SUPREME COURT OF INDIA

Md.Alauddin Khan

Vs.

Karam Thamarjit Singh

C.A.No.5851 of 2010

(V. S. Sirpurkar and Dr. Mukundakam Sharma JJ.)

22.07.2010

JUDGEMENT

V. S. SIRPURKAR, J.

1. I have had the benefit of the opinion expressed by my brother.

Since the facts in this appeal have been meticulously put in that judgment, I need not restate them. It is held in that judgment that the order passed by the Learned Single Judge deleting paragraphs 22 to 31 from the written statement of the elected candidate in pursuance of the application filed by the election petitioner under Order VI Rule 16, Code of Civil Procedure is correct. With deepest respect to my brother, I find myself unable to agree with the view taken, as also the ultimate order passed in pursuance of that view. In my opinion, the Learned Designated Election Judge was not right in striking out those paragraphs and the application made by the election petitioner under Order VI Rule 16, CPC was liable to be dismissed.

2. The election petitioner was a losing candidate and he had lost his election by merely two votes. In the election petition, the following prayers were made:

"...................

(iii) to order a re-count of the votes after excluding the void votes if required;

(iv) to declare the election of the Respondent No.1 as void;

(v) to pass other and further orders as may be deemed fit by the Hon'ble Court in the facts and circumstances of the case."

3. During pendency of the case, an application came to be made by the winning candidate herein seeking a direction to the election petitioner to clarify the exact relief sought for in prayer Nos.(iv) and (v) as probably, because the prayer in clause (v) was too general and the appellant herein probably wanted to know as to what were the ramifications of that direction and, more particularly, whether it included a prayer for a direction in favour of the election petitioner in case, if, as a result of the recount, it was found that he had secured more votes than the elected candidate.

4. A clear cut order came to be passed to the effect that the election petitioner had not made any prayer to declare himself or any other candidate as an elected candidate, which declaration can be given under Section 101 of the Representation of the People Act, 1950. The Learned Judge, therefore, held that, under clause (v), the Court could grant only such reliefs or pass such reliefs which were ancillary to the election petition and no specific declaration could be made in favour of the election petitioner or any other candidate and resultantly, the elected candidate could not raise a defence that the election petitioner had secured votes which were void and hence, the appellant had secured more votes and was rightly elected.

5. By way of defence, the appellant herein, who was an elected candidate, has enumerated from paragraphs 22 to 31 that even the defeated candidate had not secured the votes which have been shown to have been cast in his favour as, even in his case, number of dead voters had cast votes; besides, numbers of votes were illegally counted in his favour. He, therefore, raised a question that, if at all recount had to be ordered, the votes of all the candidates who contested the election should be counted.

6. In paragraph 21, it was suggested in the following words that:

"as provided and regulated by the procedure of CPC, the present answering respondent has hereby sought for raising counter claim as to the maintainability of the total number of votes obtained by the election petitioner".

7. In paragraph 22, details have been given regarding four polling stations, namely 6/1, 6/2, 6/3 and 6/4 suggesting the number of persons voted, who were, in fact, dead or who could not have otherwise cast their vote and also gave names of the persons who had impersonated the dead persons and had cast their votes. In these paragraphs, more particularly, paragraph 28 says that, in the alternative, if the High Court has to direct the recounting, the High Court should also direct recounting of the void votes of polling station Nos. 6/1, 6/2, 6/3 and 6/4 and cancel them. In short, the contention was that if there is going to be a recount, the said recount should be of all the candidates including the election petitioner.

8. Here was the case where the recount was prayed for, not of the votes of a returned candidate, but of all the candidates. The prayer was extremely general in nature suggesting the order of the recount of the votes after excluding the void votes, if required. Therefore, at least, insofar as the prayer clause is concerned, there is nothing to suggest that the recount was restricted to the votes of the returned candidate.

9. In order to buttress his case and, more particularly, to raise a valid defence to the election petition, the elected candidates alleged that number of dead persons had cast the votes in other polling stations. All that he had claimed was scrutiny of the votes polled so that there could be a proper decision on the issue as to who had polled the maximum votes. It could not have been said and indeed it was not said by the elected candidate as to in whose favour these votes had gone and it was impossible for him to contend that the votes polled by some impersonators would have gone only in favour of the election petitioner or some other candidate. Some of those could have been cast in his own favour. Therefore, it was clear by these paragraphs that the plea was to make a recount of all the votes cast of all the contesting candidates and for that purpose, permit him to prove that, even in some other polling stations, some impersonators of the dead persons were allowed to vote. It was not as if the elected candidate had made any claim in terms of recrimination either against the election petitioner or any of the other candidates contesting that election and in fact, there were three more candidates contesting elections.

10. In my opinion, therefore, the plea raised in these ten paragraphs (from 22 to 31) was not in the nature of recrimination, but, thereby the election candidate was setting up a valid defence and was suggesting that it was a case of the election petitioner that in particular number of polling stations, some impersonators had voted in the name of dead persons. Such things had happened in other constituencies also and, therefore, the votes cast in the name of dead persons in all the polling

stations, more particularly, the named polling stations should also be deleted or held to be void votes. [This, according to me, could not be viewed as a recriminatory plea which was barred under Section 97 of the Act.]

11. True it is that the words `counter claim' have been used in paragraph 21, but then the question would be as to whether by way of that so-called counter claim, the elected candidate wanted any other candidate's proposed election to be upset. It was not a question of this sort as no declaration was ever prayed by the election petitioner.

Therefore, this counter claim, in my opinion, was only to raise a valid defence to save his own election and it was in the nature of raising or introducing pleadings permitting him to show that it is not only in respect of the particular polling stations named in the election petitions that some votes cast in the name of dead persons were required to be declared as void, but such votes, cast in other polling stations also were required to be declared void in order to know as to who had, in fact, polled the majority of votes.

12. In my opinion, there was nothing wrong in raising this plea, more particularly, because rule of democracy, which depends upon the valid elections, can be called to be the 'basic structure of the Constitution of India'. Democratic Government is what we have assured to ourselves by the Constitution. There is creation of an Election Commission to control the election process in the country and it goes without saying that obtaining of majority valid votes is the soul of valid election.

