

BOMBAY HIGH COURT

H.R. Gokhale

Vs.

Bharucha Noshir C.

Election Petn. No. 5 of 1967

(Vimadalal, J.)

01.09.1967

ORDER

Vimadalal, J.

1. This is an application for inspection of ballot papers and the contents of ballot boxes by the petitioner in an election petition filed by him under Section 100 (1) (d) (iii) and (iv) of the Representation of the People Act 1951, challenging the election of the 8th Respondent to the House of the People from the Bombay North-West Parliamentary Constituency at the general election held on the 21st of February 1967, on the ground of improper reception as well as improper rejection of votes, as well as on the ground of non-compliance with certain provisions of the said Act and of the Rules framed thereunder. Respondents Nos. 1 to 7 are the other candidates who had contested the election to the said seat, and respondent No. 9 is the Returning Officer within the meaning of the said Act. By the present application, the petitioner has prayed, (a) that the 9th respondent be ordered to give inspection, or to cause inspection to be given, of all the rejected votes cast at the said election, (b) that the 9th respondent be ordered to give inspection, or to cause inspection to be given, of the contents of all the ballot boxes from each of the Counting Centres in the said Constituency and (c) that, in the alternative to the above two prayers, the petitioner be permitted to inspect the contents of the packets of used ballot papers, whether valid, tendered or rejected, mentioned in the petition.

2. This application for inspection was sought to be supported by Mr. Nariman on two grounds: (1) on the ground that the 9th respondent having in paragraph 12 of his Written Statement, expressly referred to ballot papers, the petitioner is entitled, under the provisions of Order 11, Rule 15 of the Code of Civil Procedure which is made applicable by Section 87 of the Representation of the People Act, 1951, to have inspection of all documents to which reference is made in the pleadings; and (2) on the ground that inspection should be granted of the documents to which the present application related under Rule 93(1) of the Conduct of Election Rules 1961,

framed under Section 169 of the Representation of the People Act, 1951. This application for inspection was strenuously opposed not only by Mr. Mody on behalf of the 8th respondent who was the successful candidate at the said election, but also by the learned Advocate-General on behalf of the Returning Officer (Respondent No. 9). None of the other respondents has appeared at the hearing of this application before me.

3. The first question that arises for my consideration is, what are the principles on which an order for inspection of ballot papers should be made in an election petition. That question has been the subject-matter of numerous decisions, some of them of the Supreme Court, and several authorities were cited in the course of the protracted argument of this application before me. The authorities cited before me on the point, in the chronological order, were the following :-

*Harish Chandra v. Triloki Singh*¹, Paras 8-11; Hidayatullah J, (particularly p. 72), *Inayatullah Khan v. Divanchand Mahajan*², at Pp. 71-74; *N. Pethu Peddiar v. V. A. Muthian*³, *Jabar Singh v. Genda Lal*⁴, *Ram Sewak Yadav v. Kidwai*⁵, Unreported Supreme Court decision, D/d. 18-3-1964 in C. A. No. 222 of 1964, Dr. Sushila Balraj's case; *Begum Mafida v. Rajendra Nath*⁶, *Hukum Singh v. Banwari Lal*⁷, *Tribani Ram v. Satyadeo Singh*⁸, Unreported Supreme Court decision, D/d. 10-2-1965 in C. A. No. 45 of 1965, Sitaram Mehta's case; Jagjit Singh's case, AIR 1966 Supreme Court 773. In my opinion, however, it is necessary for me to deal with only two of the above cases cited before me viz. the case of AIR 1964 Supreme Court 1249 and the case of AIR 1957 Supreme Court 444, the former of which must be regarded as the leading case laying down the law in regard to the granting of inspection in election petitions. It will, however, be necessary for me to refer to some of the other cases mentioned above on certain points that will arise for my decision in the course of this judgment.

4. Before I deal with the said two cases, it will, however, be convenient to point out that there is no allegation of corrupt practice at all in the present case. The facts of Ram Sewak Yadav's case, AIR 1964 Supreme Court 1249 show that that was also a case in which no question of corrupt practice arose. The appellant before the Supreme Court, namely, Ram Sewak Yadav, was declared elected at the election to the House of the People from the Barabanki Constituency in U. P. The unsuccessful candidate, Kidwai, who was the respondent before the Supreme Court, filed a petition before the Election Commission for an order declaring the election of Ram Sewak Yadav to be void, and for a declaration that he had been duly elected at the said election. The Election Tribunal dismissed the petition. In appeal to the High Court at Allahabad, the order passed by the Election Tribunal was reversed, and the proceedings were remanded for trial with a direction, among others, that the Tribunal do give a reasonable opportunity to both parties to inspect the ballot papers and other connected papers. It was from that order of the High Court at Allahabad that Yadav appealed to the Supreme Court. As Kidwai did not lead any evidence in regard to some of the other grounds in support of the petition the only grounds which survived were the improper reception, refusal and rejection of votes at the time of counting which had materially affected the result of the election. It was contended on behalf of Kidwai that he would be able to establish his case in regard to the same from the ballot papers, and it was submitted

that an order for inspection of the ballot papers should be made and that he be permitted to show from the ballot papers that the Returning Officer had improperly received or rejected the votes and that, on a true count, he would get the largest number of valid votes. The Tribunal rejected the application for inspection, holding that ballot papers could be allowed to be inspected only if it was necessary in the interests of justice and that, to support an order for inspection, facts must be brought to its

