

ALLAHABAD HIGH COURT

Nathu Ram

Vs.

R.P. Dikshit

Civil Misc. Writ No, 964 of 1963
(M.C. Desai, C.J., J.N. Takku and W. Broome, JJ.)

30.10.1964

JUDGMENT

Desai, C.J.

1. This is a petition for certiorari (or any other suitable writ or order) for the quashing of orders passed by an election Tribunal on 9-2-1963 and 17-8-1962 in an election petition pending before it. The petitioner, Dr. Jawahar Lal opposite party No. 2, and opposite parties Nos. 3, 4 and 5 contested election for membership of the Uttar Pradesh Vidhan Sabha and the petitioner was declared duly elected as having secured a majority of valid votes. Opposite party No. 2 (who will be referred to as the opposite party, because the other opposite parties, though served with the notice of the petition, have remained absent) filed a petition under Section 81 of the Representation of the People Act challenging the petitioner's election on several grounds including that the result of the election was materially affected by the irregularities committed by the Returning Officer and sought the relief of declarations that the petitioner's election was void and that the opposite party was duly elected as a member and other reliefs with which we are not concerned. Among the irregularities mentioned in paragraph 18 of the petition were counting of a thousand invalid votes in the petitioner's favor, wrongly rejecting many valid votes cast in the opposite party's favor and counting in the petitioner's favor a large number of votes cast in favor of the opposite party and other defeated candidates. No particulars of the votes involved in these irregularities were given in the petition. The petition was verified on 11-4-1962, but the date of its presentation is not known. It was transferred by the Election Commissioner to the Tribunal consisting of Shri R.P. Dikshit, Additional District Judge, Allahabad, in July 1962.

2. An election cannot be called in question except by an election petition presented to the Election Commission within a certain period. An election petition must contain "a concise statement of the material facts on which the petitioner relies" and "full particulars of any corrupt practice that the petitioner alleges". The reliefs that can be claimed in an election petition are a declaration that the election of any returned candidate is void and a declaration that the petitioners or any other candidate has been duly elected. On receipt of an election petition the Election Commissioner has to refer it to an Election Tribunal for trial. Every election petition is to be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the C.P.C., to the trial of suits; see Sections 80, 81, 83(1)(a), 88 and 90 (1). Section 97 lays down that when in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate 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 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 Tribunal of his intention to do so and has also given the security and the further security referred to in Sees. 117 and 118 respectively."

Every such notice must be accompanied by the statement and particulars required by Section 83 in the case of an election petition. The date fixed for the respondents to appear before the Tribunal and answer the claim or claims made in an election petition is the date of its commencement within the meaning of this provision. Section 100 sets out the grounds for declaring an election to be void and the material provision is Sub-Section (1)(d), which is as follows :-

"(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected -

(i) by the improper acceptance of any nomination, or (ii) by any corrupt practice
..... or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of this Act or of any rules or orders made under this Act."

3. Every petitioner must enclose with the election petition a Government treasury receipt showing a deposit of Rs. 2,000/- as security for the costs of the petition, vide Section 117. A Tribunal has the power under Section 118 to call upon the petitioner to give such further security for costs as it may direct. Section 101 empowers a Tribunal in a case in which the petitioner has in addition to calling in question the election of a returned candidate claimed a declaration that he himself or any other candidate has been duly elected, to declare, after holding the election of the returned candidate to be void, the petitioner or such other candidates as the case may be, to have been duly elected, if it is of opinion

"(a) that in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes".

These are the relevant provisions of the Act. The Tribunal started the hearing of the election petition and called upon the petitioner and the other defeated candidates to appear and answer the opposite party's claims made in his election petition. The date fixed by it for their appearing and answering the claims is not known. The petitioner appeared before the Tribunal as respondent No. 1 and filed a written statement answering the claims made by the opposite party. He denied the allegations made in the election petition about the irregularities and that the result of his election was materially affected by them even if they were committed. He took the following pleas :-

"41 (a) That the contents of para 18 of the petition and its sub-paragraphs are vague and the particulars of non-compliance of the provisions of Representation of the People Act and the rules framed there under have not been detailed and are liable to be struck off."

"41(b) That the counting clerks.... have counted' the votes cast for the

respondent and other candidates and also invalid votes as votes cast for the-petitioner, they rejected valid votes cast for the answering respondent as invalid and also counted valid votes cast for the answering respondent as votes-cast for the petitioner and other respondent.....

In this way the petitioner and his agent succeeded in illegally increasing the votes of the petitioner and. decreasing those of the answering respondent from, what they actually were." On 16-8-1962 the petitioner applied under Order-VI, rule 16 for the deletion of paragraphs 11, 12, 14; 15 and 17 of the petition on the ground that they were unnecessary, vague and indefinite and tended.. to harass the petitioner and prejudice the trial of the election petition. The Tribunal by its order dated 17-8-1962 dismissed this application and this is one order that is sought to be quashed. The Tribunal allowed the ballot papers to be inspected by the-parties in September 1962. On 14-12-1962 the opposite party made an application under Rule XVII of Order 6 for amendment of this election petition by adding paragraphs 18(d)(i), 18(d)(ii) and 18(d)(iii) containing three lists, (1) of invalid votes wrongly counted as valid votes cast in the petitioner's favor, (2) of valid votes cast in the opposite party's favor but wrongly rejected by the Returning Officer and (3) of valid votes cast in the opposite party's favor but wrongly counted in the petitioner's favor. This application was allowed by the Tribunal on 14-12-1962 and the petitioner was ordered to file another supplementary written statement to the amendment. The petitioner filed a supplementary written statement on 1-1-1963, adding three similar lists in respect of votes counted in the opposite party's favor. The opposite party objected to his adding these lists and on 24-1-1963 the Tribunal dismissed his objection. On 28-1-1963 it suo motu revised its order dated 24-1-1963 and fixed 6-2-1963 for the hearing of the opposite party's objection. On 9-1-1963 it passed the other impugned order deleting paragraphs 4, 5, 6 and 8 of the supplementary written statement; filed by the petitioner on the ground that the allegations contained in them amounted to recrimination and were barred by time, because they were admittedly made after more than fourteen days from the date of the commencement of the trial.