13. In this behalf, when a question was put to the Learned Counsel appearing for the respondent herein Shri P. S. Narasimhan, he very candidly agreed that, in fact, only those votes will be declared void which have been cast in the name of dead persons, only in the named polling stations in the election petition, in the process of recount and the elected candidate will not be allowed to suggest that such votes have been cast in other polling stations also which, if proved, would have the effect of affecting the votes of the election petitioner or other candidates who had lost. Shri Narasimhan further suggested as a sequel to his argument that, in the process of recount, if ordered in pursuance of the pleadings in the election petition, only the votes cast in favour of the elected candidate alone shall be counted, whereas, even if it is proved that, in some other polling stations also votes were cast in the name of dead persons, those votes cannot be invalidated, even if it is found that those votes had been cast in favour of the election petitioner or other defeated candidates. In short, according to the Learned Senior Counsel, it is only the votes of the elected candidates which will be counted and counting of votes in respect of all the other candidates will be of no consequence. According to me, if this procedure is adopted in the recount, it will be direct annihilation of the principle of majority of votes for declaring the elected candidate.

14. I have already shown above that such a recount is not prayed for.

The recount prayed for is a general recount but if the recount is to be made in such a peculiar fashion, then, it may be that even when the elected candidate has actually secured majority of votes, his election would have to be set aside. In fact, there will be no way to know as to who has actually secured majority of votes, if in a recount, the votes cast only in favour of the returned candidate are counted while ignoring his plea that there are some void votes cast in favour of the other candidates. In my opinion, this cannot be the import of Sections 100(1) (d) (iii), 84 and 97 of the Act.

Section 100(1)(d)(iii) runs as under :- 100. Grounds for declaring election to be void:

(1) Subject to the provisions of sub-Section (2) if the High Court is of opinion- (a) Not relevant (b) Not relevant (c) Not relevant (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected- (i) Not relevant (ii) Not relevant (iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or (iv) Not relevant (2) Not relevant then the High Court may decide that the election of the returned candidate is not void.

Section 84 is as under:

"84. Relief that may be claimed by the petitioner.-A petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected."

Section 97 is in the following terms:

"97. Recrimination when seat claimed.-

(1) When in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election:

Provided that the returned candidate or such other party, as aforesaid shall not be entitled to give such evidence unless he has, within fourteen days from the date of [commencement of the trial], given notice to 2[the High Court] of his intention to do so and has also given the security and the

further security referred to in sections 117 and 118 respectively.

(2) Every notice referred to in sub-section (1) shall be accompanied by the statement and particulars required by section 83 in the case of an election petition and shall be signed and verified in like manner."

15. In the present case, Sections 84 and 97 are not relevant because there is no such declaration prayed for by the election petitioner for declaring himself or any other candidate as duly elected candidate. We shall, therefore, keep those two Sections a little aside and concentrate on Section 100(1)(d)(iii) of the Act. It is only on the basis of this Section and, more particularly, the law laid down by this Court earlier that the concerned paragraphs in the Written Statement have been ordered to be deleted holding that the returned candidate cannot urge even by way of a valid defence that the other candidates have also been benefited by some void votes having been cast in their favour. It was held by the High Court that such plea cannot be raised by an elected candidate where there is no prayer made under Section 84 and resultantly, if there is a recount of votes, it will be only of the votes secured by the elected candidate. For this purpose, heavy reliance was placed on the decision was a case where, in addition to the prayer of election of the returned candidate to be declared void, another prayer was also made under Section 84 of the Act. However, the returned candidate had failed to file any recrimination under Section 97 of the Act. It was on this backdrop that the case proceeded. It was found that the course taken by the Tribunal and confirmed by the High Court in regard to examining validity of the votes cast in favour of the election petitioner was not correct and that, on bare reading of Section 100(1)(d)(iii) of the Act, it was possible only to examine validity of the votes cast in favour of the returned candidate alone.

(cited supra) was that appellant Jabar Singh was declared elected having defeated the respondent Genda Lal by 2 votes. The election petition filed by respondent Genda Lal before the Election Tribunal ordered a recount and found that Genda Lal had secured 5664 votes as compared to Jabar Singh, who had secured 5652 votes. This was the position after recount which was ordered by the Tribunal. However, at that stage, Jabar Singh raised an objection that there should be recounting and re-scrutiny on the ground that improper votes had been accepted in favour of Genda Lal and valid votes had been improperly rejected when they were cast in favour of appellant Jabar Singh.

Respondent Genda Lal, of course, objected to this course on the ground that Jabar Singh had neither recriminated nor had complied with the provisions under Section 97(1). The Tribunal, however, rejected the contention raised by respondent Genda Lal and held that, in order to consider the relief which respondent Genda Lal had claimed in his election petition, it was necessary to decide whether Genda Lal had, in fact, received majority of votes under Section 101 of the Act and so the Tribunal went on to re-examine the ballot papers of the respondent, as also appellant Jabar Singh and came to the conclusion that 22 ballot papers having votes cast in favour of the respondent had been wrongly accepted. Thus, it came to the conclusion that respondent had not secured majority of the votes. The Tribunal, however, held the election of Jabar Singh to be void and also refused to grant declaration

to the respondent Genda Lal that he was duly elected. Two appeals came to be filed before the High Court against the decision of the Election Tribunal; one by Jabar Singh and second by Genda Lal. Relying on the Mahajan [AIR 1959 M.P. 58] as well as the decision of this Court in the the appeals were dismissed by the High Court. Jabar Singh filed an appeal before this Court, while Genda Lal's appeal was dismissed on the ground of delay. The matter was referred to the Five Judges' Bench on account of the earlier judgment by this Court in the case of Bhim contended that, in fact, 22 votes received in favour of Genda Lal could not have been so received by him and they could not have been accepted as valid votes in his favour. This Court, therefore, went into the true import of Section 100(1) read with Section 101 of the Act. The Court noted the following contentions raised by appellant Jabar Singh:- "Mr. Kapoor contends that in dealing with the cases falling under Section 100(1)(d)(iii), Section 97 can have no application and so, the enquiry contemplated in regard to cases falling under that class is not restricted by the prohibition prescribed by Section 97(1). He suggests that when the Tribunal decides whether or not the election of the returned candidate has been materially affected by the improper reception, refusal, rejection of any vote, or the reception of any vote which is void, it has to examine the validity of all votes which have been counted in declaring the returned candidate to be elected, and so, no limitation can be imposed upon the right of the appellant to require the Tribunal to consider his contention that some votes which were rejected though cast in his favour had been improperly rejected and some votes which were accepted in favour of the respondent had been improperly accepted.

Basing himself on this position, Mr.Kapoor further contends that when Section 101 requires that the Tribunal has to come to the conclusion that in fact that petitioner or such other candidate received a majority of the valid votes, that can be done only when a recount is made after eliminating invalid votes, and so, no limitations can be placed upon the scope of the enquiry contemplated by Section 101(a).

Since Section 100(1)(d)(iii) is outside the purview of Section 97, it would make no difference to the scope of the enquiry even if the appellant has not recriminated as required by Section 97(1)."

