MADHYA PRADESH HIGH COURT

Inayatullah Khan

Vs

Diwanchand Mahajan

First Appeal No. 130 of 1957

(M. Hidayatullah, C.J and V.R. Sen, J.)

26.4.1958 07.12.1957. 26.04.1958

JUDGMENT

M. Hidayatullah, C.J.

1. This appeal arises out of an election in the Sehore double-member constituency to the Legislative Assembly of this State. The election took place on 25th February, 1957 and the results were declared on 1st March, 1957. Originally, six persons had offered to contest the two seats, but one of them (Amarchand) withdrew, leaving five in the field. Of these Umraosingh and Mannulal contested the reserved seat, while the remaining three, Inayatullah, Mahajan, and Nandlal contested the general seat. As a result of the poll declared on 1st March, the appellant Inayatullah was declared elected to the general seat while Umraosingh was also declared elected to the reserved seat. The result of the poll was as follows :

Umraosingh 23,757 Votes (Reserved)

Inapatullah 20,696 " (General)

C. Mahajan 20,616 " (General)

Mannulal 16,599 " (Reserved)

Nandlal 8,997 " (General))

2. The election was questioned by Diwanchand Mahajan alone. One of the other candidates Mannulal in his reply raised a ground that at Sawada polling station some of the voting papers which were not inserted but were found lying scattered on top of the ballot boxes were put inside them by the presiding officer and were counted. We mention this point at this stage because we shall have to consider it in the sequel.

3. The petition of Mahajan is a long document and runs into several sheets. It alleged inter alia the facts on which the election was challenged, and some of these grounds have been upheld by the Tribunal. When the appeal of Inayatullah was admitted, notices were caused to be issued to

Mahajan, Nandlal and Amarchand. The appeal did not make Umraosingh and Mannulal parties. Mahajan in his turn filed a cross-objection challenging the election on grounds, which were decided against him by the Tribunal, and incidentally he made an application for joining Umraosingh and Mannulal as parties for the purposes of his cross-objection only.

We heard in the beginning two preliminary objections raised by the rival parties, Mahajan contending that the appeal as filed without joining Umraosingh and Mannulal was defective and incompetent, and Inayatullah and Umraosingh contending that the cross-objection was not tenable under the Representation of the People Act. We propose to decide these objections at this stage.

4. The Representation of the People Act has been described as a Code by itself. Their Lordships of the Supreme Court stated in *Jagan Nath v. Jaswant Singh*[1], that the election law is a special law, that it is not a branch of common law, and that the implications of the common law cannot be brought to bear upon matters arising under it. They stated that the trial of an election petition was neither an action at law nor a suit in equity and was unknown to the common law. According to their Lordships, the resolution of all election disputes must be limited to the extent they are provided for in the Representation of the People Act. Basing his arguments upon this, Shri Dabir. who appeared for Inayatullah, contended that the cross-objection was untenable. Reference was made to section 82 of the Representation of the People Act, and it was contended that for the purpose of the appeal the same parties had to be before this Court as were joined before the Election Tribunal.

5. We are quite clear, and indeed the law is well settled, that an election dispute can only be conducted and tried in accordance with the provisions of the Representation of the People Act and the Rules made thereunder. There is no general power which the Courts can exercise in these matters and the provisions of that law have to be strictly followed. If one were to go by the express provision of the law with regard to appeals and cross-objections in the Act, one would have to say that though an appeal has been provided for there is no express mention that a cross-objection lies. But there is provision in the Representation of the People Act which clearly shows that in the disposal of appeals all the powers, jurisdiction, etc., which the Court exercises in disposing of an original civil appeal are also available to the appellate tribunal. We refer to the provisions of section 116-A, which reads as follows :

> "(1) An appeal shall lie from every order made by a Tribunal under section 98 or section 99 to the High-Court of the State in which the Tribunal is situated.
>
> (2) The High Court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority, and follow the same procedure, with respect to an appeal under this Chapter as if the appeal were an appeal from an original decree passed by a civil court situated within the local limit's of its civil appellate jurisdiction :

Proviso omitted

(Rest of the section omitted as not relevant).

6. The contention of the appellant was that a cross-objection is not mentioned and being a

creature of statute, it cannot be entertained unless there was specific authority to file one. In support of this contention the learned counsel relied upon *Zahid Hussain v. Khairati Lal*[2], *Khazanchi Shah v. Niaz Ali*[3], and *Venkateswarlu v. Ramamma*[4], On the other side it was contended that inasmuch as the High Court in dealing with the appeal is required to exercise the same powers, jurisdiction and authority and to follow the same procedure as is enjoined by the Code of Civil Procedure for a civil appeal, cross-objections can be filed because the provisions of the 41st Order are brought in.

7. The words of the second Sub-Section of 116A are extremely wide. They cover not only power, jurisdiction, and authority exercisable in appeal, which would refer to all the matters contained in O. 41 empowering the Court "to pass certain kinds of orders, but they also enjoin the same procedure with regard to an appeal as is enjoined in the Code of Civil Procedure. In our opinion, the words of this Sub-Section are wide and general enough to include the filing of a cross-objection, which is to be found in the procedural part dealing with the disposal of appeals under the Code of Civil Procedure. A direct authority for that proposition is available in *Jaikrishna v. Sawatram*[5], where Pollock, J. reached this conclusion in relation to the Provincial Insolvency Act, and referred to a Full Bench decision of the Madras High Court reported in *Alagappa Chettiar v. Chockalingam Chetty*[6], in his support. Shri Dabir, who appeared for the-appellant referred to AIR 1950 Madras 379 (supra) and stated that ILR 41 Mad 904 (supra) was impliedly not followed.