¹ AIR 1957 SC 444

³ AIR 1963 Mad 390

⁵ AIR 1964 SC 1249

⁷ AIR 1965 All 552

² AIR 1959 Mad Pra 58

⁴ AIR 1964 SC 1200

⁶ AIR 1965 Ass 62 (FB)

⁸ AIR 1966 All 20

notice making out a prima facie case which the respondent had failed to make out. That order was reversed by the High Court which held that the Tribunal had rejected the application for inspection without adequate reasons for doing so. The same question arose in the appeal filed by Yadav before the Supreme Court. Shah, J. who delivered the judgment of the Bench, after referring to the relevant provisions of the Act and the Rules, stated (para 6) that if the material facts on which the petitioner relies in support of his case were set out, the Tribunal undoubtedly had the power to direct discovery and inspection of documents with which a Civil Court was invested under the Code of Civil Procedure when trying a suit. He, however, pointed out that that power of the Civil Court in the trial of suits was confined to the narrow limits of Order 11 of the Code of Civil Procedure, that the Returning Officer was not a party to an election petition and an order for production of the ballot papers could not be made under Order 11 of the Code of Civil Procedure, but that the Tribunal had authority, in a proper case where the interests of justice demanded it, to call upon the Returning Officer to produce the ballot papers and to permit inspection by the parties before it of the ballot papers, that power being clearly implicit in Sections 100 (1) (d) (iii), 101 and 102 of the Act and Rule 93 of the Conduct of Election Rules, 1961. Shah, J. further observed that that power to order inspection of the ballot papers, which was apart from Order 11, Code of Civil Procedure, might be exercised subject to the statutory restrictions about the secrecy of the ballot paper prescribed by Sections 94 and 128(1). Shah, J. then proceeded to formulate when such an order for inspection should be made. He stated (para 7) that an order for inspection could not be granted as a matter of course, but the Court would be justified in making such an order, provided two conditions were fulfilled (i) that the petition for setting aside the election contains an adequate statement of material facts on which the petitioner relies in support of his case, and (ii) that the Tribunal is prima facie satisfied that, in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary. The learned Judge then proceeded to elaborate the said propositions formulated by him and stated that an order for inspection of ballot papers could not be granted to support vague pleas made in the petition not supported by material facts, or to fish out evidence to support such pleas. He further observed that a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes would not be sufficient to support an order for inspection. He then proceeded to point out (para 9) that, at every stage in the process of scrutiny and counting of votes, the candidate or his agents had an opportunity of remaining present, of watching the proceedings of the Returning Officer, of inspecting any rejected votes and of demanding a recount. He stated that a candidate who seeks to challenge an election on the

ground of improper reception or rejection of votes at the time of counting had, therefore, ample opportunity of acquainting himself with the manner in which the ballot boxes were scrutinized and opened and the votes counted, of inspecting rejected ballot papers, and of demanding a re-count. The learned Judge stated that it was in the light of the provisions of Section 83 (1) which require a concise statement of material facts on which the petitioner relied and the opportunity which a defeated candidate had at the time of counting of watching and of claiming a re-count that the application for inspection must be considered. Dealing with the facts of the case, the learned Judge stated (para 10) that what had been averred was that numerous ballot papers cast in favor of the petitioner had been wrongfully included in the bundles of the respondents and that, due to deficiency in the supply of sealing ink, marks on ballot papers, though not quite clear, yet indicating the intention of the voters, were wrongfully rejected as invalid by the Returning Officer. The learned Judge came to the conclusion that these averments in the petition for setting aside the election were vague and did not comply with the statutory requirements of Section 83 (1) (a), and, reversing the decision of the High Court, it was held that the Election Tribunal had proceeded on erroneous principle in declining to make an order for inspection.

5. It was contended by the learned Advocate-General on behalf of the Returning Officer (Respondent No. 9) and by Mr. Mody on behalf of the successful candidate (Respondent No. 8), that three conditions must be fulfilled before an order for inspection can be made in an election petition, namely, (1) material facts must be pleaded, (2) a prima facie case must be made out and (3) the interests of justice must require that inspection should be given. A careful perusal of Ram Sevak Yadav's case, AIR 1964 Supreme Court 1249 cited in the preceding paragraph, however, leaves no room for doubt in my mind that it is necessary to fulfil only the first and the last of those conditions in order to justify an order of inspection. As far as the requirement of prima facie satisfaction is concerned, what is laid down in the said case is not that the petitioner should establish a prima facie case on the merits of the petition itself, but that the Court must be prima facie satisfied that an order for inspection is necessary in the interests of justice. That is clear from the second proposition formulated by Shah, J. in paragraph 7 of the judgment in Ram Sewak Yadav's case, AIR 1964 Supreme Court 1249 and from the concluding sentence in paragraph 10 of the same judgment. There is, no doubt, a statement in the middle of the said paragraph 10 to the effect that the Tribunal was justified in declining to make an order of inspection of the ballot papers unless a prima facie case was made out in support of the claim, "but that sentence, properly read, only means that the Tribunal was justified in declining to make an order for inspection unless a prima facie case was made out in support of the claim for inspection, and not in support of the claim on the merits of the petition itself." To the same effect are the observations of the Supreme Court in Jagjit Singh's case, AIR 1966 SC 773, para 31 and its unreported decision in Dr. Sushila Balraj's case dated 18th March 1964 in Civil Appeal No. 222 of 1964 (SC).