4. A reference to Rules made under the Representation of People Act concerning counting of votes is necessary. Rule 57 provides that ballot papers taken out of each ballot box must be arranged in convenient bundles and scrutinized and that the Returning Officer must reject a ballot paper if it bears a mark by which the elector may be identified, or is a spurious ballot paper or has been damaged or mutilated or is

an unauthorized ballot paper or does not bear the official mark referred to in Rule 27(2) or the elector has put in the same ballot box more than one ballot paper, after briefly recording the reasons on it.

Rule 58 provides that "every ballot paper which is not rejected under rule 57 shall be deemed to be valid and shall be counted" and that the result of the counting of the ballot papers found in each ballot box should be noted down in form 22. Rule 60 deals with scrutiny and rejection of postal ballot papers; no cover in form 18C containing a postal ballot paper received by the Returning Officer after the expiry of the time fixed in that behalf must be opened and no vote contained in any such ballot paper must be counted and a postal ballot paper must be rejected for reasons similar to those given above. These rules make it clear that a vote that is received is either accepted as valid or is rejected. A vote cannot be both accepted and rejected. A valid vote must be accepted and can never be rejected. Section 62 of the Act prohibits voting by a person not entered in the electoral roll of the constituency, or by a person subject to certain disqualifications or at a general election in more than one constituency of the same class or more than once in the same constituency or if he is confined in a prison. These prohibited votes cannot be received at all and if a person votes in more than one constituency or votes in the same constituency more than once all his votes are void. This is the position in respect of votes cast through ballot boxes. A postal ballot paper contained in a cover received after the expiry of the prescribed time is not to be received at all. Whether any vote has been improperly received, refused or rejected or whether any void vote has been received within the meaning of Section 100(1)(d)(iii) has to be decided with reference to these provisions. If a void vote or a prohibited vote is received it is a case of improper reception. If a valid vote is rejected it is a case of improper rejecting of a vote. If a cover containing a postal ballot paper is wrongly refused it is a case of improper refusal of a vote.

5. The result of an election depends upon the figures of votes polled by all the candidates and the election of a returned candidate is affected either by illegal increase in the number of his votes or illegal decrease in the number of votes of any defeated candidate or by both. It was stated by Gajendragadkar, J. in *Jabar Singh v. Genda Lal*¹ that :

"The Tribunal has to decide whether the election of the returned candidate has been materially affected or not, and that only means that if any votes are shown to have been improperly accepted, or any votes are shown to have been

improperly refused or rejected, the Tribunal has to make calculations on the basis of its decisions on those points and nothing more."

An election petition is filed on this ground when there is improper reception of votes, or reception of void votes, counted in favor of the returned candidate or improper refusal or rejection of votes cast for any of the defeated candidates or a combination of the two. As regards the votes counted in the returned candidate's favor the only question that can be raised in an election petition is that some of them were improperly received or were void. No question about improper refusal or rejection of votes cast in his favor is possible because the result of his election, cannot be said to have been materially affected by the improper refusal or rejection of votes cast in his favor. If the votes cast in his favor had not been improperly refused or rejected he would have secured a greater majority of votes but the result of the election, namely that he was duly elected would have remained the same. It may be said that the result of the returned candidate's election is affected when the majority by which he has won is increased or reduced, but it cannot be said to be materially affected because his rights, privileges, duties and liabilities as a member depend upon His being elected a member and not at all upon the majority by which he is elected. The result of his election can be said to be materially affected by a certain fact only if in the absence of the fact he would not have been elected at all. He would not have been elected at all either if the votes counted in his favor had been less by a certain number or the votes counted in favor of a defeated candidate had been more by a certain number. In the *Clare, Eastern Division* case, (1892) 4 O' M. and H 162, O'Brien, J. rejected the view that if a mistake or non-compliance with a rule produced a diminution of the votes of a returned candidate, although it was not sufficient to destroy the majority, it was a case of the result of the election being affected and observed' at p. 164 :

"In *Woodward v. Sarsons* ² no less than 294 votes were spoiled by the mistake of the presiding officer, but they would not, if admitted: have turned the scale against the successful candidate, and therefore did not affect the result of the election." Therefore, in an election petition to challenge his election on the ground of Section 100(1)(d)(iii) it must be alleged either that votes counted in his favor were improperly received or that votes cast in favor of a defeated candidate were improperly refused or rejected. The petitioner is not at all concerned with improper rejection or refusal of votes cast in the returned candidate's favor or with improper acceptance of votes cast in a defeated

candidate's favor.