8. We have, however, other cases which support the view taken by the learned Single Judge of this Court in Jaikrishna's case AIR 1940 Nagpur 292 : See *Chandiprasad v. Jugul Kishore*[7], and a decision of the Calcutta High Court reported in *Ramasray Singh v. Bibhisan Sinha*[8],

9. There is thus authority for the proposition that a cross-objection may be filed where an appeal lies and has to be disposed of in accordance with the Code of Civil Procedure, even though there may be no express provision to confer the right of filing a cross-objection. This, in our opinion, follows readily from the observations of their Lordships of the Privy Council in *Secretary of State v. Chellikani Rama Rao*[9], where it was pointed out that when proceedings reach a Court of Civil judicature all appeals from that Court, even though not expressly mentioned, are available. This shows that when a Court of civil judicature exercises power in respect of some special law its jurisdiction is enlarged qua a Court of civil judicature. This is all the more so where the Code of Civil Procedure has expressly been made applicable and it has been stated that in disposing of an election appeal not only is the Court to exercise the same power, jurisdiction, and authority which the High Court enjoys under the Code of Civil Procedure, but it has also to follow the same procedure as is applicable to a civil appeal under the Code.

10. In our opinion, the better view therefore is the one which has been consistently followed in this Court. Indeed the decision in AIR 1954 Allahabad 419 (supra), on which strong reliance was placed, does not discuss the question but mentions the result only in a few lines. The same is the case with the other authorities on which the appellant relied to support his preliminary objection that a cross-objection does not lie.

11. Reference was also made to a ruling of their Lordships of the Supreme Court reported in *Vashist Narain v. Dev Chandra*[10], where the provisions of Order 41, Rule 22 of the Code of Civil Procedure were invoked in an appeal by special leave under article 136 of the Constitution. Their

Lordships observed that the analogy of the 22nd rule of O. 41 did not apply to such a case and that no cross-objection was entertainable under Article 136. That case is easily distinguishable. The appeal mentioned in Article 136 is not available as of right but is in the discretion of the Supreme Court. The appeal is by special leave, and if any other party is aggrieved by an order of an inferior tribunal it has to seek special leave from their Lordships of the Supreme Court in its turn. It is thus that a cross-objection without leave cannot be filed before their Lordships, and their Lordships' decision must therefore be limited as interpreting only article 136 of the Constitution.

12. Our conclusion, therefore, is that inasmuch as this Court is enjoined to exercise the same powers, jurisdiction and authority and to follow the same procedure as it would have exercised or followed in respect of a civil appeal under the Code of Civil Procedure, the right to file a cross-objection against the decision is available to a respondent, who otherwise would have felt satisfied with the result of the case and would not have moved for an appeal on his own. In view of the rulings to which we have referred and which we have followed, we are quite clear that the cross-objection is tenable.

13. Another objection was raised to the tenability of the cross-objection, because no security had been furnished as is required for an appeal. At the hearing we indicated that the making of a security deposit for the purposes of costs of the opposite party was a condition for the appeal and must be taken to be a condition for the cross-objection. This was more so in view of the fact that the cross-objector did not bring only the parties already before the Court but attempted to join the remaining candidates for whose costs no deposit had been made by the appellant. As a result of our indicating this view, the cross-objector Mahajan deposited Rs. 500 as security for costs of the cross-objection though it is delayed. It was a moot question whether the security deposit had to be made to support a cross-objection, and at best opinions could be conflicting. It was stated by Mahajan before us that he was advised that no security deposit was necessary because the provisions regarding security deposit were not applicable in terms to a cross-objection, and that accepting the advice of his counsel he refrained from making the security deposit, but that he made it as expeditiously as possible as soon as the opinion of the Court was available to him. We treat his omission to make the security deposit as bona fide, and under the provisions of Order 41 R. 22 Code of Civil Procedure we enlarge the time for its acceptance.

14. The next question that arose was whether Umraosingh and Mannulal could be joined only for the purpose of the cross-objection. Mahajan was very careful not to ask for a joinder of these two persons without reserve because if he had done so it would have displaced his entire argument with regard to the tenability of the appeal for non-joinder of parties. We ordered notices to go to these two persons, and they appeared before us through counsel. The question whether they should be joined for the purposes of the cross-objection only, loses all its force because at the hearing Shri Mahajan stated that he did not claim any relief against Umraosingh and Mannulal and did not question Umraosingh's election for the reserved seat. As a result, we discharge Umraosingh and Mannulal from this contest, and we hold that they are no longer interested or necessary parties either for the purposes of the cross-objection or the appeal. Umraosingh stated that he did not press for his costs nor was any request for costs made by Mannulal, and therefore we order that no costs shall be payable to them.

15. This brings us to the contention that the appeal as filed is incompetent. This, in our opinion,

gets disposed of because of the action of Mahajan in agreeing to discharge Umraosingh and Mannulal and in not bringing the former's election into controversy. If the election of Umraosingh is not in controversy and if the cross-objection is to be heard only against Inayatullah, the returned candidate for the general seat, then, the same reasoning should apply to the appeal and the parties therein. We hold that just as Umraosingh and Mannulal are not necessary parties for the purposes of the cross-objection they are also not necessary parties for the purposes of the appeal, and we therefore overrule the objection of the cross-objector that the appeal is incompetent for non-joinder 'of necessary parties.

16. Now, we come to the controversy in the case, and the judgment which we are delivering shall dispose of both the appeal and the cross-objection on merits. The case of the appellant was that the election was set aside mainly because of certain irregularities and defects in the conduct of the election and the counting which followed and that the result of the election was materially affected. To begin with, the first question which was raised before the Tribunal was whether one of the candidates, viz. Nandlal, could contest the election. This subject has been discussed at great length by the learned Member of the Tribunal and in his opinion Nandlal was incompetent inasmuch as he was disqualified under section 7(d) of the Act, being a contractor for the supply of goods to, or for the execution of words for, the appropriate Government, viz. the Government of Madhya Pradesh. It appears that when Nandlal filed his nomination paper this objection was taken by Mahajan, who contended that Nandlal was disqualified under Section 7(d) of the Act and could not stand for the election. This objection was overruled by the Returning Officer (Sardar Amarjit Singh), and he was allowed to contest the election. The result of the poll has been indicated by us in an earlier portion of our judgment, and the questions that arise are (a) whether Nandlal was disqualified and (b) whether as a result of his getting 8,997 votes the result of the election has been materially affected.