6. I must, therefore, proceed to consider the question as to (1) what should be regarded as an "adequate statement of material facts" and (2) what is meant by the statement that the Court must

be "prima facie satisfied" that an order for inspection is necessary in the interests of justice, these being the two conditions which are required to be fulfilled before an order for inspection can be made on the present application. I will deal with the first of the said conditions in order to find out that what would be a statement of material facts which the law regards as adequate. Section 83 of the Representation of the People Act, 1951, the heading to which is "Contents of Petition", states that an election petition (a) must contain "a concise statement of the material facts on which the petitioner relies" and (b) must set forth "full particulars of any corrupt practice that the petitioner alleges", including names, dates and places of commission of such practice. It is unnecessary to refer to the rest of the provisions of the said section.

7. Mr. Nariman has contended that it is clear from the provisions of the said section that it makes a distinction between cases in which an election is challenged on grounds other than corrupt practice and cases in which the petition is based on corrupt practice. He has submitted that in the former case, what is required is nothing more or less than what would be required in a plaint under the provisions of Order 6, Rule 2 of the Code of Civil Procedure, which is almost identical in terms with clause (a) of Section 83 (1), and that it is only in the case of a petition founded on corrupt practice that "full particulars" are required to be stated in the petition. That argument of Mr. Nariman is clearly sound on a plain reading of Section 83 itself, but by the time his turn came for replying to the arguments of the learned counsel for respondents Nos. 8 and 9, he was able to find an authority of the Supreme Court in support of his contention. That authority is the case of AIR 1957 Supreme Court 444, paras 8 to 11. After analysing the various statutory provisions which, though slightly differently numbered prior to the recent amendments, were identical in terms. Venkatarama Ayyar, J. who delivered the judgment of the Bench stated (para 9) that if the grounds on which election is sought to be set aside are something other than commission of corrupt or illegal practices, as for example, when it is stated that the nomination had been wrongly accepted or that the returned candidate was not entitled to stand for election, then Section 3(2) has no application, and the requirements of the first clause of Section 83 were satisfied when the facts of these objections were stated. The facts to be stated under the first clause of Section 83 were different from the particulars which had to be given under the second clause of Section 83, and that it was only when an election was challenged on the ground of the corrupt practices mentioned in the Act that instances constituting particulars thereof would have to be given under the second clause of Section 83. The learned Judge then proceeded to deal with the decisions of English Courts in regard to the corresponding provisions of English law which were in pan materia with our Act and stated that his decision was fortified by the same.

8. It was sought to be contended on behalf of respondents Nos. 8 and 9 that there is a presumption of validity that every accepted ballot paper was validly accepted, and every rejected ballot paper was validly rejected, and that, in order to rebut that presumption of validity, it was necessary to give particulars in respect of each ballot paper which was alleged to be wrongfully accepted or wrongfully rejected, and to make out a prima facie case in respect of the same. Reliance was placed in regard to the presumption of validity on the observations of the Supreme

Court in the Case of AIR 1964 Supreme Court 1200. The Supreme Court has stated in that case (Paras 7 and 12) that under Rule 57 (1) then in force, corresponding to the present Rule 56 (6), all voting papers which had not been rejected and had been taken into counting by the Returning Officer must be presumed to be valid, and it must be assumed that every ballot paper which had not been rejected constituted one valid vote. Mr. Nariman has pointed out that it is clear from a careful perusal of the Supreme Court decision in Jabar Singh's case, AIR 1964 Supreme Court 1200 that there is no corresponding presumption that votes which have been rejected by the Returning Officer have been validly rejected, and, in my opinion, that contention of Mr. Nariman is clearly right, both on the wording of Rule 56 (6) as well as on the construction of the corresponding Rule in Jabar Singh's case, AIR 1964 Supreme Court 1200. It may be mentioned that Jabar Singh's case, AIR 1964 Supreme Court 1200 was relied upon very strongly both by the learned Advocate-General as well as by Mr. Mody on behalf of respondents Nos. 9 and 8 respectively, and each of them took me through that case in great detail. I do not, however, consider it necessary to discuss Jabar Singh's case, AIR 1964 Supreme Court 1200 any further because, in my opinion, the main question before the Court in that case was somewhat different namely, what would be the scope of the enquiry if the returned candidate had not recriminated under Section 97 of the Representation of the People Act 1951. Particular reliance was placed, both by the learned Advocate-General as well as by Mr. Mody, on the observations of Ayyangar, J. in paragraph 40 of the dissenting judgment in the said case, but I shall deal with the same in the following paragraph, as it pertains to a question with which I propose to deal next.