6. It is not correct that in an election petition based on the ground of Section 100(1)(d)(iii) the Tribunal has suo motu to consider all votes counted in favor of all candidates and all votes rejected and refused and that before deciding whether the result of the successful candidate's election was materially affected or not it must see that no valid vote was rejected and no void or prohibited vote was received and accepted. Rules 57 and 58 show that every ballot paper that is not rejected is presumed to be valid. It was on account of this presumption that the Supreme Court held in AIR 1964 Supreme Court 1200, that Tribunal is not required in a petition based on the ground of Section 100(1)(d)(iii) to scrutinize all the ballot papers. It does not follow that a Tribunal cannot scrutinize certain ballot papers at the instance of the returned candidate if he has not filed a notice of recrimination. The presumption is only in respect of ballot papers which are not rejected and simply shifts the onus of proof ; it is a rebuttable presumption and operates only if it is not rebutted. It can be rebutted by showing that certain ballot papers ought to have been rejected and were erroneously not rejected; as soon as this is shown the presumption is rebutted and the ballot papers have to be rejected. A returned candidate against whom a petition has been filed has the inherent right of rebutting the case prima facie made out against him; no statutory provision conferring this right is required at all. It is his inherent right because without his having an opportunity to exercise it he cannot efficiently defend the petition. The right of defending the petition includes the right of rebuttal of a prima facie, case made out by the petitioner. If it is essential for him, for the purpose of rebutting the prima facie case of the petitioner to show that certain ballot papers ought to have been rejected by the Returning Officer and were, therefore, not valid he has a right to do so and that right has not been taken away by rules 56 and 57 or any other provision of the Act or the Rules. Section 97 does not deal with this right at all. Its exercise is not dependent upon any notice of recrimination. Surely it cannot be said that a notice of recrimination is essential when a petitioner claims the seat for himself or any other candidate whereas it would not be essential in the absence of such a claim. If in a petition in which no such claim is made the returned candidate has the right of proving that there was improper reception etc. in respect of votes other than those which are the subject matter of the petition without having to file a notice of recrimination (which would not be required at all because there is no claim for the seat) the fact that in another petition such a claim is made should not deprive the returned candidate of that petition of the right. The right of rebuttal and the manner in

which it can be exercised do not at all depend upon whether such a claim is made in the petition or not and whatever right of rebuttal exists when no such claim is made or exists even when such a claim is made.

7. It is to be noted that before a Tribunal declares under Section 101 the petitioner or any other candidate to have been duly elected it must find that he in fact received, or but for corrupt practices committed by the returned candidate would have received a majority of the valid votes. In a petition based only on the ground of Section 100(1)(d)(iii) the declaration can be given by a Tribunal only if it finds that "in fact" the petitioner or such other candidate had received a majority of the valid votes. This means an inquiry in addition to the inquiry into the question whether the election of the returned candidate was void or not. It is, however, an additional inquiry only if the result of the returned candidate's election has been found to have been materially affected by the improper reception, refusal or rejection of any vote or the reception of any void vote.

In considering whether the result of the returned candidate's election has been materially affected or not one has to consider not only the votes received by him but also the votes received by other candidates including the petitioner or such other candidate on whose behalf the seat is claimed. If no candidate other than the returned candidate has in fact received a majority of the valid votes it means that the election of the returned candidate has not been materially affected by the improper reception etc., but this would be the finding recorded during the inquiry into the petition against the returned candidate. No question of declaring the petitioner or such other candidate as having been duly elected would arise if it is found that the returned candidate's election has not been materially affected by the improper reception etc. A recrimination proceeding is nothing other than, an election petition against the petitioner or such other candidate who would have been declared as duly elected under Section 101, the only difference being that an election petition follows such a declaration whereas a recrimination proceeding is in advance of it and with the object of preventing it. Therefore, a question of a recrimination proceeding arises only after it has been found by the Tribunal that the returned candidate's election has been materially affected by the improper reception etc.

8. When void votes are received or when votes are improperly received, refused, or rejected and the result is that a person who did not legally receive a majority of the valid votes was declared duly elected his election can be questioned under Section

100(1)(d)(iii). The ground for questioning the election is the improper reception etc. of votes materially affecting the result of the returned candidate's election. The petitioner has to prove two facts, (1) that the reception etc. was improper and (2) that thereby the result of the returned candidate's election was materially affected. The petitioner would fail if either fact remains unproved. If the petitioner prima facie proves both the returned candidate may disprove either or both and on his disproving either or both the petitioner would fail. If he is unable to disprove the first fact he can disprove the other fact only by showing that there was improper reception etc. in respect of other votes and that consequently the effect of the improper reception etc. alleged by the petitioner was nullified or reversed by the effect of the improper reception etc. of other votes. The failure on the part of the returned candidate to disprove the first fact does not deprive him of the right to disprove the other fact just as the petitioner has to prove both the facts so also the returned candidate has the right to, disprove one of them without being able to disprove the other. The only manner in which he can disprove the other fact is by proving that there was improper reception etc. other than that proved by the petitioner and that it had the reverse or nullifying effect. To debar the returned candidate from showing other improper reception etc. would amount to debarring him from disproving the other fact, i.e., denying him the right of rebuttal. It, therefore, cannot be said that, such a petition is confined only to an inquiry into the particular votes mentioned in the petition and that an inquiry into votes is always a recrimination proceeding governed by Section 97.

"That the result of the returned candidate's election was materially affected by the improper reception etc. of votes" is a perfectly good ground for a petition. Which votes were improperly received etc. is a matter of evidence to prove the ground. The ground is that votes were improperly received etc. and is proved by showing that particular votes were improperly received etc. The votes selected by the petitioner do not exhaust the ground for the simple reason that the result of the election depends not only upon the votes which are the subject-matter of the petition but also upon other votes. Even if it be said that the ground is the improper reception etc. of particular votes, in considering the effect of it upon the result of the election the Tribunal must consider improper reception etc. of other votes in respect of which evidence has been given by the returned candidate. The proper reception etc. of votes materially affecting the result of the returned candidate's election (sic). The petitioner naturally selects only those votes, the improper reception etc. of which has the effect of increasing the

number of votes of the returned candidate or decreasing the number of votes of a defeated candidate, but the returned candidate's right of rebuttal is not confined to the votes proved to have been improperly received etc. It extends to showing that on account of other improper reception etc. the result of the election was not materially affected.