17. Shri Chitale contended that the finding of the Tribunal that Nandlal was disqualified was not correct. His contention was based on the argument that Nandlal was not a contractor who held any contract with the "appropriate Government", viz. the Government of Madhya Pradesh. Shri Chitale contended that the contracts, if any, which Nandlal had executed for the Government were contracts with the Bhopal State and that they became contracts of the Madhya Pradesh Government only by a fiction under section 101 of the States Reorganisation Act, 1956. According to him the fiction contained in Section 101 of the Act could not be carried further than the purpose for which it was enacted, and he referred also to *Mahadeosa v. Deputy Commissioner, Amravati*[11], in support of his contention. The facts of the case are that there were five contracts which Nandlal had undertaken to execute for the Bhopal State. They are all mentioned together in Exhs. P-53 and 53-A. These contracts were to be completed as shown in tabular form below :

Name of Building To be completed on

1. Civil Hospital 23-3-56

2. Saharyar College 18-3-56

3. Basic Training College. 18-3-56

4. Library 28-2-56

5. A. B. ?S quarters 27-2-56

18. It appears that payment for some of these was not made before the nomination papers were filed, and the contention was that Nandlal continued to be a contractor because the contract was still subsisting, and had not been discharged by performance on both sides. In addition to these five contracts there was one other matter which Nandlal had executed for the State Government, and that was the fixing of four hand-pumps at the instance of the Deputy Inspector-General of Police and the District Development Officer, for which payment was still to be made. It appears that these pumps were fitted on or about 1 November, 1956, mainly to provide water for the police force which was to be stationed in the neighbourhood. Shri Chitale contended that in so far as the five contracts were concerned, even if they were contracts, they were with the erstwhile Bhopal State and not with the 'appropriate Government', as contemplated by the Representation of the People Act. He argued that the fiction incorporated in section 101 of the States Reorganisation Act could not be carried into the provisions of the Representation of the People Act, and therefore it could not be said that Nandlal was a contractor of the State of Madhya Pradesh, to whose legislatures he was a candidate.

19. The answer to this is indeed a very short one, though it has been elaborated in several pages by the learned Tribunal. It is well known that statutes can be engrafted upon the contracts of parties, and when so engrafted they change the nature and performance of the contract. Even in the present case the contract was between the Bhopal State and Nandlal. That contract was statutorily novated to substitute for the Bhopal State the State of Madhya Pradesh. When this novation came into being statutorily, it got engrafted upon the contract of the parties, and even though the fiction had worked itself out, for all intents and purposes, in view of the provisions of the States Reorganisation Act, the State of Madhya Pradesh became substituted for the State of Bhopal as one of the contracting parties. With this statutory novation, performance, could be demanded only by the State of Madhya Pradesh, and Nandlal had to look to the State of Madhya Pradesh for payment. The statutory fiction having worked its end the Representation of the People Act took on the result It is not that the provisions of section 101 and the statutory fiction therein have to be incorporated into the Representation of the People Act before they become effective. They become effective once they have worked their way, and having become effective the result is available for all dealings between the State of Madhya Pradesh and Nandlal. In other words, the statutory fiction which was created produced a statutory novation, and that novation engrafted itself upon the contract of the parties and made it a contract between Nandlal and the State of Madhya Pradesh.

20. In view of our conclusion on this matter there is no escape but to hold that Nandlal held a contract from the appropriate Government. It was contended that he did not hold a contract of the exact description given in Section 7(d) of the Act. According to him, all these contracts were no more than ordinary sales of goods in which the goods are delivered and all that remains is the payment of price. He contended that Nandlal could not be described as holding a contract because he only sold goods. This, in our opinion, is not quite a correct picture of Nandlal's activities. Nandlal was a partner in a firm called the Bharat Trading Company, which had submitted tenders for execution of works, including the supply of goods for the Bhopall State. He was thus a contractor, who undertook not only to supply goods but to complete certain works for and on behalf of the State.

21. It would appear from the correspondence - to which detailed reference need not be made - that he was required in doing so to supply fans and fix them and also to supply wiring for the electrical installations of many of the buildings. There is also the further fact that in the supply of the pumps it was not a casual sale transaction, as Shri Chitale described it to be, but entailed upon Nandlal the duty of fixing pumps, with their accessories. A reference to the bills will show that the pumps were affixed to the earth in brick and cement, and further that links had to be established by pipe connexion. This shows execution of work by Nandlal. No doubt, all these contracts apparently were completed before nomination papers were filed, except in one instance in which he was described as doing alterations and modifications even after he had filed his nomination paper. If Nandlal held a contract - as we hold he did - then his continuing to do work in the shape of rectification of mistakes committed by him would show that he was still executing works on behalf of the State Government and thus holding a contract in reality.

22. But the matter does not end there. The evidence in the case clearly shows that the bills which Nandlal had submitted for the supply of pumps and the execution of other works had remained unpaid till after the election was over. We need not refer to these bills, which have been referred to by the Election- Tribunal. It thus does appear that Nandlal had to execute some work, though in the shape of repairs to his work already executed, after his nomination and had also to await payment of his bills while he was offering himself as a candidate. The question is whether the contract must be deemed to have come to an end so as to save him from the operation of Section 7(d) when he had completed his contract, or the contract would continue to disbar him, for the purposes of the said section, till payment to him was made.

23. The matter is not 'res integra' because in two cases their Lordships of the Supreme Court considered an identical point. Reference in this connexion may be made to the decision of their Lordships reported in *Chatturbhuj Vithaldas v. Moreshwar Parashram*[12], where their Lordships made the following observation :

> "There can be no doubt that these various transactions were contracts and there can equally be no doubt that they were contracts for the supply of goods. Whether they were contracts for the supply of goods to the Government is a matter which we shall deal with presently. But we have no doubt that they were contracts for the supply of goods.

The question then is, does a contract for the supply of goods terminate when the goods are supplied or does it continue in being till payment is made and the contract is fully discharged by performance on both sides ? We are of opinion that it continues in being till it is fully discharged by performance on both sides. It was contended, on the strength of certain observations in some English cases, that the moment a contract is fully executed on one side and all that remains is to receive payment from the other, then the contract terminates and a new relationship of debtor and creditor takes its place. With the utmost respect we are unable to agree. There is always a possibility of the liability being disputed before actual payment is made and the vendor may have to bring an action to establish his claim to payment. The existence of debt depends on the contract and cannot be established without showing that payment was a term of the contract. It is true the contractor might abandon the contract and sue on "quantum meruit' but if the other side contested and relied on the terms of the contract, the decision would have to rest on that basis. In any case, as we are not bound by the "dicta" and authority of those cases, even assuming they go that far, we prefer to hold that a contract continues in being till it is fully discharged by both

sides" see the observations of Gibson, J. on - *'O'Carroll v. Hastings*[13]. To use the language of 'O'Brien L. C.J. in that case at p. 599, these contracts have not been

> "merged, abandoned, rescinded, extinguished or satisfied; and if any demur was made as to payment before payment was actually made, he could have sued upon the contract specially; or if he sued for work done at the request of the defendants the contract would have been a part of his. necessary proofs.'"