9. It was sought to be contended both by the Learned Advocate-General as well as by Mr. Mody that the Serial Numbers of the ballot papers, the improper acceptance or rejection of which is sought to be called in question by the petitioner, must be specified in the petition, and that unless that is done, it cannot be said that there is an adequate statement of material facts as required by Section 83 (1) (a) of the Act. There is however, not a single case cited before me in which it has been so held, nor do the provisions of the said Section 83 (1) (a), which, as already stated by me do not go beyond the provisions of Order 6, Rule 2, Code of Civil Procedure, require that Serial Numbers should be specified in the petition. As pointed out by the Supreme Court itself in Harish Chandra's case, AIR 1957 Supreme Court 444 referred to by me earlier in this judgment, in the matter of pleadings, Section 83 itself makes a distinction between a petition based on corrupt practice and a petition based on other improprieties, requiring full particulars only in the former case. There is, no doubt, a reference to the numbers of ballot papers in the dissenting judgment of Ayyangar J. (Para 40) in the case of AIR 1964 Supreme Court 1200 cited above but the statements on which strong reliance has been placed in that behalf both by the learned Advocate-General as well as by Mr. Mody, do not show that any Serial Numbers were specified by the petitioner himself in his petition. The reference in the said paragraph is to the Tribunal having specified Serial Numbers of certain ballot papers which, the facts of the case show (Para 4), the Tribunal had re-examined. Moreover. Mr. Nariman is right in his contention that the minority judgment of Avvngar, J. on this point conflicts with the majority view. The majority view in the said case was that the election of the appellant Jabar Singh had been rightly set aside

by the High Court and by the Tribunal, in view of the fact that Jabar Singh had not recriminated under Section 97 of the Representation of the People Act 1951, Gajendragadkar, C. J. who delivered the majority judgment, has, however, made it clear (para 15) that the majority of the Judges did not propose to rest their decision on the point that the relief granted by the Tribunal was not justified by the pleadings of the appellant before the Supreme Court who, it may be stated, was the respondent to the election petition originally filed before the Tribunal. In his minority judgment, Ayyangar, J. however, took the view that Jabar Singh's election should not have been set aside by the Tribunal and by the High Court on the mere ground that he had not recriminated, but came to the conclusion that, all the same, Jabar Singh's election had to be set aside because he had not raised the necessary pleas in his Written Statement. It is therefore, clear that the majority judgment in Jabar Singh's case, AIR 1964 Supreme Court 1200 not only does not deal with the question of pleadings at all, but expressly states that it does not rest its decision on that ground. In view of that position, any observation made by Ayyangar, J. in his minority Judgment cannot be regarded as laying down the law on the point. All that the law as well as the authorities cited before me lay down is that there must be an adequate statement of the material facts and I am not prepared to hold that that must necessarily mean that the Serial Numbers of the Ballot Papers challenged by the Petitioner must be stated in the petition. In my opinion, it is open to the petitioner to give such particulars, other than the Serial Numbers of the ballot papers, as the Court might consider to be adequate, having regard to the facts of the same. It is significant that there is nothing in affidavit to show that the Counting Agents of Shah (Respondent No. 8), or of any of the other candidates, made any notes of the Serial Numbers at the time when the counting was in progress. I had specifically asked Mr. Mody to take instructions from his client and state to the Court whether any of the Counting Agents of his client had made notes in regard to the Serial Numbers of the ballot papers. After taking instructions overnight from his client, the 8th Respondent, Mr. Mody made a statement but I would prefer not to refer to the same in this Order, as the said statement does not appear in any of the affidavits or in the pleadings. I cannot help feeling that the law has advisedly refrained from requiring a petitioner to state the serial numbers of the ballot papers, the validity of which he challenges. As Mr. Nariman has pointed out under Section 81, any elector, which means a person who was entitled to vote at the election, can also challenge the result of that election on the very grounds mentioned in Section 100 (1) on which an unsuccessful candidate can challenge that election. It is clear from the provisions of R. 53 that a voter would not be allowed admission into the place fixed for the counting of votes. It would, therefore, be impossible for a voter, who challenges an election on the ground of the improper acceptance or rejection of votes within the terms of Section 100 (1) (d) (iii), to furnish the Serial Numbers of the ballot papers in an election petition which he is entitled to file under the provisions already referred to by me. It was submitted by the Learned Advocate-General on behalf of the Returning Officer (Respondent No. 9) that it was unquestionably permissible to Counting Agents to note down the Serial Numbers of any ballot papers whilst the counting was in progress, but, I am afraid, that is not the position under the statutory rules relating to the same. Rule 56 (3), on which the Learned Advocate-General has relied, gives a right of inspection to the Counting Agents of the candidates only in