9. Section 97 applies whenever the seat is claimed in an election petition, regardless of the ground on which the election of the returned candidate is attacked. The evidence that is permitted to be given by a returned candidate under it is to show that the election of the candidate for whom the seat is claimed would have been void if he had been the returned candidate, e.g., the evidence that would have been given by the returned candidate if he had filed a petition to question the candidate's election under Section 100. It is this evidence that is barred if the formality prescribed by the proviso to Section 97 has not been complied with. The evidence that a returned candidate gives to rebut the prima facie case made out by the petition is not evidence meant to prove that the election of the candidate for whom the seat is claimed would have been void if he had been the returned candidate. If he has rebutted the petitioner's case by showing that the improper reception etc. of votes proved by him did not materially affect the result of his election (on account of improper reception etc. of other votes) there would be no question of the other candidate's being declared to be duly elected and of the returned candidate's questioning his election. Therefore, when a petition is filed on the ground of Section 100(1)(d)(iii) the evidence that the returned candidate can give under Section 97 is evidence in respect of other grounds. For instance he can give evidence to prove that he was not qualified, or was disqualified, to be chosen to fill the seat or that he had committed corrupt practices or that his nomination was improperly accepted or that the result of his election was materially affected by non-compliance with the provisions of the Constitution, the Act or Rules or orders made under the Act. To what extent there was improper reception etc. of votes and what was its effect on the result of the returned candidate's election would have been inquired into on the trial of the petition itself and before the returned candidate's election was found to be void. Consequently there would be no occasion for his producing evidence in respect of improper reception etc. of other votes and its effect on the result of the election in order to question the election of the candidate for whom the seat is claimed and Section 97 would have no application. In the instant case the petitioner seeks to produce evidence not to show that the election of the party would have been void if he had been declared duly elected but to disprove that his own election was void. The

evidence that he is entitled to produce before his own election is declared to be void cannot possibly be hit by the provision of Section 97, which comes into play only after his election has been declared to be void and the Tribunal proceeds to decide whether the other candidate should be declared to have been duly elected or not. When the petitioner has shown that his election was materially affected by the improper reception or acceptance of votes counted in his favor or improper rejection or refusal of votes cast in a defeated candidate's favor he has a right to rebut this by showing that the reception, acceptance, rejection or refusal was not improper as also by showing that the result was not materially affected by the reception etc. even if it was improper. The result of an election depends not only on the number of votes counted in favor of one candidate but also on the number of votes counted in favor of another candidate and the effect of increasing the votes counted in favor of a defeated candidate may be completely nullified by increasing the votes counted in the returned candidate's favor. When a petitioner proves his case by showing that the returned candidate's votes should be less, or a defeated candidate's votes should be more, to this extent that the declared result of the election is reversed the returned candidate can, by showing that his own votes should be more or that the defeated candidate's votes should be less for other reasons, establish that the result of the election would remain the same even on the petitioner's case being proved. Suppose R, the returned candidate, has secured 100 votes and D the defeated candidate has secured 90 votes. If D in an election petition establishes that 5 votes counted in R's favor were wrongly received or accepted and that 7 votes cast in his favor were wrongly refused or rejected the result would be that R secured 95 votes and D. 97. This means that the result of R's election was materially affected because D, and not R, should have been declared elected, but if he in rebuttal shows that 3 votes cast in his favor were wrongly rejected or refused or that 3 votes cast in the defeated candidate's favor were wrongly accepted the result of the election should have been either that he got 98 votes as against 97 votes polled by D or that he got 95 votes as against 94 votes polled by D, i.e. it would have been the same even if the illegalities proved by the petitioner had not been committed.

10. The provisions in Section 97(1) have been borrowed from the English law with some alterations. Section 5 of the Parliamentary Elections Act, 1889 (31 and 32 Vic C. 125 (a)) provided that "a petition complaining of undue return or undue election of a member may be presented" etc. and Section 53 laid down that :

"On the trial of a petition complaining of an undue return and claiming the

seat for some person, the respondent may give evidence to prove that the election of such person was undue in the same manner as if he had presented a petition complaining of such election."

The phrases 'undue return' and 'undue election' have been defined nowhere. Rules made in exercise of the powers conferred by that Act contained the following rules :

'7. When a petitioner claims the seat for unsuccessful candidate, alleging that he had a majority of lawful votes, the party complaining of or defending the election or return shall, six days before the day appointed for trial, deliver to the master a list of the votes intended to be objected to and the master shall allow inspection and no evidence shall be given against the validity of any vote except by leave of the Court

8. When the respondent in a petition under the Act, complaining of an undue return and claiming the seat for some person, intends to give evidence to prove that the election of such person was undue, pursuant to the fifty-third Section of the Act, such respondent shall, six days before the day appointed for trial, deliver to the master. a list of the objections to the election upon which he intends to rely, and the master shall allow inspection : and no evidence shall be given by a respondent of any objection to the election not specified in the list, except by leave of the Court .,...."

Both the rules dealt with a case in which a petitioner claimed the seat for an unsuccessful candidate; but rule 7 applied when the petitioner only claimed scrutiny while the returned candidate objected to certain votes counted in favor of the defeated candidate. Rule 8 applied in a case governed by Section 53. Rule 8 was to be complied with by the returned candidate while rule 7 was to be complied with by the petitioner and the returned candidate. Rule 7 applied when the petitioner claimed that a defeated candidate had a majority of lawful votes while rule 8 applied when he complained of an undue return. The grounds for a petition were the existence of corrupt or illegal practices committed by a candidate or his agents, the disqualification of a candidate for being elected, the employment as canvassers or agents or prohibited persons and the petitioner's having received a majority of lawful votes. The inquiry in a case governed by rule 7 became

"a scrutiny, each party endeavoring to support the objections of which particulars have been given, and also to add to their own poll any votes to which

they can show they were entitled." (See Rogers on Election, Vol. II, 20th Edn., p. 220).