24. In view of these observations, it is clear that Nandlal to whom bills were owing held a contract within the meaning of Section 7(d) of the Representation of the People Act. We find from the record that in making his objection, Mahajan had. drawn the attention of the Returning Officer to this case. There is on record his application which he gave in writing (Exh. 118) in which he pointedly drew attention to this ruling. Whether the Returning Officer did not read this ruling or having read it did not understand it, the conclusion is inevitable that he did not apply it. If he had applied this ruling, he would have found that Nandlal held a contract and we are surprised to find that the Returning Officer held on the strength of two certificates (Exhs. Z-24 and Z-25) that Nandlal was not a contractor. He also obtained from Nandlal an affidavit that no amount was due to him from Government and relied upon it when he himself had written a few days earlier pressing very strongly that Nandlal's bills should be paid because he had authorized those works and the Government stood committed, to pay those bills. In our opinion, this conduct of the Returning Officer was not quite correct and he should have looked into the Supreme Court ruling, to find out the exact status of Nandlal and decided it in the light of the Supreme Court decision. He should have also considered the affidavits, filed on behalf of Mahajan. Not having done that, he allowed Nandlal, who was disqualified person, to contest the election with the result that this election petition had to be filed and the question had to be decided again.

25. We are, therefore, quite clear that Nandlal was disqualified under section 7(d) of the Representation of the People Act and could not stand for election. That being so, the question that arises is what happens to the election as a result. It was contended by Shri Trivedi that the margin of votes was small and that the result of the election must be taken to have been materially affected because Nandlal got 8000 odd votes, which in the event of his not contesting would have gone to Mahajan. Evidence was read before us by both sides to show how the votes which went to Nandlal would have been divided and both sides claimed that if Nandlal had not contested the election, the votes would have gone to them.

26. The evidence on this part of the case is exceedingly general and apart from the statement by the witnesses who came forward as to their opinion, there is nothing definite about it. The learned counsel for the respondent Mahajan referred us to the evidence of Narendrakumar (P.W. 12) (son of Paramlal), who belongs to the Arya Samaj and stated that the Ganj was mainly peopled by Hindus and that Muslims were only 1/16 of the number and those votes would have gone to Mahajan making up the necessary difference in the votes. He also referred to the evidence of eight ether witnesses viz., P.Ws. 14, 16, 25, 26, 28, 33, 36 and 39. He also referred us to certain observations in the evidence of two of the witnesses for the respondent, viz., Nandlal and his brother Udaisingh (P.W. 24), to show that Nandlal was an Arya Samajist and that Arya Samajists would not have voted for a Muslim candidate if they had not to give their votes for Nandlal.

27. All this evidence which has been brought to our notice is not decisive of the matter in view of the test laid down by their Lordships of the Supreme Court in another case. We refer to AIR 1954 Supreme Court 513. There the Supreme Court had to consider au identical question. One of the candidate stood disqualified under the Representation of the People Act and the result of the poll is to be found at page 514 of their Lordships' judgment. In dealing with the matter, their Lordships referred to Section 100(1)(c) of the Representation of the People Act and observed as follows :

> "Before an election can be declared to be wholly void under section 100(1)(c), the tribunal must find that 'the result of the election has been materially affected'. These words have been the subject of much controversy before the Election Tribunals and it is agreed that the opinion expressed have not always been uniform or consistent.

These words seem to us to indicate that the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that the wasted votes would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate."

> "Their Lordships then worked out the onus and decided that the onus lay upon a person who contended that the result of the election was materially affected. In discharging this burden, their Lordships said, a general probability was not all that was required but some actuality had to be established. Their Lordships then observed as follows :
>
> ",.,..... we are not prepared to hold that the mere fact that the wasted votes are greater than the margin of votes between the returned candidate securing the next highest number of votes must lead to the necessary inference that the result of the election has been materially affected. That is a matter which has to be proved and the onus of proving it lies upon the petitioner. It will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate."

28. From these observations it is therefore clear that general evidence of a likelihood, such as has been tendered in this case, is not decisive of the matter under section 100 of the Representation of the People Act. What the party who wishes to get an election declared void has to establish is that the result of the poll had in fact been materially affected by the improper acceptance of a nomination paper. To do this, it has to be demonstrated that the votes would have been divided in such a way that the returned candidate would have been unsuccessful.

29. We consider that the matter is not 'res Integra', and our view of the matter is irrelevant. "Their Lordships also noted with regret the difficulty of establishing such a result by concrete evidence and stated that the matter could only be rectified by the Legislature and not by the Courts. According to their Lordships, the onus which was placed upon the contending party was insuperable and incapable of being discharged. Indeed, the Legislature in laying that burden seems to ask the contestant to do the impossible. We do not consider that the matter is open to us to express a different view and applying the ruling to the facts of the case, which are analogous to those in the case which their Lordships decided, we must hold that the evidence tendered is not sufficient to discharge the onus which was upon Mahajan. Indeed, Shri Trivedi, though he argued

against this conclusion, was unable to give an effective reply more than by pointing out the words of the section and contending that what the law required was that there should be a firm basis for the opinion that the result of the poll had been 'materially' affected. But he recognized frankly the futility of arguing against the ruling and in the end we felt that he was very much like Sisyphus of the Greek legend and that he had abandoned the issue. The result, therefore, is that by allowing Nandlal to contest the election, the result of the poll must be said on evidence not to have been materially affected.

30. We cannot help expressing with regret that the law is as it is. It is quite obvious that the law should not contemplate the doing of an impossible task by a candidate who is contesting the election of a returned candidate on such grounds. The law should provide for a burden of proof which would be capable of being humanly discharged and not a burden which no person can ever hope to discharge. We hope that the Legislature will intervene and deal with this question as their Lordships of the Supreme Court have already expressed.