17. This argument was resisted and the Court had dealt with the argument in para 9 of the judgment as under :- "On the other hand, Mr.Garg who has addressed to us a very able argument on behalf of the respondent, urged that the approach adopted by the appellant in dealing with the problem posed for our decision in the present appeal is inappropriate. He contends that in construing Sections 97, 100 and 101, we must bear in mind one important fact that the returned candidate whose election is challenged can face the challenge under Section 100 only by making pleas which can be described as pleas affording him a shield of defence, whereas if the election petition besides challenging the validity of the returned candidate claims that some other person has been duly elected, the returned candidate is given opportunity to recriminate and by way of recrimination he can adopt pleas which can be described as weapons of attack against the validity of the election of the other person. His argument is that though Section 100(1)(d)(iii) is outside Section 97, it does not mean that in dealing with a claim made by an election petition challenging the validity of his election, a returned candidate can both defend the validity of his election and assail the validity of the votes cast in favour of the petitioner or some other person. It is in the light of these two rival contentions that we

must now proceed to decide what the true legal position in the matter is."

18. Following were the observations made in the majority judgment in para 10:- "It would be convenient if we take a simple case of an election petition where the petitioner makes only one claim and that is that the election of the returned candidate is void. This claim can be made under Section 100. Section 100(1)(a), (b) and (c) refer to three distinct grounds on which the election of the returned candidate can be challenged. We are not concerned with any of these grounds. In dealing with the challenge to the validity of the election of the returned candidate under Section 100(1)(d), it would be noticed that what the election petition has to prove is not only the existence of one or the other of the grounds specified in clauses (i) to (iv) of Section 100(1)(d), but it has also to establish that as a result of the existence of the said ground, the result of the election in so far as it concerns a returned candidate has been materially affected. It is thus obvious that what the Tribunal has to find is whether or not the election in so far as it concerns the returned candidate has been materially affected, and that means that the only point which the Tribunal has to decide is: has the election of the returned candidate been materially affected? And no other enquiry is legitimate or permissible in such a case. This requirement of Section 100(1)(d) necessarily imports limitations on the scope of the enquiry. Confining ourselves to clause (iii) of Section 100(1)(d), what the Tribunal has to consider is whether there has been an improper reception of votes in favour of the returned candidate. It may also enquire whether there has been a refusal or rejection of any vote in regard to any other candidate or whether there has been a reception of any vote which is void and this can only be the reception of a void vote in favour of the returned candidate. In other words, the scope of the enquiry in a case falling under Section 100(1)(d)(iii) is to determine whether any votes have been improperly cast in favour of the returned candidate, or any votes have been improperly refused or rejected in regard to any other candidate. These are the only two matters which would be relevant in deciding whether the election of the returned candidate has been materially affected or not. At this enquiry, the onus is on the petitioner to show that by reason of the infirmities specified in Section 100(1)(d)(iii), the result of the returned candidate's election has been materially affected, and that, incidentally, helps to determine the scope of the enquiry.

Therefore, it seems to us that in the case of a petition where the only claim made is that the election of the returned candidate is void, the scope of the enquiry is clearly limited by the requirement of Section 100(1)(d) itself.

The enquiry is limited not because the returned candidate has not recriminated under Section 97(1); in fact, Section 97(1) has no application to the case falling under Section 100(1)(d)(iii); the scope of the enquiry is limited for the simple reason that what the clause requires to be considered is whether the election of the returned candidate has been materially affected and nothing else.....

the Tribunal has to make a declaration to that effect, and that declaration brings to an end the proceedings in the election petition." (emphasis supplied) This judgment was given by Hon'ble Gajendragadkar, J.

However, Hon'ble Ayyangar, J., in his minority judgment, did not agree with the interpretation put forward by Hon'ble Gajendragadkar, J. on the correct import of Section 100(1)(d)(iii). Hon'ble Ayyangar, J. had very painstakingly pointed out that the interpretation put forward in the majority judgment was not correct. In Para 30 of the judgment, after quoting the Section, the learned Judge formulated the question of law in the following words:- "what is the import of the words by the improper reception, refusal or rejection of any vote or the reception of any vote which is void? The learned Judge left out of the consideration the last clause i.e. "the reception of any vote which is void" and considered only the earlier clause. The learned Judge further held that the jurisdiction of the Election Tribunal to declare the election void arises only if it is of the opinion that result of the election has been materially affected by the defects or improprieties set out in clause (i) to (iv), so that even if there are such improprieties or illegalities and yet if the result of the election is not materially affected, the returned candidate would retain his seat.

The learned Judge then pointed out that, the Tribunal, in considering whether the result of an election had been materially affected, was confined to the consideration of any impropriety alleged as regards reception of the votes of the returned candidate as well as the improprieties alleged by the petitioner in refusal or rejection of votes stated to have been cast in favour of that petitioner and denials of these charges by the returned candidate. It was further observed that the contention raised was that, in dealing with an objection under Section 100(i)(d), the Tribunal had jurisdiction to proceed only on the allegations made in the petition and that, even where a case had been established for a scrutiny and recount was ordered, it would be so confined and that its jurisdiction would not extend to the cases of complaints by the returned candidate. The learned Judge specifically refused to accept this argument. In para 32, the learned Judge then gave a specific example in the following words:- "32 .... Let us suppose that A has been declared elected as having secured, say 200 votes as against B who has secured 190. If B in his election petition says that A's votes have been wrongly counted as 200, whereas, in fact, if they were recounted they would only be 180 and the Tribunal on a recount finds the allegation in the petition made out and that the returned candidate had obtained only 180 votes the acceptance of Mr. Garg's argument would mean that the election of A would have to be set aside notwithstanding that there has been a similar mistake in the counting of B's votes and if these were properly counted they might not amount to more than 170. Mr. Garg submitted that though if B claimed the seat there would have to be a recount of the votes of both the candidates and this also, only in the event of a recrimination being filed under Section 97, still if no seat was claimed the election of the returned candidate would be set aside and that the latter had no means whereby he could maintain his election notwithstanding that as a fact he had obtained a majority of lawful votes."

19. In para 33, the learned Judge observed:- "33. .... I do not see any force in the contention that the returned candidate is confined merely to disproving what is alleged to dislodge him from his seat and is forbidden from proving that votes which under the law had to be counted in his favour, have been wrongly omitted to be so counted. The words in clause (iii) do not impose any such restriction, for they speak of the "improper reception or refusal of any vote", and as the inquiry under Section 100(1)(d) is for ascertaining whether the result of the election has been materially affected which in the context of clause (iii) obviously means "the returned candidate has been

proved not to have obtained, in fact, a majority of valid votes", there appears to me no scope for the argument pressed before us by Mr.Garg."

