the majority of the electors. This is the purpose and object of the election law.

27. Though the inspection of ballot papers is to be allowed sparingly and the Court may refuse the prayer of the defeated candidate for inspection if, in the garb of seeking inspection, he was indulging into a roving enquiry in order to fish out materials to set aside the election, or the allegations made in support of such prayer were vague or too generalized to deserve any cognizance. Nevertheless, the power to direct inspection of ballot papers is there and ought to be exercised if, based on precise allegations of material facts, also substantiated, a case for permitting inspection is made out as is necessary to determine the issue arising for decision in the case and in the interest of justice. As held by the Constitution Bench in Ram Sewak Yadav v. Hussain Kamil Kidwai and others, (1964) 6 SCR 238, an Election Tribunal has undoubtedly the power to direct discovery and inspection of documents within the narrow limits of Order XI of Code of Civil Procedure. Inspection of documents under Rule 15 of Order XI of Code of Civil Procedure may be ordered of documents which are referred to in the pleadings or particulars as disclosed in the affidavit of documents of the other party, and under Rule 18(2) of other documents in the possession or power of the other party. The returning officer is not a party to an election petition and an order for production of the ballot papers cannot be made under Order XI of Code of Civil Procedure. But the Election Tribunal is not on that account without authority in respect of the ballot papers. In a proper case where the interests of justice demand it, the Tribunal may call upon the returning officer to produce the ballot papers and may permit inspection by the parties before it of the ballot papers which power is clearly implicit in Ss. 100(1)(d)(iii), 101, 102 and Rule 93 of the Conduct of Election Rules, 1961. This power to order inspection of the ballot papers which is apart from Order XI Code of Civil Procedure may be exercised, subject to the statutory restrictions about the secrecy of the ballot paper prescribed by Ss. 94 and 128(1). However, the Constitution Bench has cautioned, by the mere production of the sealed boxes of ballot papers before the Election Tribunal pursuant to its order the ballot papers do not become part of the record and they are not liable to be inspected unless the Tribunal is satisfied that such inspection is in the circumstances of the case necessary in the interests of justice. AIR 1964 SC 1249

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

29. So also, once the Court exercises its jurisdiction to enter into the question of improper reception, refusal or rejection of any vote, or the reception of an vote which is void by reference to the election result of the returned candidate under Section 100 (1)(d)(iii), as also as to the result of the election

of any other candidate by reference to Section 97 of the Act and enters into scrutiny of the votes polled, followed by recount, consistently with its findings on the validity or invalidity of the votes, it cannot refuse to give effect to the result of its findings as to the validity or invalidity of the votes for the purpose of finding out true result of recount though the actual finding as to validity or otherwise of the votes by reference to number may be at variance with the pleadings. In short, the pleadings and proof in the matter of recount have relevance for the purpose of determining the question of jurisdiction to permit or not to permit recount. Once the jurisdiction to order recount is found to have been rightly exercised, thereafter it is the truth as revealed by the result of recounting that has to be given effect to.

30. In N. E. Horo's case (supra), the High Court reached and recorded a finding as to the availability of a prima facie case calling for inspection of ballot papers having been made out on consideration of relevant evidence produced by the parties. It was held that thereafter the scope of inspection could not be kept confined to the pleadings alone. In the course of such inspection, if the ballot papers which ought not to have been accepted have, in fact been counted in favour of a candidate, such votes must also fall to be excluded. There may not be any specific allegation in the pleading in respect of such ballot papers but the absence of specific averments in the pleadings is no bar to inspect such ballot papers. "When illegality is noticed by the inspection, it must be corrected. Invalid votes, if any, should be excluded. That is, precisely the purpose of inspection of ballot papers." In S. Raghbir Singh Gill v. Gurcharan Singh Tohra (1980) Supp SCC 53 it was held that a petition for a recount on the allegation of miscount or error in counting is based not upon specific allegation of miscounting but errors which may indicate a miscount, and recount becomes necessary. When it is alleged that postal ballot papers were tampered with, the implication in law is that those ballot papers have been wrongly received in favour of a candidate not entitled to the same, and improperly refused in favour of the candidate entitled to the same, and this is miscount and a recount is necessary. In the very nature of things the allegation can be not on each specific instance of any error of counting or miscount but broad allegations indicating error in counting or miscount necessitating a recount (para 32 ibid). On a pure grammatical construction of the relevant clause it cannot be gainsaid that an improper reception of any note or an improper refusal of any vote implies not only reception or refusal of a vote contended to be invalid or valid, as the case may be, but consequent reception in favour of any contesting candidate at the election which would simultaneously show the vote being refused in counting to any other candidate at the election. The expression 'refusal' implies 'refuse to accept' and the expression 'reception' implies AIR 1989 SC 2023, AIR 1980 SC 1362 'refuse to reject'. Apart from the setting and the context in which the clause finds it place, in its interpretation it is to be borne in mind that it seeks to specify one of the grounds for declaring an election to be void. In this situation the expressions 'improper reception' and 'improper refusal' have to be interpreted as would carry out the purpose underlying the provision contained in Section 100." (para 46, ibid).