31. This brings us to three other matters on which the election of the returned candidate Inayatullah was declared void. These can be summarized under the following three heads :

(1) Result of the count at Ichawar-A (Polling Station No. 60).

(2) Count of the voting papers not stamped with distinguishing marks at Kannod (Polling Station No. 27) and

(3) Count of postal ballots, 26 in number, issued and received contrary to rules.

32. We shall deal with these matters 'seriatim'. With regard to the poll at Ichhawar-A, the contention of the election petitioner was that there was a manifest over-writing of figure 284 in place of 103, with the consequent change of total in Exh. 116(11). This is form No. 22 and represents the result of the count at each polling station. The form, as it stands, shows that five polling stations are entered therein and the votes received by each of the candidates are shown in one column and alongside are shown votes received by him but rejected by the Returning Officer. In parallel columns the result of the poll from each polling station is entered under the name of each of the candidates. The form includes five such polling stations and at the bottom there is a total made of all the votes and at the right hand side there is a running total of all the votes taken together and the total of the rejected votes is also indicated. There is another entry with the names of the contesting candidates on top and underneath are entered votes which they have received as a result of the count of all the five stations. The corrections in this form are quite patent. They have been made in the column of Inayatullah, where quite apparently, the figure 103 which was entered first has been scored out and the figure 284 is written. As a consequence, in the first total of the votes polled by Inayatullah at all the five polling stations taken together, a correction had to be made. The total at first shown was 564 and it has been corrected to 745. The other totals in the other parts of the form have been left intact and show the result of the corrections. We checked this form very carefully. Indeed, we totalled it for ourselves and we came to the conclusion that all the other totals are quite accurate.

33. The question therefore is whether this correction amounts to a manipulation of the figures so as to give Inayatullah a majority of 181 votes over the other candidates. It may be pointed out that at Ichhawar-A Mannulal got 103 votes and that that figure is entered in the appropriate

column under his name. The contention of Shri Chitale for the appellant was that this was nothing more than a clerical error which was corrected at the time and no objection was taken to it. He pointed out that the figure of the votes of Mannulal was wrongly put into the column of Inayatullah. As a result of the discovery that this mistake had arisen, a correction was made though it was not initialld. The learned Member of the Tribunal took this fact into account and declared that the votes of Inayatullah had been increased by 181 at the expense of the other candidates. He stated that the form disclosed a blatant forgery which the Returning Officer did not even initial because he did not wish to take the responsibility for it. He looked into the form No. 16 which was the ballot paper account of the station, but he observed that there was no need to write 103 if the ballot paper account was such as it was. In the end, he held that in view of the fact that there was a very obvious correction in the number of votes obtained by Inayatullah, which correction was not even initialled, there was reason to think that Inayatullah had not received these 181 votes. In conclusion, he held that if those votes were excluded, regard being had to the margin by which he had won (80 votes), the balance would be against him.

34. We must say that the learned Tribunal has not gone about the matter in the correct manner. When an entry of this type is found, it becomes necessary for the Tribunal to examine whether the correction was 'bona fide' or was made with the ulterior motive of increasing the votes. For this purpose, the Tribunal ought to have looked into the other available documents and tested it from every angle. To hold that 103 should not at all have been written there and not to take into account the evidence of form No. 16 was, with all due respect, to put the cart before the horse or to argue in a circle or to beg the whole question. The tribunal committed no less than three fallacies. We shall examine the matter in a sequent way.

35. The first document which would be prepared according to the scheme of the election would be the ballot paper account. The ballot paper account (Exh. CC shows the ballot papers which had been sent to Ichhawar-A. That paper does not show any correction at all. Indeed, of the ballot paper accounts which have been filed, it is one of those documents which has been correctly entered. The argument of the learned counsel for Mahajan was that these papers remained in the custody of the Returning Officer and, therefore, they could easily be manipulated in the same way as form No. 22 was manipulated. This begs the whole question. There is nothing to show that this form No. 16, which shows the account of the ballot papers issued to Ichhawar-A, was ever manipulated. In fact a certified copy of it was given about the 4th or 5th March to Mahajan, 'Suspicion cannot take the place of proof and what we to examine is whether the entry in form No. 22 was correct. Form No. 16 gives us the clue to the total number of voles which had been cast at that polling station. That total, according to the ballot paper account, is 994 including papers of both the kinds. When we look into form No. 16, we find that 994 votes in fact had been accounted for and not a single vote was either extra or less. When we compare form No. 22 with the counting slip (Form R. H. 7) which was issued the same night, we find that votes of Inayatullah are entered as 284 and not 103. These documents, both coming prior to the filling in of the form No. 22, prove that the total number of votes have all been accounted for and that the votes cast in Inayatullah's box were 284 and not 103.

36. We had the voting papers brought before us and we counted them. We find that there are 28 bundles of 10 votes each. We may say here that we did not count all the bundles but we made a check count of three bundles. One of the bundles was not of 10 but had four voting papers. We were assured that there are 284 votes and we asked Mahajan to count those votes if he wanted.

His argument was that it was no use counting these papers now because all the bundles dealing with the ballot papers were not sealed and, at the time they were before us, the envelopes were not even closed properly. He contended that when these ballot papers remained in the custody of the Returning Officer, anything could have been clone. His contention, therefore, was that the entire record of the election and counting not having been sealed as required by the rules cannot be relied upon and the result must be taken to have been materially affected.

37. As to whether the rules were observed or not is another matter, and we shall deal with it in its own proper place. We shall at that time take into account all the lapses committed in the carrying on of the election and the counting and the declaration of the result together with anything else that has been brought to our notice, and we shall judge the result of the poll in the light of what our findings are. But, for the moment, we are dealing with the question whether 284 has wrongly been entered in place of 103 in form No. 22. On an examination of all the documents from which there can be a check of the entry, we find that 284 votes were entered in the counting slip, that all the voting papers which were issued at Ichhawar-A had been accounted for and that the corrections if made later would have affected five other totals. No correction was necessary in those totals. In view of this, we find it difficult to think that 284 represents a forgery and we must hold that it is a "bona fide' correction of a mistake. There are, of course, other irregularities in the keeping of the record and the manner of counting, to which we shall come later. But they have a different bearing upon the matter which we will work out. We also find that 284 votes were in fact obtained by Inayatullah as disclosed by the voting papers examined by us. We cannot omit to say hero that no other candidate has stated that the votes obtained by him have been wrongly entered. The charge is that 103 votes of Inayatullah have been increased to 284 votes. But there is no allegation that anybody has been robbed of any votes which have been cast in his favour. If this is worked out logically, then the total number of the votes found in the box would be smaller by 181 and it would be impossible to reconcile the ballot paper account as well as the totals given in form No. 22 which needed no correction, with the original entry of 103.