The learned Judge gave another example, while considering Rule 59 under the Act, in the following words:- "Let us for instance assume that the voting procedure adopted in an election was that prescribed in rule 59 i.e. by placing the ballot papers in the ballot boxes set apart for the different contesting candidates. The returning officer counts the valid votes cast in the several boxes and declares A elected as having secured 200 votes as against B whose votes are counted as 198. If B files a petition and alleges that the counting was irregular, that the totals of the ballot papers in the result sheet are not properly computed, and that as a matter of fact A's papers if counted, would be 196, Mr. Garg's submission is that though the discrepancy disclosed in the totals is considerable, A cannot prove that there has been a miscounting of B's votes also, and that though if properly counted his total is only 190, still A's election should be set aside. It is said that the position would be different and the anomaly would be overcome in cases where the election petitioner, besides claiming a declaration that the election of the returned candidate is void, also seeks a further declaration that he should be declared duly elected and the returned candidate files a recrimination against such a prayer."

20. The learned Judge proceeded to hold:- "Therefore we would have the anomalous situation wherein the election of the returned candidate is declared void by reason of his not obtaining the majority of valid votes so far as the decision under Section 100(1)(d) is concerned and then after the matter set out in the claim to the seat and the recrimination is inquired into and decided the election tribunal holds that the returned candidate had a majority of lawful votes but that this affected only the right of the defeated candidate to claim the seat. In my judgment the provisions of Section 100 read with Section 101 do not contemplate this position of a candidate's election being set aside because he did not get a majority of lawful votes but in the same proceedings and as part of the same inquiry, he being held to have obtained a majority of lawful votes.

A construction of Section 100(1)(d) which would lead to this result must, in my opinion, be rejected as unsound."

In para 35 also, the learned Judge had shown, again taking an example of multi-cornered contest, that the interpretation put forward by the majority judgment was incorrect. The learned Judge observed:- "35. .... I cannot accept the position that either Section 100(1)(d)(iii) or Section 101(a) contemplate this result which is at once so unjust and anomalous and appears to me to contradict the basic principles underlying election law viz., (1) 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 (2) no candidates shall be declared duly elected who has not obtained the majority of valid votes."

21. In para 36, the learned Judge had shown the findings where majority proceeded on the

misconception of the procedure involved in a scrutiny. In that para, the learned Judge had considered Rule 57(3) also. The learned Judge ultimately observed in para 37:- "37. .... I do not consider that it is possible to contend that it is beyond the power of the returned candidate to establish this fact which he might do in any manner he likes. He might do this by establishing that though a few votes were wrongly counted as in his favour, still a larger number of his own votes were counted in favour of the petitioner or that votes which ought to have been counted as cast for him, have been improperly counted as cast in favour of defeated candidates other than the petitioner.

Without such a scrutiny it would manifestly not be possible to determine whether the election of the returned candidate has been materially affected or not. Nor do I see anything in the language of clause (iii) which precludes the returned candidate from establishing this......."

In para 38, the language of Section 101 was also considered on the backdrop of Section 100(i)(d)(iii) alongwith Rule 57(1) and 57(3) and ultimately, the learned Judge held that the construction put forward by the majority judgment was not correct.

22. Therefore, the view that has been taken by me is in consonance with the view taken by the minority judgment, which according to the law of precedents is not possible. However, the judgment in the case of Krishnamurthy & Ors. [1987 (2) SCC 58], where the identical controversy was involved. In that case, the learned Judges considered 61] and recommended that this question should be referred to a larger Bench for reconsidering the views expressed in the decision in the case Prasad Chaudhary (cited supra), the Division Bench had taken a view which was not strictly in accordance with the principles laid down in the Court had refused to grant benefit of 250 votes to the returned candidate while recounting in view of the absence of recriminating notice under Section 97 of the Act. In that case, this Court had held that the claim of the returned candidate that he should be granted benefit of 250 votes cast in his favour although placed in another candidate's package, was justified and his claim could not be rejected in the absence of recriminatory notice under Section 97 as the claim of the returned candidate did not involve reconsideration of validity of the votes. However, unfortunately, it is reported at the Bar that the matter never came to be considered by the larger Bench, though a specific reference was made, probably on the ground that the period of election was over by the time the matter came up before this Court again.

23. Now, the law is settled that a Two Judge Bench cannot make a direct reference to Seven Judge Bench and can only make a reference to Three Judge Bench. Therefore, I am not in a position to recommend a reference to a larger Bench to reconsider the decision in the case of peculiar history of this controversy and further, in view of importance of the question and its direct impact on the principle of majority of valid votes for winning an election, it would be worthwhile if the position is reconsidered.

24. It must be noted that, the present matter, with which we are dealing, more or less depends upon

incorrect acceptance of votes but not the void votes. According to the election petitioner, the elected candidate has received some votes which were cast by some impersonators of the dead voters. In reality, therefore, the question before the present Election Tribunal is whether the election petitioner proves that some dead voters were impersonated and in their name, votes were cast. Again, it will have to be proved by the election petitioner that those impersonated had voted in favour of the elected candidate because that will be the only way to prove that the void votes have affected the result in favour of elected candidate materially. The question of void votes was not considered in Jabar Singh's case.

Even, in the minority judgment, Hon'ble Ayyanger, J. restricted himself to the earlier part of clause 100 (1) (d) (iii) and left the clause of "the reception of any vote which is void". The import of words "the reception of any vote which is void" would, in my opinion, cover each and every void vote received by each and every candidate because void vote cannot be counted: whether it is cast in favour of an elected candidate or any other candidate contesting the elections. Once the real import of clause "the reception of any vote which is void" is realized, it becomes clear that, in recount of the votes which are void votes, those would have to be excluded and for that purpose, the returned candidate can raise a plea by way of defence that the void votes were cast either in favour of elected candidate or any other defeated candidate. He can at least raise a plea that such void votes were actually cast and he would certainly be justified in raising a plea that the void votes were cast not only in the polling Stations named in the election petition, but in some other polling Stations also. Therefore, if recount was to be ordered, the recount cannot be restricted only to the named polling Stations in the election petition, but it would have to be a general recount where the void votes would have to be avoided. Therefore, there would have to be an opportunity to the elected candidate to prove that there were void votes in other polling Stations also and for that purpose, there should be recount of all the votes of all the Polling Stations. It is only thereafter that the true position as regards majority of votes could be obtained. In this view also, I cannot agree with my learned brother Sharma J, as also the Judgment of the High Court holding that it is only the votes cast in the named polling Stations which are liable to be counted and not those which have been named in the questioned paragraphs which have been ordered to be deleted from the Written Statement of the elected candidate.

25. There is one more reason why I felt compelled to differ with my learned brother and recommend reconsideration of this question.