11. Recriminatory evidence was not permitted if the petitioner did not claim a seat for a defeated candidate; if a seat was claimed recriminatory evidence could be given even though the defeated candidate was not the petitioner or a party to the petition. In Blackburn's case, (1869) 20 L T 823 : 1 O' M and H, p. 198 at p. 199, Willes, J. held that as the seat was not claimed the returned candidate had not in his power to set up a recriminatory case. The case set up by the returned candidate under Section 53 read with R. 8 was known as recriminatory case, the case referred to R. 7 being one of scrutiny; see Rogers p. 226. "Scrutiny is the term used to describe a reviewing of the ballot papers following an order of the Court" (Parliamentary Elections by Schofield, 1950, at p. 550). What happens in scrutiny is that each side makes its own list of ballot papers which it objects to or claims to be added and delivers it to the Court six days before the hearing and cannot vary it without the Court's consent. The scrutiny results in the striking off or adding of votes. It is stated in 14 Halsbury's Laws of England, "Elections" paragraph 543 :

"..... on a petition complaining of an undue election the petitioner may claim that the successful candidate was not elected by a majority of lawful votes and demand a scrutiny. The object of scrutiny is to ascertain by striking off votes or adding votes which candidate had the majority of lawful votes."

A returned candidate whose election was proved to be void could still continue the scrutiny with the object of "showing that the person for whom the seat was claimed had not obtained a majority of lawful votes. Similarly if a petitioner was proved not to be qualified for election he could still proceed with the scrutiny in order to show that the respondent had not obtained a majority of lawful votes and so was not duly elected; see paragraph 552 in 14 H. L. There was thus a clear distinction between scrutiny and recriminatory case; the former was demanded by a petitioner while the latter was set up by a returned candidate. The inquiry into each vote was in the nature of a separate trial. When the petitioner put himself in a majority, i.e. when he added sufficient votes to his own poll or struck them of the respondent's, then the respondent began and adopted the same course until he was in a majority, and so the scrutiny continued until the particulars were exhausted; (Rogers p. 224).

12. The Representation of the People Act, 1949 (12 and 13 George 6, c. 68) which repealed the Act of 1868 has not made any material change in the law : Section 122(5) reads as follows :

"On the trial of a petition complaining of an undue election and claiming the seat..... for some person, the respondent may give evidence to prove that that person was not duly elected, in the same manner as if he had presented a petition against the election of that person."

Section 97 of our Representation of the People Act deals with recrimination case and not with scrutiny.

13. The nature of a notice of recrimination was explained by the Supreme Court in *Mallappa Basappa v. Basavaraj Ayyappa*,³ The precise question that had to be answered by the Court was whether an election petitioner could, by abandoning a claim to a declaration that a certain defeated candidate should be declared elected, deprive a respondent of his right to give a notice of recrimination under Section 97, and it was when answering this question that it explained the nature of a notice of recrimination, Bhagwati, J. observed at p. 702 :

"This notice would be, in effect, a counter petition presented by the returned candidate or any other party to the petition accompanied by the statement and particulars required by Section 83 in the case of an election petition The election contest would then not only be between the petitioner on the one hand and the returned candidate on the other but also between the returned candidate or any other party to the petition and the candidate who has been sponsored by the petitioner for such election."

These observations do not help the opposite party at all. On the other hand, by suggesting that a recrimination proceeding is in effect a counter petition they support the petitioner to some extent. If a recrimination proceeding is a counter petition the right to give a notice of recrimination is a right in addition to, and independent of, whatever right the respondent to the election petition possesses in defending the election petition. There are two petitions, one by the Original petitioner and the other by the respondent to the petition. The respondent to the petition has a certain right when defending the petition; his right to file the other petition against the election

petitioner is an additional right. If he has not the additional rights, or if he forfeits it by laches, his right to defend the original petition remains intact and is not at all affected by the non-existence or forfeiture. It is immaterial that the act that he would have to do in prosecuting the counter petition is same as the act that he has to do in defending the original petition; the non-existence or forfeiture of the right to do the former act does not involve forfeiture of his right to do the latter act. In other words, by forfeiting the right to give a notice of recrimination he does not forfeit the right to defend the election petition by rebutting the evidence produced by the petitioner. The decision most strongly relied upon by the-opposite party is *Bhim Sen v. Gopali*,⁴ The facts of the case were these. Bhim Sen filed an election petition to challenge the election of Gopali on the grounds (1) that the result of the election had been materially affected because some votes-counted in Gopali's favor were void and some provisions of the Act and the Rules had not been complied with and (2) that Gopali had been guilty of corrupt practice. He claimed a declaration that he in fact had received, or but for the votes obtained by, Gopali by corrupt practices would have received, a majority of valid votes and would have been declared, duly elected. Gopali in his written statement simply traversed the allegations made by Bhim Sen. As regards the allegation that he had received void votes, his reply was simply a denial. It is important to note that he did not plead that Bhim Sen had not-received a majority of valid votes even if his own void votes had been excluded. Thus Bhim. Sen had to prove that some of the votes received by Gopali were void and Gopali had simply to rebut this evidence of Bhim Sen. If Bhim Sen succeeded in proving that a sufficient number of votes received by Gopali were void he would have succeeded in proving that he himself had received a majority of valid votes. If Gopali failed to rebuffe Bhim Sen's evidence he would have failed to show that he had not received a majority of valid votes. Subsequently, Bhim Sen examined the ballot papers-and applied for amendment of the petition by giving; particulars of void votes received by Gopali and the amendment was allowed by the tribunal. This Court quashed the order of the tribunal allowing the amendment and Bhim Sen appealed from its judgment to the Supreme Court. The Supreme Court set aside this Court's order and restored the amendment. It was urged on behalf of Gopali before the Supreme-Court that he also should have been allowed inspection of the ballot papers cast in favor of Bhim Sen so that he could see if he (Bhim Sen) also had got the benefit of void votes. The Supreme Court rejected this plea, observing at p. 298 :