respect of the ballot papers that are proposed to be rejected by the Returning Officer, which as is common ground, takes place at a table different from the various tables at which the Counting Assistants count the accepted votes. Mr. Nariman has pointed out that this position is also clear from the observations of Shah, J. in Ram Sevak Yadav's case, AIR 1964 Supreme Court 1249, (Paras 8 and 9). It may be that if the petitioner's Application for recount had been granted by the Returning Officer, the petitioner might have had the opportunity of giving the serial numbers of all the ballot papers, the validity of which is challenged by him. That application, however, was not allowed by the Returning Officer. I may, in passing, observe that there is force in Mr. Nariman's contention that it is difficult to understand how the Returning Officer (Respondent No. 9) held the petitioner's application for recount to be "frivolous, unreasonable" in terms of Rule 63(3), in view of the fact that, admittedly, the only investigation that he made on the petitioner's application for re-count was by way of enquiries during the night of 24th of February 1967 from the Assistant Returning Officers, in the absence of the petitioner. Another reason why the law does not enjoin that serial numbers of ballot papers should be furnished in the petition is that, having regard to the fact that the law itself contemplates continuous and rapid counting of votes, it would obstruct that process if the Counting Agents of the various candidates were to be at liberty to note down the serial numbers of the objected ballot papers, together with the grounds of objection in respect of each of them. Reference may be made in this connection to R. 60 which provides in clear terms that the process of counting must be a continuous process, Paragraph 3 (a) read with paragraph 3 (c) at page 67 of the Hand Book for Returning Officers in the General Elections of 1967, which directs that every effort should be made by the Returning Officers to complete the counting on the same day, and R. 53 (4) of the Rules framed under the Act which gives the Returning Officers the power to remove from the Counting Centres any person who misconducts himself during the counting of votes. Taking even the figures furnished by respondents Nos. 8 and 9 themselves, the process of sorting and counting in the present case worked out to about 4 votes a minute, and the rate of rejection of votes by the Assistant Returning Officer at each Counting Centre worked out on an average to over 117 votes per hour. Having regard to the continuity and rapidity of counting contemplated by the Rules and Instructions mentioned by me above, and to the actual rate of counting mentioned by me, the process of counting would be seriously impeded if the law had given to the Counting Agents of each candidate the right to take notes in respect of any ballot whether accepted or rejected. As a matter of fact, as already stated by me, even the right to inspect is therefore, advisedly confined by the law to rejected votes only, and even in regard to rejected votes there is no provision which requires the serial numbers of rejected ballot papers to be furnished in the petition.

10. It was sought to be contended by Mr. Mody for respondent No. 8 that the right to inspect conferred by R. 56 (3) carried with it the right to take notes, and the cases reported in (1901) 2 Ch 59 at p. 74, (1898) 1 Ch D 596 at pp. 600-601 and (1888) 38 Ch D 92 at pp. 104-106 were cited by him in support of that propositions. Of these three cases, the case reported in (1898) 1 Ch D 596 purported to lay down a proposition as a matter of "general law" that the right to inspect carried with it right to take copies, make extracts and take notes, but as Mr. Nariman has

pointed out, to the extent to which that case purports to lay down a general proposition, the same has been disapproved of and overruled in (1901) 2 KB 665 at p. 667. The case reported in (1888) 38 Ch D 92 has also been considered in the said case reported in (1901) 2 KB 665 at pp. 667-668, as limited on its own facts to cases in which the right to inspect would be rendered useless unless it carried with it the right to take notes. It is true that the case reported in (1888) 38 Ch D 92 has been followed by a single judge of our High Court in the case of *Fatmabai v. Hajee Cassam*¹¹, at p. 404, but Fatmabai's case (1887) 11 Bom LR 402 related to inspection under the general provisions of Order 11, Rule 15 of the Code of Civil Procedure. As laid down in the third case cited by Mr. Mody himself viz., (1901) 2 Ch 59 at pp. 68-69, the right to take copies or notes would not be implicit in the right to take inspection if there is something in the nature of the right of inspection which shows that the same is limited. In my opinion, Mr. Nariman is right in his contention that, having regard to the provisions of the law relating to election in regard to the secrecy of voting and counting, and which provide that, even at the time of counting, the candidates or their Counting Agents have no right to handle the ballot papers, and having regard to the provisions of the Rules and instructions referred to above which contemplate a continuous and rapid process of counting, the right of inspection conferred by R. 56 (3) is, from its very nature, limited and cannot be construed to include a right to take notes. Though I have stated it earlier in this judgment, in my opinion, it can bear repetition if I state once again that R. 56 (3) makes it clear that even the right of inspection is limited to rejected ballot papers alone, and that, in respect of ballot papers which are alleged to have been wrongfully accepted, the law does not even confer a right of inspection on the candidates or their counting agents.

11. Mr. Nariman has, however, gone further and contended that the provisions in regard to the secrecy of voting and counting contained in Sections 94 and 128 and R. 54 would be violated if a Counting Agent were to attempt to note down the serial number of any

¹¹(1887) 11 Bom LR 402

ballot paper. In short, his contention is that there is a legal impediment in the way of a Counting Agent noting down the serial number of a ballot paper which arises from the provisions in regard to the secrecy of voting and counting referred to above. In support of that contention, Mr. Nariman has drawn my attention to the fact that Section 128 not only enjoins secrecy of voting at the time of the recording of votes, but also at the time of "counting of votes", and Rule 54 in terms enjoins that the Returning Officer must, before he commences the "counting", read out the provisions of Section 128 to the persons present at the Counting Centre. Mr. Nariman has further pointed out that, under Rule 52(3), the counting agents of every candidate are required to make a declaration in Form No. 18 which is to be found at p. 465 of the Manual of Election Law published by the Government, whereby the Counting Agents declare that they would not do anything forbidden by Section 128 of the Act. Mr. Nariman has stated that only thing on which the secrecy of voting depends at the time of counting is the serial number which should not be disclosed, and that there is nothing else the disclosure of which could possibly violate the principle of secrecy of voting at the stage of counting. As against that, it must be pointed out that the learned Advocate-General has argued that, once the marked copy of the Electoral Roll is