26. The plain language, according to me, does not suggest that where the declaration is not prayed for by the election petitioner, the elected candidate cannot raise any plea in his written statement that, in fact, he has secured the majority of votes. In my opinion, the plea raised herein is not a recriminatory plea within the meaning of Section 97 of the Representation of the People Act, 1950. What is raised is a mere plain defence that, even if there was going to be a recount, then it should be a recount of all the votes and not of the votes cast only in his favour and for that purpose, he would be allowed to prove that it is not only in the particular polling stations that the votes were cast in the name of dead persons, but they were also cast in other polling stations.

All that the elected candidate is doing here is trying to show that it is he who is actually the elected candidate having secured the majority of valid votes.

27. At the time when Jabar Singh's case (cited supra) was decided, the amended provisions of Order VIII, Rule 6A of the Code of Civil Procedure providing for counter claim was not available on the Statute.

That provision came only by way of amendment later on. Though, the concept of counter claim was not unknown, even in the absence of a specific provision therefor, introduction of a specific provision for raising the counter claim would, in my opinion, be a relevant factor for considering as to whether a candidate, in the absence of any recrimination, could insist upon counting of the votes cast in favour of the other losing candidates. The provisions of Order VIII, Rule 6A have not been considered in the later decisions. In my opinion, raising of a counter claim by way of a valid defence would still be permissible considering the broad language of that provision. Shri Singh, very earnestly argued that an election petition has to be tried in accordance with Civil Procedure Code and, therefore, the amended provisions providing for laying of a counter claim has to be read in favour of the elected candidate for raising a plea that it is he, who has secured the maximum votes. The recount order should, therefore, be not limited to counting of his votes alone, but it should be a general recount in respect of the votes secured by all the contesting candidates. Shri Singh, therefore, urged that, by introducing the paragraphs, which have been ordered to be struck off from the written statement of the appellant, the appellant, who was an elected candidate, had raised a valid defence by way of a counter claim. The argument is undoubtedly a novel one and has not been so far considered by this Court. At this juncture, I must point out again, at the cost of repetition that, in ordering counting of the votes of the elected candidate alone, the whole election process would stand prejudiced, inasmuch as, then, even if some invalid votes are cast in favour of the other candidates or void votes are cast in the election, those votes would not be counted and in that case, there could be no correct reflection in respect of the votes secured by each candidate.

28. This is apart from the fact that a very unfair advantage can be secured by an election petitioner in favour of the losing candidate by deliberately not claiming any declaration either in favour of the election petitioner or in favour of any other losing candidate so that the elected candidate would be rendered completely helpless in showing that he alone is a candidate having secured majority of votes. As I have already expressed, securing a majority of votes is the very essence of the democratic elections and the democracy being a part of the basic structure of our Constitution, the question involved herein gains all the more importance. I may point out here that the theory of basic structure of the Constitution also was not available when Jabar Singh's case (cited supra) was decided. In my opinion, the interpretation put forth in Jabar Singh's case, in a majority decision would, therefore, require reconsideration, more particularly, in view of the minority decisions therein which is more in accord with the principles of securing majority votes in a democratic elections. The very roots of the democracy would be shaken if the majority view expressed in Jabar Singh's case, which was already recommended to be reconsidered, is valid. For these reasons, I am

not in a position to agree with my learned brother, nor can I agree with the judgment of the High Court (Election Tribunal).

In short, my conclusions are as follows:- (1) Jabar Singh's case (cited supra), which was referred to the Seven Judge Bench needs reconsideration, since the question involved therein goes to the very root of the democratic election process.

(2) The interpretation put forward to the provision of Section 100(1)(d)(iii) read with section 97 of the Representation of the People Act would be very unfair for an elected candidate, particularly where the election petition seeks for recount of votes. In such a petition where the question involved is of recount, it will be extremely unfair to count only the votes of returned candidate and ignore all his objections regarding the votes improperly accepted in case of the other candidates or the other candidates having secured void votes. Such unfairness cannot be permitted at least to maintain the purity of election process.

(3) The observations in Jabar Singh's case particularly in para 10 thereof, could amount to obiter dicta, particularly, in view of the factual position in Jabar Singh's case. It is to be remembered that the observations in para 10 were taken only by way of an example. This position is all the more obtained because in that case though the declaration was claimed, there was no recrimination filed and, therefore, the observations in Jabar Singh's Case would become a binding law only in case where though a declaration is claimed in favour of other candidate than the elected one, yet the elected candidate has not claimed any recrimination. In short, the observations made in para 10 thereof may not become a binding law in case where no declaration is sought for at all and, therefore, no recrimination is claimed by the elected candidate.

(4) When a recount is ordered at the instance of a election petitioner, it cannot be a partial recount. It has to be a general recount where the void votes can be located and ignored to arrive at a conclusion that this will also apply to the votes improperly accepted of the other candidates than the elected candidates. It is only then that a correct position could be arrived at as to which candidate has, in fact, secured majority of votes. It has to be remembered that securing of majority of votes is the basis of democratic election.

(5) In the wake of amended provision of Order VIII, Rule 6 of the Code of Civil Procedure introducing counter claim, the defendant in this case - the elected candidate, could still raise his defence by way of a counter claim. The language of Section 97 of the Representation of the People Act, 1950, which is in the nature of positive language, does not bar raising of any such defence.

29. In view of the difference of opinion, the papers be kept before the Hon'ble, the Chief Justice of

India for referring the matter to an appropriate bench.

DR. MUKUNDAKAM SHARMA, J.

1. Leave granted.

2. The present appeal is directed against the order dated 11.02.2008 passed by the Designated Election Judge of the Gauhati High Court in M. C. (Election Petition) No. 1 of 2008 in Election Petition No. 2 of 2007, whereby the learned Election Judge allowed the miscellaneous application filed by the election petitioner, respondent herein, with an order that the statements, in the nature of recrimination and counter claim, made in the written statement of the returned candidate, appellant herein, more particularly, in paragraph nos. 22-31 would stand struck off from the defence of the appellant.

3. Being aggrieved by the aforesaid order, the appellant filed the present Special Leave Petition on which notice was initially issued and on service the respondent entered appearance. The learned senior counsel appearing for the parties have been heard at length.

4. The appellant and the respondent and few other candidates had contested the election of the 9th Manipur Legislative Assembly from 6-Keirao Assembly Constituency. The said election was held on 14.02.2007 and 16.02.2007 (re-poll in polling station No. 615) and the election result was declared on 27.02.2007, wherein the appellant emerged as the winner after defeating the respondent-election petitioner by a margin of only two votes. The aforesaid election of the appellant-returned candidate was challenged by the respondent by filing an election petition basically under Section 100(1)(d) (iii) and (iv) of the Representation of the People Act, 1951 [for short "the Act"], with a prayer that the election of the appellant be declared void.