"In our opinion, it is too late to raise such a contention now in his first

written statement respondent 1 made a positive averment that no void votes had been allowed to be used by the returning officer and that the returning officer had fully discharged his duties under Section 63. It is true that after it was discovered that he had received 37 void votes respondent 1 attempted to make an allegation that the appellant may likewise have received similar void votes, but it was too late then, because the time for making such an allegation by way of a recriminatory proceeding had elapsed 'In any event' we are not satisfied that the tribunal was in error in not giving respondent 1 the opportunity in question." (respondent 1 was Gopali) (Emphasis (here in ' ') supplied).

The case of Gopali was that there was no infringement of any provision of the Act or the Rules and that no void votes were received by the returning officer at all. There was, therefore, no scope for his contending subsequently that the returning officer had erroneously refused or rejected some of his valid votes or had received some void votes cast in favor of Bhim Sen. If Bhim Sen succeeded in proving prima facie that Gopali had received some void votes Gopali had the right of rebutting the prima facie case by showing that they were not void. According to Gopali's own case this was all he could do in rebuttal and if he wanted to prevent Bhim Sen's being declared as duly elected, without rebutting the prima facie case, he had to file a counter petition e.g. a recrimination. When the Supreme Court observed that it was "too late" for Gopali to allege that some void votes 'had been counted in favor of Bhim Sen what it meant was that it was inconsistent with the case set up by him in his written statement. The issue before the election tribunal was whether the result of the election as regards Gopali had been materially affected by non-compliance with the provisions of the Act or the Rules but it was based on the sole plea that 37 void votes had been counted in Gopali's favor. The issue whether the result of the election had been materially affected or not was confined to the case of the 37 void votes only. The Supreme Court did not 'go into the question what right Gopali has in respect at this allegation and did not decide that he had no right to rebut the case, if prima facie made out by Bhim Sen, in respect of them. Since Gopali's whole defense was that there had been no infringement of the provisions of the Act or the Rules, if the result of the election had been materially affected it was materially affected only by the receipt of the 37 void votes (or some of them).

If Gopali intended to show that some of his own votes had been wrongly excluded or that some void votes had been counted in favor of Bhim Sen, the right to do so did not arise from the right of rebuttal of the prima facie case, if any made out by Bhini Sen

and could arise only under Section 97. The facts in the instant case are clearly distinguishable; here the petitioner in his written statement filed before the tribunal had expressly pleaded that the result of the election had not been materially affected by the noncompliance alleged by the opposite party because some of his valid votes were excluded and the opposite party also had received some void votes. Thus the petitioner's showing that some of his valid votes were erroneously rejected and that some void votes were erroneously counted in favor of the opposite party was by way of rebutting the case, if prima facie made out by the opposite party. The decision of the Supreme Court in Bhim Sen's case does not deprive the petitioner of his right of rebutting the opposite party's prima facie case. The reason on account of which it was held that Gopali's remedy was to give a notice of recrimination does not exist in the instant case. Further the above observations were made by the Supreme Court when repelling the contention advanced on behalf of Gopali that he would have been allowed to inspect the ballot papers counted in Bhim Sen's favor and it was this contention that was found to be "too late". What the Supreme Court held was that it was too late to raise the contention in the appeal to the Supreme Court. Even after it was discovered on an inspection of the ballot papers counted in Gopali's favor that he had received 37 void votes Gopali did not make a definite allegation that Bhim Sen also had received some void votes; what he said instead was that he "might" have received, which was quite a different kind of allegation. It was not his positive case that even if 37 void votes were counted in his favor the result of the election had still not been materially affected because some void votes were counted in Bhim Sen's favor.

The Supreme Court was not called upon to and did not, enter into a detailed discussion of the nature of a notice of recrimination and the right of a successful candidate defending an election petition to rebut the prima facie case made out by the election petitioner without his having been given a notice of recrimination. Consequently nothing that I have said above militates against the decision of the Supreme Court. Finally, the Supreme Court decision did not consider that the above observations were final; its use of the words "in any event" in the last sentence shows that it did not reject the contention advanced on behalf of Gopali definitely on the ground that his remedy was to give a notice of recrimination. The decision was considered by this Court in *Satya Ketii v. Election Tribunal, Bareilly*,⁵ and *Brij Mohan Lal v. Election Tribunal*,⁶ In Satya Ketu's case Shyam Sunder a defeated candidate, filed a petition to challenge the election of Satya Ketu on the ground that some void votes had been counted in his favor, Satya Ketu in his written statement alleged that some invalid