38. We may also point out that this count appears to be in the middle of the counting session and if such a blatant forgery had occurred, it would have been noted. Every one of the candidates had no less than five counting agents, which made at least 20 watchful counting agents, exclusive of the officer conducting the count. There is nothing on the record to show that immediately after the results were announced, this alleged forgery was detected. From what we have seen of the record, we feel that Mahajan and. the rival candidates would not have rest content with this correction and would have immediately raised protest in a very violent form. Mahajan sent numerous telegrams to the Election Commission about the vagaries of the Returning Officer but did not state this fact. It is not that he was not supplied with a copy of the forms. The forms in dispute at the moment were all in his hands as early as 5 March 1957 and be could, if he wanted, have raised this issue. When we come to the petition, we find that there is no specific plea on this part of the case, and it appears that after all the forms No. 22 were in, this was discovered and something was sought to be made of it. It is also to be noted that even at the time of claiming the recount there was no allegation of this type. It is common knowledge that counting agents and the candidates who are present at the counting hall keep jotting down the results as they are announced and it is in the evidence of Shri Sharma, Assistant Returning Officer (P.W. 55) that the result of each "round" was in fact loudly announced. With all these checks, it seems impossible to say that a correction of this type would have passed muster and would have remained unnoticed till the end of the case. Indeed, the Election Tribunal, if it had gone about the

business in a careful manner, would have noticed all these things. But the Election Tribunal did not attempt to verify the fact and characterised all the documents as forged for the reason that they remained in the custody of the Returning Officer and that the Returning Officer did not initial the correction.

39. We do not say that the action of the Returning Officer in following the rules of the election was always correct. We shall have occasion hereafter to show the breaches on his part of the rules which he should have observed, but we refrain from commenting on them in a general way at the moment.

40. We may point out that when the ballot papers were opened before us, we found a mistake in the counting of ballot papers of Inayatullah inasmuch as in one instance both the ballot papers A and B belonging to a single series were found to have been counted. We do not at this moment refer to this. We shall do so in the sequence. We find, however, that there is no material on which it can be said that 103 votes received by Inayatullah were increased to 284, thus giving him an advantage of 181. votes. We must hold on the facts as they have been placed and proved before us that it was a mistake which was corrected and no more.

41. This brings us to the next argument relating to the votes without the distinguishing marks counted at Kannod Polling Station (No. 27). It appears that at Kannod, ballot papers without the distinguishing marks were issued. The Tribunal found that such ballot papers were issued not only for Inayatullah but also for Mahajan. Of those Inayatullah received 107 and Mahajan 115.

42. Sub-Rule (2) of R. 27 lays down as follows :

> "Every ballot paper shall before issue to an elector be stamped with such distinguishing mark as the Election Commission may direct."

Rule 57(2) lays down :

> "The returning officer shall reject a ballot paper -
>
> * * * * *
>
> (e) If it does not bear any mark which it should have borne under the provisions of sub-rule (2) of Rule 27;
>
> Provided that where the Election Commission on being satisfied that any such defect as is mentioned in Clause (d) or Clause (e) has in respect of any of the ballot papers at a polling station, been caused by any mistake or failure on the part of the presiding officer or polling officer, has directed that the defect should be overlooked, a ballot paper shall not; be rejected merely on the ground of such defect."

43. It appears from these rules that a ballot paper not bearing a distinguishing mark has to be rejected unless it is validated by the Election Commission. The Election Commission had issued a communique (Exh. Z-II) to all the Returning Officers saying that counting of votes should not be held over if the distinguishing marks were not to be found on ballot papers but that the result

of the ballot together with all details should immediately be sent to the Election Commission for its approval. No doubt, the Election Commission did say that formal approval was necessary before effect could be given to the ballot papers not so marked. The intention of the Election Commission was that some reference in this behalf should be made to it. We looked into the record of the papers of this election and we find that no such communication was sent to the Election Commission and approval of such ballot papers of Kannod Polling Station was not obtained. In view of these facts, the proviso to Sub-Rule (2)(e) of R. 57 does not operate in regard to the polling at Kannod and those ballot papers must be rejected as is laid down therein.

44. The question arises whether the unmarked ballot papers of one or both the candidates should be rejected. We are at this moment considering only the finding of the Election Tribunal and we shall then deal with the question whether the voting papers suffering from the same defect cast in favor of Mahajan should be eliminated or not. We are quite satisfied that orders of the Election Commission according its formal approval of these unmarked ballot papers were not obtained. They could not be counted for Inayatullah. That would diminish his votes by 107 and this has been held by the Election Tribunal. We accept the findings of the Election Tribunal on that point.

45. This brings us to the next question whether the same rule should be applied to Mahajan or not. The Election Tribunal held that since Inayatullah had not filed a statement or recrimination as required by section 97 he could sot ask that the unmarked ballot papers of Mahajan should be cancelled. At first sight, it looks as if the recrimination needed is for corrupt practices but on a closer examination of section 97 we are in agreement with the Tribunal that Inayatullah could not contend that Mahajan's voting papers should be rejected for the like reason. We refer to the provisions of the law on the subject. Section 97 reads as follows :

> "(1) When in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election :
>
> Provided that the returned candidate or such other party as aforesaid shall not be entitled to give such evidence unless he has, within fourteen days from the date of commencement of the trial, given notice to the Tribunal of his intention to do so and has also given the security and the further security referred to in Sections 117 and 118 respectively.
>
> (2) Every notice referred to in Sub-Section (1) shall be accompanied by the statement and particulars required by section 83 in the case of an election petition and shall be signed and verified in like manner."