5. In order to appreciate the contention of the counsel appearing for the parties, the relevant portion of the prayer made in the election petition viz., paras iii to v, is extracted hereinbelow: - "...............

iii) to order a re-count of the votes after excluding the void votes if required;

iv) to declare the election of the Respondent No. 1 as void;

v) to pass other and further orders as may be deemed fit by the Hon'ble Court in the facts and circumstances of the case."

So far as the reliefs prayed in paragraphs i) & ii) are concerned, they relate to seeking for a direction and for calling certain records. As the same are not directly connected with the contentions raised herein, they have not been extracted.

6. Immediately after appearance in the election petition, the appellant filed a miscellaneous application before the Gauhati High Court which was registered as MC (EP) No. 6 of 2007 whereby the appellant challenged the maintainability of the election petition on technical grounds. The said miscellaneous application was however dismissed on 31.10.2007. After taking a few adjournments, the appellant filed the written statement on 04.01.2008, in which, apart from contesting the allegations made in the election petition, the appellant-returned candidate made several statements in the nature of counter claim/recrimination in paragraph nos. 22-31.

7. The respondent thereafter filed an application under Order VI Rule 16 of the Code of Civil Procedure [for short `the Code'] praying for striking off the aforesaid paragraphs allegedly made by way of counter claim/recrimination. The said application came up for consideration before the learned Election Judge, who after an elaborate discussion on the merits of the said application allowed the same by holding that the statements in the nature of recrimination and counter claim made in the written statement by the appellant, more particularly, in paragraphs nos. 22-31 would stand struck off from the defence pleaded. Being aggrieved by the aforesaid order this appeal was filed.

8. The main contention of the counsel appearing for the appellant is that under Order VIII Rule 6A of the Code the appellant has a right and a prerogative to raise certain defences by way of counter claim and the said right can be exercised even in a case where there is no additional claim in terms of Section 84 of the Act; and despite the fact that a recrimination petition as such may not be maintainable in terms of Section 97 of the Act. It was further submitted that since in the present case the election petitioner has intentionally avoided to make additional claim as provided under Section 84 of the Act, the appellant-returned candidate had no other option except to fall back upon Order VIII, Rule 6-A of the Code.

9. The short question that falls for consideration in the present appeal is: when there is no provision and right vested in the returned candidate to file a recrimination petition due to absence of a prayer by the election petitioner in the election petition seeking for his declaration (or any other candidate) as a returned candidate, can the returned candidate in his written statement take up pleas which are in fact counter claims with the aid of Order VIII, Rule 6A of the Code?

10. In order to answer the aforesaid issues, it would be necessary to peruse some of the relevant provisions of the Act and some of the decisions of this Court referred to and relied upon by the counsel appearing for the parties and also the contents of the paragraph nos. 22-31 of the written statement filed by the appellant. However, before proceeding with the same, it would be appropriate to refer to an order passed by the Election Judge on 29.08.2007, on the application filed by the appellant under Section 101 of the Act read with Section 151 of the Code, seeking a direction to the election petitioner to clarify the exact relief sought for in the prayer nos. (iv) to (v) (already extracted hereinabove). The said application came up for hearing and after conclusion of the hearing, an order was passed on 29.08.2007 to the following effect: - "Under Section 82 of the Representation of People Act, 1951, all the candidates to the election are required to be impleaded as a party in the Election Petition if the petitioner makes any prayer to declare himself or any other candidate as duly elected representative. In the present case, the election petitioner has not impleaded the remaining candidates. Hence, it is implied that the petitioner has not made any prayer to declare himself or any other candidate as elected representative, which declaration can be given u/s 101 of the Representation of People Act, 1951.

In my considered opinion, under clause (v) of the prayer, this Court can only grant the relief to the petitioner or pass appropriate orders, which are ancillary to the Election Petition and no specific declaration can be granted that either the election petitioner or any other candidate shall be construed as elected candidate."

It is, therefore, established from the aforesaid order passed by the Election Judge by way of a clarification that in the election petition what survives for consideration is the prayer as to whether or not to declare the election of the appellant-returned candidate as void.

Therefore, there is no dispute with regard to the fact that in the said election petition no additional prayer was made by the election petitioner seeking for a declaration that he or any other candidate be declared as the elected candidate.

11.The relevant statutory provisions, which may now be referred to, read as follows:

"Section 84: Relief that may be claimed by the petitioner:- A petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected.

Section 87: Procedure before the High Court - (1) Subject to the provisions of this Act and of any rules made thereunder every election petition shall be tried by the High Court as nearly as may be, in accordance with the procedure applicable under the code of Civil Procedure, 1908 for the trial of

suits.

Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

(2) The provisions of the Indian Evidence Act, 1872, shall, subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition.

Section 97: Recrimination when seat claimed - (1) When in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election:

Provided that the returned candidate or such other party as aforesaid shall not be entitled to give such evidence unless he has within fourteen days from the date of commencement of the trial given notice to the High Court of his intention to do so and has also given the security and the further security referred to in sections 117 and 118, respectively.

(2) Every notice referred by in sub-section (1) shall be accompanied by the statement and particulars required by section 83 in the case of an election petition and shall be signed and verified in like manner.

Section 100 - Grounds for declaring election to be void - S.100 (1) (d) (iii): - By the improper reception, refusal or rejection of any vote or the reception of any vote which is void; or ...."

12.The provisions of Order VIII Rule 6A of the Code, which was repeatedly referred to during the course of the arguments, may also be extracted here: - "Order VIII - Written Statement, Set-off and Counter- Claim Rules 6A - Counter-claim by defendant -(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action according to the defendant against the plaintiff either before or after the filing of the suit but before the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the

nature of a claim for damages or not;

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

13. Reference was also made to the decisions of this Court in Jabar Singh v. Genda Lal [AIR 1964 SC 1200]; T.A. Ahammed Kabeer v. A.A. Azees and Others [(2003) 5 SCC 650]; Virendra Kumar Saklecha v. Jagjiwan & Others [(1972) 1 SCC 826]; Dr. Rajendra Kumari Bajpai v. Ram Adhar Yadav and Others [(1975) 2 SCC 447]. Reference was also made to Order VI Rule 16 of the Code and relying on the same counsel appearing for the appellant submitted that interference by the High Court at the behest and request of the respondent was unjustified and uncalled for as none of the conditions laid down in Rule 16 was attracted in the present case.

This argument may be dealt with at the outset.

14.Order VI Rule 16 of the Code has been incorporated therein with the idea of empowering the Courts to strike out or amend any matter in any pleading, including the statement in the written statement, at any stage of the proceedings when the same is found to be unnecessary, scandalous, frivolous and vexatious; or which may tend to prejudice, embarrass or delay the fair trial of the suit;

or which is otherwise an abuse of the process of the Court.