votes counted in favor of Shyam Sundar also should be rejected and that when it is done it would be found that the result of the election had not been materially affected by the reception of void votes and it was held by B. Dayal and Pathak, JJ. that this defense did not amount to recrimination. They observed that Satya Ketu by taking the pleas merely defended his election. They distinguished between a defense that the result of the election would remain the same if other infringements of the provisions of the Act and the Rules regarding reception and rejection of votes also were taken into consideration and a defense that the election of the candidate for whom a seat was claimed would have been void on account of corrupt practices. The latter defence gives rise to a recriminatory proceeding but not the former. Though Satya Ketu had not given any notice of recrimination he was allowed by the learned Judges to show that the provisions of the Act and the Rules had not been complied with in respect of other ballot papers also i.e. (ballot papers other than those which were the subject-matter of election petition) and that consequently the result of the election had not been materially affected by the non-compliance in respect of the ballot papers which were the subject-matter of the election petition. They interpreted the decision in Bhim Sen's case as not involving the decision that a defense that the provisions of the Act or the Rules had not been complied with in respect of other ballot paper also could be taken only through a notice of recrimination. In the other case of Brij Mohan Lal Civil Misc. Writ No. 697 of 1963, D/-12-3-1964 : AIR 1965 Allahabad 450 he was a successful candidate and his election was challenged by Shanker Lal, a defeated candidate on various grounds including the grounds that he had been guilty of corrupt practices and that the result of the election had been materially affected by non-compliance with the provision of the Act and the Rules regarding rejection and reception of votes and he claimed that seat for himself. Brij Mohan Lal recriminated by alleging only corrupt practice on the part of Shanker Lal. In the notice of recrimination he did not allege that there was non-compliance with the provisions of the Act or the Rules in respect of other ballot papers and that consequently the result of the election would not have been materially affected even if the non-compliance in respect of the ballot papers, which were the subject-matter of the election petition, had been proved. After inspecting the ballot paper Brij Mohan Lal applied, for amendment of his recriminatory statement by including the allegations that valid votes cast in his favor were wrongly rejected or were wrongly counted as votes cast in favor of other candidates and that void votes were wrongly counted in favor of Brij Mohan Lal. Brij Mohan Lal also filed an additional written statement. Our brothers Dhavan and Asthana, JJ. held that the Tribunal could allow the amendment and the additional

written statement.

14. One more decision which was relied upon is AIR 1964 Supreme Court 1200 in which the Supreme Court observed at p. 1208 :-

"Section 97(1) allows the returned candidate to recriminate and raise pleas in support of his case that the other person in whose favor 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 alternative candidate. The result of Section 97(1), therefore, is that in dealing with a composite election petition, the Tribunal enquires into not only the case made out by the petitioners but also the counter claim made by the returned candidate. That being the nature of the proceedings contemplated by Section 97(1) it is not surprising that the returned candidate is required to make his recrimination and serve notice in that behalf in the manner and within the time specified by Section 97(1) proviso and Section 97(2). 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."

Those observations also do not support the case of the opposite party. They do not deal with a returned candidate's right of rebuttal of the case made out prima facie by the election petitioner as distinct from his right to recriminate. He may defend an election petition by rebutting the prima facie case made out by the petitioner and also by making a counter claim against him; it is the latter that requires a notice of recrimination. A returned candidate is a counter petitioner. Only in respect of the counterclaim setup by him and not in respect of the case set up by him in rebuttal of the case set up against him in the election petition. What is meant by the last sentence is that if he does not recriminate he must fail if he is not able to rebut the case made out prima facie against him by the election petitioner and not that he is not permitted to rebut the prima facie case. A notice of recrimination is required only when the returned candidate wants to attack and not when he wants to defend, i.e. do something in addition to what he has already done to defend the petition.

15. In *Lakshmi Shankar Yadev v. Kunwar Sripal Singh*,⁷ this Court observed at page

51 as follows :-

". . . . in order to find out whether the result of the election has been materially affected by the improper reception, refusal or rejection of votes, the returned candidate should be permitted to show that the result of the election has not been so affected as some of his votes were also improperly refused or rejected
.....

..... It he can take the plea mentioned above in his written statement in or to meet the ground taken, in the election petition under Section 100(1)(d)(iii) and he succeeds in the grounds, his election would stand, quite irrespective of the fact whether he had filed recriminatory proceedings under Section 97 of the Act or not.

..... Section 101 has not been made subject to Section 97 of the Act and duty has been cast upon the Tribunal to see which of the candidates actually received the majority of valid votes. A plea by the elected candidate that some of his votes were wrongly rejected or some of the other candidate's wrongly accepted is a plea which we think falls outside the ambit of Sub-Section (1) of 97 of the Act."

An election can be declared to be void on several grounds and a returned candidate may show that the election of the candidate in whose favor the seat is claimed, would have been void on the same ground on which his own election has been attacked as void, or may show that his election would have been void on another ground. Whether the case set up by a returned candidate; is one of recrimination or of mere rebuttal of the case prima facie made out against him depends upon the nature of the grounds taken in the election petition and in his defence. If the election petition is based on; the sole ground that the result of the election had been materially affected by reception or acceptance of void votes or by refusal or rejection of valid votes the enquiry to be conducted by the Tribunal is whether the result had been materially affected or not by this fact. The election petitioner applies the ground to certain ballot papers and the returned candidate may apply it to other ballot papers. Since the result of the election depends upon a scrutiny of all the ballot papers, the enquiry about the ballot papers referred to in the petition and the ballot papers referred to in the written statement is but one enquiry. The enquiry in respect of the ballot papers referred to in the written statement does not become another or distinct enquiry merely because they are ballot papers other than those referred to in the petition.