sealed by the Presiding Officer under Rule 46, the identity of the voter cannot be found out even if the serial number is noted down by the Counting Agents of the candidates at the Counting Centre whilst the counting is in progress. It must not, however, be forgotten that, as Mr. Nariman has pointed out, it is possible under the rules for the same person to be a Polling Agent at the Polling Booth and a Counting Agent at the Counting Centre in respect of a candidate whom he represents, and, having regard to the procedure followed at the Polling Booth, it would not, perhaps, be difficult for such a person to identify the voter by the Serial Number of his ballot paper if he is allowed to note down the same at the time of counting. Mr. Nariman gave an extreme illustration which brings home the point urged by him, and asked whether the secrecy of voting would not be violated if a Counting Agent who noted down the serial number of ballot papers were to publish the same in a newspaper. It is hard to accept the arguments of the learned Advocate-General, and all that one can say is that it is only because it might be possible to identify the voter by reason of the serial number of his ballot paper that the law makes the provision in regard to the secrecy of voting applicable to the process of counting also. There is no other reason why that provision should have been made applicable to the process of counting. There is, therefore, considerable force in Mr. Nariman's submission that there is a legal impediment created by the Rules relating to the secrecy of voting in the way of Counting Agents noting down the serial numbers of the ballot papers. In view, however, of the conclusion at which I have arrived viz. that there is nothing, either in the language of the statute or of the statutory Rules, or in the judicial decisions on the point, which lays down that the serial numbers of the ballot papers must be furnished in a petition based on the wrongful acceptance and wrongful rejection of ballot papers, it is not necessary for me to go further and hold that the provisions of law relating to the secrecy of voting prohibit the taking down of serial numbers at the time of counting. That is a point of considerable importance, and I do not think I would be justified in pronouncing on it in a case like the present one, in which it is not necessary to do so. It is sufficient for me to hold, as I do, that the law does not require the petitioner, in a case like the present one which does not relate to corrupt practice, to furnish the serial numbers of the ballot papers in the petition.

12. An alternative contention was, however, urged by Mr. Mody to the effect that in any event, even apart from the serial numbers of the ballot papers not being furnished the petition does not contain an adequate statement of material facts. I will consider that alternative contention advanced by Mr. Mody when I deal with the facts of the case later on.

13. Towards the end of his arguments, the learned Advocate-General, with his usual industry, listed the various averments from the cases cited before me which have been held as not containing an adequate statement of material facts, but as the Supreme Court itself has said, AIR 1965 Supreme Court 1887, para 8, the observations of the Supreme Court are not to be read as statutory enactments. What averments should be regarded as adequate must depend on the facts of each particular case and cannot be governed by authority. Mr. Nariman is right when he contends that acie case does not mean a case proved to the hilt but a case which can be said to be

established if the evidence which is led in support of the same were believed. While determining whether a prima facie case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence". The Supreme Court then stated (Para 28) that the Labor Appellate Tribunal had discussed the evidence led before it "in meticulous detail" and had applied a standard of proof which, having regard to the observations made by it earlier, was strictly justifiable. Their Lordships, however, dismissed the appeal on the ground that there was such a lacuna in the evidence led before the Tribunal "that it was impossible to come to the conclusion that even if the evidence was taken at its face value a prima facie case was made out by the appellant." It is, therefore, clear that, in arriving at its conclusion as to whether a prima facie case in regard to a particular point has been made out a Court of law is not bound to weigh the evidence or to judge the credibility of the witnesses, but has only got to see whether that case could be said to be established if the evidence led by the party concerned on the point were believed, taking it at its "face value". The learned Advocate-General relied on a passage from Halsbury, 3rd Edition volume 15, paragraph 506, in support of his contention that the meaning of the expression "prima facie case" must necessarily be different according to the context and in the stage of the proceedings in which the question arises. What is stated in the passage from Halsbury on which the learned Advocate-General has relied is that prima facie evidence is evidence which, if accepted by the Tribunal, establishes a fact in the absence of acceptable evidence to the contrary. I do not think the said passage lays down a principle which is in any manner different from the principle enunciated by the Supreme Court in Martin Burn's case AIR 1958 Supreme Court 79 to which I have just referred. The question before me at this stage, therefore, is not whether the evidence furnished by the Petitioner to show that an order for inspection should be made in the interests of justice should be believed, but is whether, if that evidence were believed it would be sufficient to satisfy me that, in the interests of justice, an order for inspection should be made. The whole fallacy underlying the argument of Mr. Mody on behalf of the 8th Respondent was that Mr. Mody wanted the Court to form an opinion with regard to the merits of the petitioner's claim in the petition itself, which is not what I am called upon to do under the law on the point as formulated by Shah, J. in Ram Sewak Yadav's case, AIR 1964 Supreme Court 1249 (Para 7), or by any of the other decisions of the Supreme Court which were cited before me. In fact, in the courses of his arguments which lasted several hours, Mr. Mody for the 8th Respondent embarked on a meticulous weighing and examination of the evidence, which is the very thing which the Supreme Court itself disapproved of (para 28) in regard to what the Labour Appellate Tribunal did in Martin Burn's case, AIR 1958 Supreme Court 79 cited above.