15.Order VIII Rule 6A empowers the defendant in a suit to raise by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff and that such a counter-claim would have the same effect as a cross-suit so as to

enable the Court to pronounce the final judgment in the same suit, both on the original claim and on the counter-claim. It is also provided therein in sub-rule (4) of Rule 6A that the counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. So far as in the present case the statements made by the appellant-returned candidate in the written statement, particularly in paragraph nos. 22-31 are concerned, it would indicate that those statements are by way of counter-claim against the claim of the election petitioner and relate to the right or claim in respect of the same cause of action.

16. Section 97 of the Act which deals with an election petition provides that when an election petition is filed claiming a declaration that any candidate other than the returned candidate has been duly elected, in that event, the returned candidate or any other party would be entitled to give evidence to prove that the election of such candidate would have been void had he been the returned candidate. Therefore, paragraphs nos. 22-31 of the written statement relate to matters in respect of which evidence should have to be laid to prove that if those allegations are established then the election of such candidate would be void.

17.An election petition is required to be considered and decided in accordance with the procedure laid down in the Representation of People Act, 1951 which constitutes a complete and self-contained code. This view was endorsed by this Court in the case of Jyoti Basu v. Debi Ghosal [AIR 1982 SC 983 : (1982) 1 SCC 691] in the following words:- "8. ....An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down.

In the trial of election disputes, court is put in a strait-jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act.....................So the Representation of the People Act has been held to be a complete and self-contained code within which must be found any rights claimed in relation to an election or an election dispute.............."

18.Now since there is a specific provision in the Act as to how a recrimination petition is to be dealt with, the same is required to be decided in the manner as provided therein. In the present case since there was no prayer in the election petition to declare the election petitioner or any other candidate as elected candidate, necessarily therefore, the provisions of Section 97 of the Act could not be said to be applicable or attracted. In fact, statements which are intended and could be made in light of

Section 97 of the Act are counter-claims, which are so stated in the Five-Judge Bench decision of this Court in Jabar Singh (supra). When the specific provision which provides for raising a counter-claim is excluded and not attracted in terms of the provisions of Section 97 of the Act, it cannot be said that such counter-claim could be raised in terms of the provisions of Order VIII Rule 6A. The decision in the case of Jyoti Basu (supra) is clearly applicable as the provision of common law is held to be not applicable when specific special law would apply. The legality and validity of the provisions contained either in Section 97 or in Section 87 of the Act has not been challenged. Therefore, in line with the provisions in Section 97 of the Act, the counter-claims could not be allowed to be raised by following the procedure under Order VIII Rule 6A. The learned Senior counsel for the appellant also did not contend that the provision of filing recrimination petition under Section 97 is in the nature of filing a counter-claim under the provision in the Code. The same could not have also been done in view of the ratio of the decision in Jabar Singh (supra).

19.The Representation of People Act, 1951 is a self contained code and the enacted provisions therein have substituted the general provisions under the common law. Under the Act, a specific provision has been incorporated in the form of Section 97 providing for considering recrimination petition/counter-claim under certain circumstances, and therefore, the same being a provision under a special Act, would prevail over the provisions of Order VIII Rule 6A of the Code which is a general law. The said legal principle is based on the latin maxim generalia specialibus non derogant which means general words do not derogate from special. It is also to be kept in mind that when the legislation inserted the provision of Order VIII Rule 6A into the Code, it never intended to bring a corresponding change in Section 97 of the Act, despite being fully conscious of the change. In view of this mandate, permitting the returned candidate to file a counter claim in terms of Order VIII Rule 6A, when the same cannot be done under Section 97 of the Act would tantamount to completely obliterating the effect of Section 97 of the Act. If Section 97 of the Act expressly allows a recrimination petition when an election petition is filed seeking a declaration that the election petitioner or any other candidate is the returned candidate, then there is an implied bar on filing a recrimination petition in the absence of such a declaration. As the principle of statutory construction, Expressio Unius Est Exclusio Alterius states, the express inclusion of one thing is the exclusion of all others. In this case, the specific inclusion of a condition for filing a recriminatory petition under Section 97 of the Act, namely that a declaration that the election petitioner or any other candidate is the returned candidate should be filed, excludes its filing in all other cases. Simply put, Section 97 of the Act bars filing of a counter-claim by way of a recrimination petition when an election petition is filed without seeking for a declaration that the election petitioner or any other candidate is the returned candidate. In such a case, the application of Order VIII Rule 6A would not be permissible, as permitting the same would amount to allowing indirectly, what is prohibited by law to be done directly. It is settled law that whatever is prohibited by law to be done directly cannot be allowed to be done indirectly. The decision of the Court in Jagir Singh v. Ranbir Singh & Anr. [(1979) 1 SCC 560], maybe referred to, where it was held thus:

"5..........................We do not think that it is permissible to do so. What may not be done directly cannot be allowed to be done indirectly; that would be an evasion of the statute. It is a "well-known principle of law that the provisions of an Act of Parliament shall not be evaded by shift or contrivance"

(per Abbot, C.J. in Fox v. Bishop of Chester).

"To carry out effectually the object of a Statute, it must be construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined."(Maxwell, 11th Edn., p.109) ...."

20.Section 87 of the Representation of People Act, 1951 opens with the expression "subject to the provisions of this Act and any other rules made thereunder". This definitely means that Section 87 is subject to the provisions of Section 97 of the Act. Section 87 also specifically provides that the procedure under the Code would be applicable "as nearly as may be" meaning thereby that only those provisions for which there is no corresponding provision in the Act could be made applicable. The distinction between sub-section (1) and sub-section (2) of Section 87 of the Act brings out the contradistinction between the two provisions inasmuch as sub- section (2) makes the entire Evidence Act applicable subject to the provisions of the Act but in extenso whereas sub-section (1) makes the Code of Civil Procedure applicable subject to the provisions of the Act and as nearly as possible. Therefore, the provisions of the Code are not wholly applicable to the trial of the election petitions.

Accordingly, if there is no scope for filing a recrimination petition under Section 97 of the Act, this limitation cannot be sought to be removed or overcome by taking resort to another provision of the Code which will be explicitly and impliedly inconsistent with the provisions of Section 97 of the Act. A similar view was taken by the Constitution Bench of this Court in the case of Jabar Singh v. Genda Lal [AIR 1964 SC 1200 : (1964) 6 SCR 54]. In para 11 this Court has held as follows:-

11. There are, however, cases in which the election petition makes a double claim; it claims that the election of the returned candidate is void, and also asks for a declaration that the petitioner himself or some other person has been duly elected. It is in regard to such a composite case that Section 100 as well as Section 101 would apply, and it is in respect of the additional claim for a declaration that some other candidate has been duly elected that Section 97 comes into play.