31. With the pronouncement of this Court in Anirudh Prasad v. Rajeshwari Saroj Das and others, (1977) 1 SCC 105 (3-judges coram) and Janardan Dattuappa Bondre v. Govind Prasad Shivprasad Choudhari and others, (1979) 4 SCC 516 (2-judges coram), it is clear that a distinction has to be drawn between two situations :- (i) when during inspection or consequent upon inspection, the Court is called upon to adjudicate upon the issue as to whether any vote or votes were improperly received, refused or rejected or whether any vote received was void, and (ii) a case where no such

adjudication is involved but all that is needed is to perform the mechanical process of counting the valid and invalid votes or just placing the votes admittedly cast in favour of a candidate in his box or bundle by removing the same from where they were wrongly placed, or, to put in other words, where all that is needed to be done is to perform a mere mechanical process of recounting the votes without any adjudication of validity or invalidity of votes. In such a case, the Court is treating the votes as valid or invalid consistently with the decision of the Returning Officer at the counting on validity or invalidity of votes and without embarking upon testing the correctness of such decision the Court is simply correcting the error in counting detected at the recount. The latter case would be covered by Section 100(1)(d)(iv) and not by Section 100(1)(d)(iii) of the Act as the error in counting amounts to non-compliance with the provisions of the Act and rules and orders made thereunder. A recrimination notice under Section 97 is needed in the former case but is not required in the latter case. A case clearly covered by Section 100(1)(d)(iii) would not be covered by Section 100(1)(d)(vi) as special provision excludes the general provision. Yet another exception in which the applicability of Section 97 is not attracted is when the process of inspection would entail adjustment of votes between two successful candidates, both declared elected, where that be the situation.
AIR 1986 SC 2184

AIR 1979 SC 1617

32. In P. Malai Chami v. M. Andi Ambalam and others, (supra) further declaration was claimed that the respondent himself be declared elected over and above the declaration that the appellant's election was void. What was sought for, the Court noted vide para 10 "was not a mere mechanical process" by way of recount. Adjudication as to improper acceptance/rejection and validity of votes was sought for. In this context the Court held that in the absence of a recrimination petition the Election Tribunal did not acquire jurisdiction to go into the question as to whether any wrong votes had been counted in favour of the election-petitioner. The Court opined that it was not a question of mere pleadings; it was a question of jurisdiction. AIR 1973 SC 2077

33. We have already stated that the rigorous rule propounded by the Constitution Bench in Jabar Singh's case has met with criticism in some of the subsequent decisions of this Court though by Benches of lesser coram and an attempt at seeking reconsideration of the majority opinion in Jabar Singh's case has so far proved to be abortive. The view of the law taken by the Constitution Bench in Jabar Singh's case is binding on us. Analysing the majority opinion in Jabar Singh's case and the view AIR 1964 SC 1200 taken in several decisions of this Court, referred to hereinabove, we sum up the law as under:-

(1) In an election petition wherein the limited relief sought for is the declaration that the election of returned candidate is void on the ground under Section 100(1)(d)(iii) of the Act, the scope of enquiry shall remain confined to two questions : (a) finding out any votes having been improperly cast in favour of the returned candidate, and (b) any votes having been improperly refused or rejected in regard to any other candidate. In such a case an enquiry cannot be held into and the election petition decided on the finding (a) that any votes have been improperly cast in favour of a candidate other than the returned candidate, or (b) any votes were improperly refused or rejected in

regard to the returned candidate.

(2) A recrimination by the returned candidate or any other party can be filed under Section 97 (1) in a case where in an election petition an additional declaration is claimed that any candidate other than the returned candidate has been duly elected.

(3) For the purpose of enabling an enquiry that any votes have been improperly cast in favour of any candidate other than the returned candidate or any votes have been improperly refused or rejected in regard to the returned candidate the election Court shall acquire jurisdiction to do so only on the two conditions being satisfied : (i) the election petition seeks a declaration that any candidate other than returned candidate has been duly elected over and above the declaration that the election of the returned candidate is void; and (ii) the recrimination petition under Section 97 (1) is filed.