15. In the light of these principles, I will now proceed to consider whether, having regard to the

facts of the present case, the petition contains an adequate statement of material facts, and whether the petitioner has satisfied me prima facie that, in the interests of justice, inspection of the ballot papers should be ordered, and, if so, to what extent it should be ordered. An analysis of the petition discloses the following grounds for challenging the election of the 8th Respondent :-

- (1) Narrow margin of 1364 votes and large number of rejected votes, namely, 14,077; (Clause (a) of paras 14 and 4). Grave probability of human error (Clause (f) of para 14 read with para 15).
- (2) Mark on shaded area in "numerous" ballot papers (Clause (b) of para 14). Smudge on other area in the case of "nearly 5,000" ballot papers (Clause (b) of para 14 read with Clause (b) of para 4).
- (3) A number of valid votes of Madhu Mehta (Respondent No. 3) were wrongly included in the bundle of Shantilal Shah (Respondent No. 8). Particularly in Malad and Borivli areas; (Clause (c) of para 14 and para 11).
- (4) Non-compliance with the Act and Rules (Clause (d) of para 14). Counting done by counting agents instead of by counting assistants, particularly at Borivli, Malad and Andheri, contrary to Section 64 and Rules 53 and 56 (Clause (e) of para 14 and paras 8, 9 and 10).
- (5) Removal of ballot boxes from the Polling Stations at various place without proper police escort and without intimation to the polling agents (para 12).
- (6) Improper sealing and broken seals on some of the ballot boxes (para 12).

16. I will now proceed to deal with each of the various grounds set out above on which the present petition is based. I may state straightway that ground No. 1 does not arise on an application for inspection, though Ground No. 1 (1) may have to be incidentally considered in another context. As far as Grounds Nos. (5) and (6) are concerned, no amount of inspection can now reveal whether those grounds are true or false, and it cannot, therefore, be said that the interests of justice require that inspection should be ordered on those grounds.

17. As far as Ground No. (2) mentioned above is concerned, the same relates to the improper rejection of ballot papers which, according to the petitioner, should have been accepted. It was sought to be contended by Mr. Mody on behalf of the 8th Respondent that even if the serial numbers of the ballot papers are not required to be stated, the petitioner should in any event, have stated, the precise number of ballot papers to which the allegations relates, and the particular Counting Centres at which such ballot papers were wrongfully rejected. As already stated by me above, there is no presumption in law that rejected ballot papers were validly rejected. Whilst there is some force in the argument of Mr. Mody in regard to the petitioner's allegation regarding ballot papers on which a smudge of the mark shaded area in so far as even the approximate number of such ballot papers is not stated, in my opinion, it is sufficient for the petitioner to have stated, as he has done, in regard to the ballot papers on which a smudge of the mark occurred on other parts of the ballot papers, that the same happened in the case of "nearly 5000" ballot papers.

In my opinion, it is neither necessary, nor would it serve any useful purpose to state the precise number of ballot papers in which smudging occurred. The rejected votes in respect of all the candidates are kept together in one bundle at each polling station, and under the circumstances I do not see what further particulars could have been given by the petitioner in regard to the alleged smudging of the mark on other parts of the ballot paper during the process of folding. The affidavits of the Counting Agents of the petitioner filed in support of this application bear out the same. The only thing urged by Mr. Mody against those affidavits is that they are stereotyped in form and I should not, therefore, give any credence to them. The form of the affidavits is a matter of drafting by the legal advisers of the party concerned, and I do not think I would be justified in discarding them on that ground alone. Moreover, as already stated by me, I am not called upon to weigh the evidence at this stage. Having regard to these affidavits, and having regard to the fact that this complaint of the petitioner relates to nearly 5,000 out of 14,077 rejected votes, when the margin between the 8th Respondent and the petitioner was only 1,364 votes. I am, prima facie, satisfied that the interests of justice require that inspection should be granted to the petitioner of the entire number of ballot papers rejected at all the Counting Centres.

18. As far as Ground No. (3) mentioned above is concerned, I do not see how the petitioner could give particulars which could be said to be more adequate than those given by him in the relevant paragraphs of the petition mentioned above. In regard to this ground, however the petitioner has not satisfied me, even prima facie, that the interests of justice require that inspection should be granted to him. The petitioner himself has no personal knowledge in regard to the facts relating to this ground, and he must necessarily have made the statements in the petition on the information received by him from one or the other of his Counting Agents. It is stated in the petition that a number of votes of Madhu Mehta (Respondent No. 3) were wrongfully included in the bundle of Shantilal Shah (Respondent No. 8), particularly in Malad and Borivli area, but it is significant that neither K. D. Mehta, who was one of the Counting Agents posted by the petitioner at Malad, nor H. S. Bhatta, who was one of the Counting Agents posted by the petitioner at Borivli, has in his affidavit stated that any such thing occurred at those Centres, and there is no affidavit filed by the petitioner in respect of any of his other Counting Agents on which he can rely in support of the same. I have, therefore, come to the conclusion that the petitioner has failed to make out a prima facie case in respect of his claim for inspection on Ground No. (3) with which I am now dealing and I decline to make an order for inspection in favour of the petitioner in regard to the same.