The result of an election cannot be judged by considering only some of the ballot papers used in the election. Consequently when a returned candidate simply wants to

prove that other ballot papers also were wrongly received or refused or rejected, he does not recriminate or start another distinct enquiry. If he wants to prove that the election of the person for whom the seat is claimed would have been void on another ground, such as that he was guilty of corrupt practice, or that his nomination was improperly accepted, he starts a separate enquiry because the matters could not have been considered at all during the hearing of the petition. This enquiry is not a part of the enquiry started by the election petition. Similarly, if an election petition is based on the ground of corrupt practices on the part of the returned candidate and the latter wants to prove that some void votes were counted in favor of the defeated candidate, for whom the seat is claimed, or that valid votes cast in favor of another defeated candidate were erroneously refused or rejected, he starts an enquiry which is quite distinct from the enquiry into the corrupt practices committed by him. In these two cases the returned candidate must recriminate; what he wants to do is not by way of rebuttal of the case made out against him and is an independent and additional enquiry challenging the election of the defeated candidate. So a plea by a returned candidate that some of his votes were erroneously rejected or that some void votes were counted in favor of the candidate for whom the seat is claimed is a plea falling outside of the scope of Section 97 when the petition itself was based on the ground that the result of the election had been materially affected by erroneous reception or rejection or refusal of ballot papers.

16. In the result I hold that Section 97 did not apply to the supplementary written statement filed by the petitioner and to his right to produce evidence, by way of rebuttal, to prove that the result of his election was not materially affected by the improper reception etc., of votes mentioned in the lists attached to the petition. The Tribunal had rightly allowed him to file the supplementary written statement and should not have deleted Paras. 4, 5, 6 and 8 from it.

17. There is no substance in the contention advanced on behalf of the petitioner that the supplementary written statement filed by him was a valid notice of recrimination. He counted the period of 14 days from 14-12-1962, excluded the period during which the Tribunal remained closed on account of Christmas holidays and contended that the supplementary written statement filed on 1-1-63 was within time. The period of 14 days runs from the date of commencement of the trial. The explanation to Section 90(4) lays down that for the purposes of Section 97 the trial of a petition shall be deemed to commence on the date fixed for the respondent to appear before the Tribunal and answer the claim or claims made in the petition. The date fixed by the

Tribunal for the attendance of the respondents before it is not stated in the petition but it was undoubtedly more than 14 days before 1-1-1963. It was rightly pointed out on behalf of the opposite party that the right to recriminate arises out of the claim for the seat made by the opposite party and not out of his adding the lists to his petition in order to give particulars of the improper reception etc., of votes. The petitioner also referred to contents of Para. 41(b) of his original written statement and contended that they were a notice of recrimination within the meaning of Section 97 but they did not express any intention on his part to give recriminatory evidence. What is required by Section 97 is a notice of an intention to give recriminatory evidence. The petitioner has not given security referred to in Section 117 and so it was argued on behalf of the opposite party that the petitioner was not entitled to give recriminatory evidence under 97.

The proviso to Section 97 requires a security to be given but does not fix the period within which it should be given. It is certainly not required to be given within 14 days from the commencement of the trial. Only a notice of the intention to give recriminatory evidence is to be given within 14 days and not the security. The words "within fourteen days trial" govern the giving of notice and not the giving of security. Two conditions have to be fulfilled, (1) giving the notice within 14 days and (2) giving the security. Since no period is fixed within which the security is to be given and since the proviso is that the returned candidate is not entitled to give evidence unless he has given the security it means that the security may be given at any time before he gives evidence. It is when he proceeds to give evidence that it has to be seen whether the security has been given or not; if it has been given before that stage the returned candidate has the right to give the evidence. The period mentioned in Section 117 does not govern the giving of the security under the proviso to Section 97; reference to Section 117 is made in the proviso only for the purpose of showing the form of the security to be given. The whole of Section 117 does not govern the security referred to in the proviso.

18. When the Tribunal accepted the supplementary written statement of the petitioner after rejecting the opposite party's objection on 24-1-1963 it did so under the erroneous belief that the period of 14 days prescribed by the proviso to Section 97 commences on the date on which the evidence is led; its attention was not drawn to the explanation to Section 90(4). When subsequently its attention was drawn to it in some other case it realised its mistake and suo motu reviewed its order D/-24-1-1963. The petitioner challenges this order of the Tribunal reviewing its earlier order on the

ground that the Act confers upon it no power to review its orders. He relies upon the case of *Brij Mohan Lal, Civil Misc. Writ No. 697 of 1963, D/d. 12-3-1964 : AIR 1965 Allahabad 450 (Supra)*. In *Laxman Purshottam v. State of Bombay*,⁸ Supreme Court held that a quasi judicial order cannot be reviewed by the authority in the absence of a provision for it. It is not necessary to decide in this case whether the Tribunal could have reviewed its earlier order or not because the second order by which it reviewed it deserves to be quashed on merits. The previous order was not erroneous at all and, therefore, could not have been reviewed even if there existed the power of review.

19. Nothing was said against the order of the Tribunal D/d. 17-8-1962 either in the written arguments or in the oral arguments and no case is made out for its being quashed. Therefore, the prayer for certiorari for quashing it must be refused.

20. In the result I would allow the petition, quash the order of the Election Tribunal, D/d. 9-2-1963 in Election Petition No. 308 of 1962 and give the petitioner his costs of this Court which will include counsel's fee assessed at Rs. 200.

Broome, J.:- I agree.

Takru, J.:- I agree.

Petition allowed.

Cases Referred.

1. AIR 1964 SC 1200, at p. 1208
2. (1875) 10 C P 733
3. AIR 1958 SC 698
4. 22 Ele LR 288 (SC).
5. 1963 All LJ 841: AIR 1964 All 225
6. Civil Misc. Writ No. 697 of 1963, D/-12-3-1964: AIR 1965 All 450
7. 22 Ele. L. R., 47
8. AIR 1964 SC 436