(4) A recrimination petition must satisfy the same requirements as that of an election petition in the matter of pleadings, signing and verification as an election petition is required to fulfil within the meaning of Section 83 of the Act and must be accompanied by the security or the further security referred to in Sections 117 and 118 of the Act.

(5) The bar on enquiry enacted by Section 97 read with Section 100 (1)(d)(iii) of the Act is attracted when the validity of the votes is to be gone into and adjudged or in other words the question of improper reception, refusal or rejection of any vote or reception of any vote which is void is to be gone into. The bar is not attracted to a case where it is merely a question of correct counting of the votes without entering into adjudication as to propriety, impropriety or validity of acceptance, rejection or reception of any vote. In other words, where on a recount the election Judge finds the result of recount to be different from the one arrived at by the returning officer or when the election Judge finds that there was an error of counting the bar is not attracted because the Court in a pure and simple counting carried out by it or under its directions is not adjudicating upon any issue as to improper reception, refusal or rejection of any vote or the reception of any vote which is void but is performing mechanical process of counting or recounting by placing the vote at the place where it ought to have been placed. A case of error in counting would fall within the purview of sub-clause (iv), and not sub-clause (iii) of Clause (d) of sub-section (1) of Section 100 of the Act.

34. The above was the plea seriously pressed and argued in very many details on behalf of the appellant, and therefore, we have dealt with the same extensively. There were other submissions made which being not of much substance may be briefly noticed and disposed of summarily. It was urged that the voters list supplied at one of the polling booths namely booth No. 185 was deficient as a few pages containing names of 83 voters were missing therefrom. The mistake was detected within a short time of commencement of polling and rectified at about 11.30 a.m. On such mistake having been detected and deficiency in the voters list having been removed, 30 out of such 83 voters did turn up and exercise their voting right. Out of such 83 voters, 53 were allegedly deprived of

voting. Of these 53, only 6 were examined as witnesses on behalf of the election petitioner. The witnesses are PWs 18, 19, 20, 22, 23 and 24. They have stated that they had gone at the polling booth in the earlier part of the day but could not vote as their names were missing from the voters list as available at that time with the polling officer. They have also deposed that if they would have been allowed to cast their votes, they would have voted for the election petitioner. They claimed to be the followers of the same political party to which the election petitioner belonged. However, this averment is missing from the election petition. Further, excepting the oral ipse dixit of these 6 witnesses there is no contemporaneous record available to show that these persons did go to cast their ballots. They do not say why they could not have gone in the latter part of the day to exercise their right to vote. Moreover, from the available evidence it cannot be inferred and held positively that all the persons whose names were missing from the voters list as initially available at the polling booth, would have all exercised their right to vote and actually wished to exercise their such right and, if so, which way the result of the polling would have gone. On the available evidence an inference as to the result of the election having been materially affected insofar as the returned candidate is concerned, cannot be drawn.

35. It was submitted that there was one tendered ballot by a voter named Khalid but that is missing. Similarly it is submitted that there were a few postal ballots which were not attested by a gazetted officer as required by the Conduct of Election Rules. There is no material to hold which way the missing postal ballot had gone, that is, in favour of which candidate it was cast. As to the attestation by gazetted officer the only plea taken in the election petition is that "it is reliably understood that these votes cast through postal ballots were attested by an officer who is not a gazetted officer and therefore not competent to attest postal votes as per the Conduct of Election Rules". At the trial no evidence was adduced in this regard. On the contrary the evidence was directed towards proving that the postal ballots were not actually signed by these voters by which they purport to have been signed. Thus, there was a divergence between the pleadings and proof and hence the plea was rightly discarded by the High Court.

36. In the light of the law as stated hereinabove no fault can be found with the view taken by the High Court in the impugned judgment. Jabar Singh's case has no applicability to the present case for two reasons. Firstly, there is a recrimination petition filed in the present case and the High Court has on the basis of material available arrived at a finding that a case for decoding of votes (equivalent to inspection of ballot papers) cast through electronic voting machines was made out and thereupon proceeded to decode the ballets cast. Secondly, to the extent to which the ballot have been merely recounted through the process of decoding, Jabar Singh's case has no applicability as the case would be covered by Section 100(i)(d)(iv) and not Section 100(i)(d)(iii). So far as the correctness of the facts found as a result of decoding and recount is concerned, the same is not disputed. The controversy centered around the legal aspect only and has already been dealt with hereinabove.
AIR 1964 SC 1200

37. For all the foregoing reasons we find the appeals devoid of any merit and liable to the dismissed. These are dismissed accordingly.

Appeals dismissed.