19. As far as Ground No. (4) is concerned, the petitioner has specified the particular Centres where the counting is alleged to have been done by the Counting Agents of the various candidates instead of by the Counting Assistants of the Returning Officer, as required by the Act and the Rules. I fail to see what other particulars could possibly have been given in respect of this ground alleged by the petitioner. Moreover, the petitioner has satisfied me prima facie that inspection should be granted in the interests of justice in regard to this ground urged by the petitioner. K. D. Mehta, who was, as already stated by me, one of the Counting Agents posted by

the petitioner at Malad, has, in paragraph 4 of his affidavit dated 12th July 1967, stated in clear terms that as the counting progressed the ballot papers were handled both by the Counting Assistants and by the Counting Agents and he has proceeded to state that, "with so many persons doing counting", it was difficult to observe the process of counting that was going on. This statement, read as a whole, leaves no room for doubt in my mind that what K. D. Mehta has stated in the said affidavit is that the Counting Assistants as well as the Counting Agents were not only handling the ballot papers but were also counting the same. H. S. Bhatta who as already stated by me, was one of the Counting Agents posted by the petitioner for the Borivli area, has, in paragraph 3 of his affidavit dated 12th July 1967, stated that the sorting out of the ballot papers was done both by the counting agents as well as by the Counting Assistants, and that there was no restrictions whatsoever on the Counting Agents touching the ballot papers. He has proceeded to state in the said affidavit that the said process involved a continuous sorting out of ballot papers by a large number of Counting Agents and Counting Assistants at each table, with the result that it was difficult to keep a watch on all of them. It is true that Bhatt has, in the said affidavit, not stated that the counting itself was done by the counting Agents also, but the process of sorting and counting is the continuous process, and, for the purpose of taking a prima facie view of the matter at this stage, in my opinion, the affidavit of Bhatt, taken along with the affidavit of K. D. Mehta, is sufficient to enable me to come to the conclusion that, in the interests of justice, inspection of all the accepted ballot papers of all the respondents at two of the three centres specified by the petitioner viz., Borivli and Malad, should be ordered by me. There is no material placed before me which could satisfy me, even prima facie that such thing occurred at the Andheri Centre and I do not, therefore, propose to make any order with regard to that Centre.

20. I, therefore, order that the District Election Officer, in whose custody all the Ballot papers are at present should give inspection to the petitioner and his legal advisers (a) of all bundles of ballot papers rejected at all the Counting Centres in the constituency, and (b) of all ballot papers of all the respondents accepted at the Borivli and Malad Centres, and permit them to make copies or extracts or take notes of the same. Respondent No. 8 and his legal advisers will also be at liberty to take inspection, make copies and extracts and take notes of those ballot papers, after inspection in accordance with my order is completed. I direct the District Election Officer to reseal and produce in Court all the ballot papers, of which inspection has been ordered by me. As the District Election Officer is not a party to the present petition, I am passing these orders, not under the provisions of Order 11, Rule 15, of the Code of Civil Procedure read with Section 87 of the Act, but pursuant to the provisions of Rule 93 of the Conduct of Election Rules, 1961. The learned Advocate General had, at the very outset of his argument, stated to the Court that any order passed by the Court under the said Rule 93 would be respected by the District Election Officer. It may be mentioned that, relying on an observation made by Shah, J. in paragraph 6 of the Judgment in Ram Sewak Yadav's case, AIR 1964 Supreme Court 1249 cited above, the learned Advocate-General has however contended that the Returning Officer should not have been joined as a party to the present petition. In answer to that contention, Mr. Nariman has relied on the decision of the Calcutta High Court in

the case of *Dwijendra Lal v. Harakrishnan*¹², in which it has been laid down (at p. 927 of Cal WN) : (at P. 224 of AIR) that, in an appropriate case where allegations of bad faith, misconduct and impropriety, and not mere illegality, are made in an election petition against a Returning Officer, the Returning Officer is a proper party, though he may not be a necessary party to the proceedings. Mr. Nariman has contended that, though there is no allegation of dishonesty made by the petitioner against the Returning Officer in the present case, there are allegations of improprieties on the part of the Returning Officer which petitioner has made in this petition, particularly in regard to his rejection of the petitioner's application for a recount as frivolous and unreasonable, and the Returning Officer is, therefore, a proper party to this petition. It was further pointed out by Mr. Nariman that not only has the Returning Officer (Respondent No. 9) not taken up any plea in his written statement to the effect that he should not have been joined, but he has filed a contentious written statement, and even the present application for inspection was actively and strongly resisted by the learned Advocate-General on his behalf, I do not think that by his observations in paragraph 6 of Ram Sewak Yadav's case, AIR 1964 Supreme Court 1249 Shah, J. intended to lay down that the Returning Officer can in no event be even a proper party to an election petition. The observation, as such is only a passing observation, and I do not think that it should be construed in the manner stated by the learned Advocate-General. Having regard to the averments made in the petition, in my opinion, the Returning Officer (Respondent No. 9), though not a necessary party to the present petition, was a proper party, and in any event, it is not open to him to raise this point after having filed a contentious written statement in reply to this petition.

21. The 8th respondent must pay the petitioner's costs of this application fixed at Rs. 300.

22. On the application of Mr. Mody, I direct that the order for inspection made by me should not be carried out till 20th September 1967 in order to enable Mr. Mody's client to consider his position.

Order accordingly.

¹²(66 Cal WN 917)