46. The learned counsel for Inayatullah contended that the Election Tribunal was in error in relying upon this provision because he was only asking that the votes of Mahajan should be eliminated for the same defect. He contended that he was entitled to show under section 100(1)(d) of the Act that the result of the poll was not materially affected by this irregularity and that he was therefore entitled to ask that the vote cast in the same manner for Mahajan should

also be excluded. He relied upon the provisions of section 100(1)(d) of the Act in support. He drew the analogy of the Transfer of Property Act in relation to the equity of part performance and stated that though he could not use the argument as a weapon of attack, he could use it as a shield for his own benefit.

47. We were at first considerably pressed by the argument, but we think that the matter can only be resolved in the light of the provisions of the Act. In the present matter, Mahajan had not only contended that these votes of Inayatullah should not be counted, but the petition contained a prayer that he should be declared as the returned candidate in place of Inayatullah.

In our opinion, this immediately brought in the provisions of section 97 because in the election petition a declaration that Mahajan instead of Inayatullah should be declared elected was claimed. If Inayatullah desired that this part of the case should not be given effect to and that votes of Mahajan suffering from a like defect should be eliminated he had, in our opinion, to comply with the provisions of section 97 and file a recrimination bringing in the question whether the votes cast in favor of Mahajan should also be excluded in the light of the defect discovered. Unless he did so, the proviso to section 97 would apply and he would be estopped from giving evidence in the case.

48. It will be noticed that the Election Tribunal got the votes of Mahajan scrutinized merely because it was at that moment not quite clear whether section 97 applied or not. Imagine a position in which the Election Tribunal or this Court has not before it the ballot papers of Mahajan and the question arose on the statement of Mahajan that he should be declared the returned candidate in preference to Inayatullah by excluding these 107 votes cast in favor of Inayatullah. In answer to this, Inayatullah, if he wanted that such a declaration should not be given, would have been required to file a recrimination under section 97, and, unless he did so, he could not lead evidence in support of his contention.

49. In our opinion, the provisions of section 97 being of a special character will cut down the general provisions of section 100(1)(d) and to that extent the special law will prevail. In view of the fact that Mahajan had claimed to be the returned candidate instead of Inayatullah, Inayatullah had to take recourse to the law of recrimination to bring into question the votes polled by Mahajan. If he did not do so, and if he only defended, his own votes, he could not ask that the votes of Mahajan be looked into, and, in our opinion, the Tribunal ought not to have looked into that evidence.

50. The matter, however, is not at an end there. Mahajan in fact claimed to be the returned candidate on the strength of the exclusion of 107 votes for Inayatullah. Hero the provisions of section 101 would apply. We quote that Section :

> "101. 'Grounds for which a candidate other than the returned candidate may be declared to have been elected'.- If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the Tribunal 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 candidates by corrupt practices the petitioner or such other candidate would have obtained a majority of the Valid votes', the Tribunal shall after declaring the election of the returned candidate to be void declare the petitioner or such other candidate as the case may be, to have been duly elected."

(Underlined (here into ' ') by us).

The emphasis in the first clause of section 101 is placed upon the words "valid votes". The duty of the, candidate seeking to be returned in place of the returned candidate is to show that he received a majority of valid votes. To work this out, it would be necessary to examine, whether in fact the candidate so claiming had received a majority of valid votes. To do this, one would have to take into account the fact that certain number of votes which were cast in favor of such a candidate were invalid.In this context, the casting of invalid votes for Mahajan assumes importance which it does not in the context of the challenge to the returned candidate's election. In our opinion, if one were to go by this, one would find that Mahajan cannot receive a majority of valid votes. We have shown that 107 in valid votes were cast for Inayatullah, while 115 invalid votes were cast for Mahajan. This shows that if the valid votes of Mahajan were alone counted, and the invalid votes of Inayatullah were excluded, the difference would be eight votes in favor of Inayatullah and not in favor of Mahajan, and the majority obtained by Inayatullah would be increased by eight and not diminished. In view of this we agree with the learned Tribunal that 107 votes given to Inayatullah cannot be counted being invalid. They were invalid to start with. They could have been validated, but no effort was made by the Returning Officer to obtain the approval of the Election Commission as required by memorandum Exh. Z-II. We have looked in vain to find out whether any further communication for formal approval 'ex post facto' of these votes had been sent. But no such document was brought to our notice and in spite of our request to the Returning Officer, no such document has been sent to us. In view of this, we cannot but hold that the Election Tribunal was right in rejecting the 107 votes of Inayatullah.

51. This brings us to the question whether the postal ballot papers are to be counted or not. These postal ballot papers are 28 in number. Of these 26 were in favor of Inayatullah and one each in favor of Mahajan and Mannulal. They were cast by Government servants and officers who were engaged in the arrangements for the polling of various stations. A postal ballot is to be issued to a person desirous of it on an application to be made seven days before and the matter is governed in by Rules 44-51 of the Rules. The condition precedent to the issue of a postal ballot paper is the making of an application by the voter himself. Unless a voter demands a postal ballot paper, the rules do not contemplate the issuance of a postal ballot paper to him. We sent for the record of the postal ballot papers and we found that the at ballot papers were issued on request. In one form, however, a person who was asking for the postal ballot paper had not even signed, though the identity was scrutinized by the Tahsildar and the postal ballot paper was apparently issued to him. We found that the Returning Officer had endorsed on some applications that ballot papers be issued, but not on others.

52. Evidence of Shri D.R. Sharma (P.W. 55) who dealt with this matter and Roshanlal Saxsena (P.W. 26), the head-clerk, who handled the postal ballot papers was led in the case. According to these postal ballot papers were issued to the voters under the orders of the Returning Officer. But a scrutiny of some of the ballot papers shows that no endorsement of the Returning Officer was obtained, and the ballot papers were issued. It is surprising that some of the ballot papers were