Section 97(1) thus allows the returned candidate to recriminate and raise pleas in support of his case that the other person in whose favour a declaration is claimed by the petition cannot be said to be validly elected, and these would be pleas of attack and it would be open to the returned candidate to take these pleas, because when he recriminates, he really becomes a counter-petitioner challenging the validity of the election of the alternative candidate....................If the returned candidate does not recriminate as required by Section 97, then he cannot make any attack against the alternative claim made by the petition. In such a case an enquiry would be held under Section 100 so far as the validity of the returned candidate's election is concerned, and if as a result of the said enquiry

declaration is made that the election of the returned candidate is void, then the Tribunal will proceed to deal with the alternative claim, but in doing so, the returned candidate will not be allowed to lead any evidence because he is precluded from raising any pleas against the validity of the claim of the alternative candidate."

21.Reliance was, however, placed by the counsel appearing for the appellant on the decision of this Court in the case of Dr. Rajendra Kumari Bajpai v. Ram Adhar Yadav and Others [(1975) 2 SCC 447]. The said decision does not in any manner advance the case of the appellant because of the fact that it has already been held hereinbefore that the provision of Order VIII Rule 6A cannot be substituted in place of provision of Section 97 and that Section 97 excludes the applicability of the provisions of Order VIII Rule 6A of the Code. Attention was also drawn to the decision of this Court in the case of N. Gopal Reddy v. Bonala Krishnamurthy and Others [(1987) 2 SCC 58], which is distinguishable inasmuch as in the said case the issue was whether the returned candidate can refer to and rely upon the evidence already on record, in the light of the fact that he is not entitled to lead evidence as he had failed to file the recrimination petition in a case where there was an additional prayer for declaring the election petitioner as the elected candidate.

The said decision was taken notice by this Court in the case of T.A. Ahammed Kabeer v. A.A. Azees and Others [(2003) 5 SCC 650] and after referring to all the existing decisions of this Court on the issue in question, the Division Bench summed up the legal position as follows:- "33. We have already stated that the rigorous rule propounded by the Constitution Bench in Jabar Singh 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 case has so far proved to be abortive. The view of the law taken by the Constitution Bench in Jabar Singh case is binding on us. Analysing the majority opinion in Jabar Singh case and the view taken in several decisions of this Court, referred to hereinabove, we sum up the law as under:

(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 two conditions being satisfied: (i) the election petition seeks a declaration that any candidate other than the returned candidate has been duly elected over and above the declaration that the election of the returned candidate is void; and (ii) a 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.

............................."

22.In view of the fact that there is a pronouncement of the Constitution Bench of this Court in Jabar Singh (supra) and also the decision of this Court in T.A. Ahammed Kabeer (supra) which on an interpretation of Section 97 of the Act, has carved out a settled position of law, a different view cannot be taken. So long the Legislature does not change the law to obliterate the discrepancy, if any, the Court cannot do so on its own. It would not be appropriate for the Court to go beyond the legislative intent as derived from the existing provisions and lay down its views on a particular matter although such a view could be a possible view. The judiciary does not have any power to legislate and that is to be strictly adhered to.

The Constitution-bench decision of this Court in the celebrated case of Bachan Singh v. State of Punjab (1982) 3 SCC 24 may be cited here to bring out the position clearly:

"77. Now it is true that there are cases where the court lays down principles and standards for guidance in the exercise of the discretion conferred upon it by a statute, but that is done by the court only in those cases where the principles or standards are gatherable from the provisions of the statute. Where a statute confers discretion upon a court, the statute may lay down the broad standards or principles which should guide the court in the exercise of such discretion or such standards or principles may be discovered from the object and purpose of the statute, its underlying policy and the scheme of its provisions and sometimes, even from the surrounding circumstances. When the court lays down standards or principles which should guide it in the exercise of its discretion, the court does not evolve any new standards or principles of its own but merely discovers them from the statute. The standards or principles laid down by the court in such a case are not standards or principles created or evolved by the court but they are standards or principles enunciated by the legislature in the statute and are merely discovered by the court as a matter of statutory interpretation. It is not legitimate for the court to create or evolve any standards or principles which are not found in the statute, because enunciation of such standards or principles is a legislative function which belongs to the legislative and not to the judicial department.

(emphasis supplied) 23.It is no doubt true that a two-Judges Bench of this Court in the case of N. Gopal Reddy (supra) opined that the law laid down in Jabar Singh (supra) requires reconsideration but the reference made could not be finally decided as the petition became infructuous on expiry of the term of five years and the parties having lost interest in view of that eventuality. Therefore, the field continues to be governed by the position of law as laid down in the Jabar Singh (supra). Since then there has been no change in the law regarding the issue at hand.

24. It was at one stage argued by the counsel appearing for the appellant that the concept of counter-claim was for the first time inserted in the Code of Civil Procedure in the year 1976 and therefore when Jabar Singh (supra) was decided, the concept of counter-claim was not there and what was available was only a concept of written statement and set-off. It is to be pointed out that though it is true that there was no specific provision for raising a counter-claim by the defendant in the written statement prior to the amendment of the Code in 1976 but claims by way of counter claims were in fact raised and considered by all the Courts including the Supreme Court of India which would be apparent from a bare reference of the decision in the case of Jabar Singh (supra). It is needless to point out that Section 97 of the Act bestows a right upon the returned candidate to raise a defence when an additional claim under Section 84 of the Act is made by the election petitioner. Recrimination, as envisaged under Section 97 of the Act, is nothing else but a counter-claim and this concept was incorporated in the Act, which as noted earlier is a special Act, even prior to 1976 when the provision of counter claim now contained in Order VIII Rule 6A was inserted in the Code.

Therefore, the aforesaid change brought in the Code, which is a general common law, would not have any consequential effect so far as the present case is concerned. It is thus apt to note that the concept of counter-claim was not foreign or totally absent during the period prior to 1976.

25. In view of the aforesaid position and also in view of the fact that there is a specific provision in the Act to raise counter-claim with certain pre-conditions and on certain specific conditions the provisions of Order VIII Rule 6A of the Code cannot be invoked in view of the bar and prohibition enforced by Section 97 of the Act.

26. The present petition is an election petition. In view of the mandate of Section 86(7), an Election Petition is required to be considered and finally decided within a period of six months. Two and a half years have already passed and the matter is still pending in the Gauhati High Court and that too at a preliminary stage. The instant situation is one which warrants urgent consideration by the High Court.

27. In view of the foregoing discussion, there is no merit in this appeal, and the same is hereby dismissed, leaving the parties to bear their own costs.