delivered on 26-2-1957 to the voters though the polling was on 25-2-1957. In one instance, we find that as many as 23 postal papers were delivered to one person and in some cases postal ballot papers were delivered not by post but to the persons concerned, though there is no means at hand for checking it. We find on a scrutiny of the papers that no record of the receipt of these papers was maintained. Indeed, it could not be made if the ballot papers had been issued after the polling date and we discovered that no envelopes in which the ballot papers were supposed to have come and also the inner envelopes in which they had to be closed for secrecy had been preserved. The issuance of the ballot papers, if one is to go by the evidence of Roshanlal, was entirely taken over by Roshanlal, the head-clerk. We do not suggest here that the Returning Officer has always to deal with every matter himself and he will certainly employ his own subordinates to give effect in his orders. But what we find is the absence of orders on the part of the Returning Officer or any of his assistants for the issuance of the postal ballot papers. We also find that though the rules require that the postal ballot papers when received shall be kept in safe custody by the Returning Officer, no register of their receipt showing the date and time of receipt was maintained. Roshanlal stated that he had noted the date and time of the receipt on the envelopes themselves, but no envelopes have been preserved. When we find from the record of the Returning Officer that 23 postal ballot papers were issued on the 26th when they should have been returned by the 25th, we think there is much room for holding that the postal ballot papers were not properly issued and received that there has been gross violation of the rules with regard to postal ballot papers. These ballot papers were counted right at the end of the poll when, of course, the issue was not affected one way or the other by them count. All these postal ballot papers barring two went in favor of Inayatullah and we think that a greater amount of scrutiny was needed in view of the short difference in the votes-cast between the rival candidates.

53. We therefore hold, agreeing with the learned Tribunal, that in view of the facts that the postal ballot paper record has not been properly maintained, that the rules with regard to their issuance have been breached, that there has been evidence that they were issued on the 26th February when the voting had to be completed on the 25th, that as many as 23 ballot papers were handed over to one person, that one of the forms of the application was not signed by the applicant and that there are no orders engrossed upon these applications for the issuance of postal ballot papers to the applicants except in a very few cases, the ballot papers must be disregarded from the count and that would make a difference of 26 votes to Inayatullah.

54. As a result of what we have stated with regard to the ballot papers not showing distinguishing marks and the postal ballots, which number 26, the result of the poll in so far as Inayatullah is concerned is diminished by 133. In view of the fact that the difference was 80 to start with, this, in our opinion, would tilt the balance against him unless it can be shown that this result cannot be reached. There is nothing on the record for us to hold that the decision of the Tribunal on these two particulars of the case is not warranted by the record or the actualities in it.

55. This brings us to the voting at the Sevada polling station No. 21. The evidence on the part of the case consists of Motilal (P.W. 57) and the Presiding Officer Shri S.S. Paranjpe (C.W. 1.) The report of the Presiding Officer at the poll is Ex. AA, which was admitted by the Tribunal at a late stage, after the arguments in the case were over. The allegation was that at the Sevada polling station the voters had not cared to insert the ballot papers into the respective boxes but had left them scattered at the top of the ballot boxes, and that the Presiding Officer inserted those ballot papers into the boxes.

It was contended that as many as 70 to 80 such ballot papers were inserted into the box of Inayatullah and therefore those papers should be excluded. The Presiding Officer in his report Ex. AA stated that he had found the ballot papers 'scattered' on top of the boxes, and that he had inserted them into the respective boxes. The rule on the subject is R. 31. It requires that if any ballot paper issued to an elector has not been inserted by him into any ballot box but is found anywhere in or near the polling station it shall be cancelled and dealt with in a manner similar to that laid down in R. 29. The instructions issued by the Election Commission were that if Presiding Officers found that a ballot paper had been only partially inserted into a ballot box but not fully, he could, in the presence of the parties or their agents, insert it properly into the box.

56. There was a great deal of argument before the Tribunal as to what Shri Paranjpe meant by 'scattered'. His knowledge of English was examined, and the Tribunal indulged in a long discussion as to what that term meant. It would appear, however, from what the report says and what the Presiding Officer said in the witness-box that these voting papers were in fact not inserted or even partially inserted into the boxes but were left lying on top of the boxes and were collected and pushed into the slits and into the boxes by the Presiding Officer. If a voting paper is left on top of a box, it cannot be said that the voter intended to insert it in that box. The intention of the voter can only be taken from the fact of his having started to insert the paper but not effectively. If there was no evidence that the voting paper had at all been inserted, that is to say, if the voting paper was not partly inside and partly outside - however small the part which was inside the Presiding Officer way bound to cancel that paper under the provisions of R. 31 of the Rules. In our opinion, though the exact number cannot be found out, it is obvious enough that the Presiding Officer at the Sevada polling station took the law into his own hands and devised a rule of his own by inserting these ballot papers into the respective boxes. However much he may have acted upon the supposed intention of the voter, it is clear that he did not carry out the intention of the rule.

57. In our opinion, there was a breach of R. 31 at the Sevada polling station, but there is nothing to show, except a rough guess by the Presiding Officer or by the candidate or by his witness Motilal (P.W. 57), as to how many such papers were inserted in such boxes. Insertion of these ballot papers into any of the boxes was a breach of the rules.

58. We may point out, as we have hinted in the earlier portion of this judgment, that this point was not taken by the petitioner Mahajan. It was found in the written statement filed by one of the contending candidates, viz., Manulal, which the Election Commission took into account. In our opinion, the point could be considered in an election petition even though raised on behalf of one of the defeated candidates. The purity of elections and the observance of the law require that all breaches of the election law should be unravelled and found out not only in the interests of the electors and the candidates but also in the interest of future elections, so that protective measures may be taken to obviate such breaches. In the present case, there being no indication of how many ballot papers were inserted in each box, it would be difficult to say how the result of the election has been affected. It is impossible to say whether it has been affected one way or the ether. The fact, however, remains that there has been a breach of the election law at this polling station, a breach which we shall consider along with other breaches to which we shall have to advert in considering the cross-objection.

59. This brings us to the polling station No. 104 Old Nizamat. At that polling station the

allegation was that the polling commenced late. The Tribunal has given a finding that the polling commenced late because the Presiding Officer was late in attending. Though the Tribunal came to the conclusion that the result of the poll was not materially affected inasmuch as there was no trustworthy evidence to show that any voter who wished to vote at that polling station went away without exercising his franchise. The Presiding Officer at this polling station delivered his report and in that he showed that polling commenced at 9-20 a.m. The learned Tribunal has commented that he had at first entered the time as 9.28 a.m., which he altered to 9.20 a.m. In any event, since the polling was to commence at 8.30 a.m., it is manifest that polling at this station commenced 50 minutes too late. Mahajan brought a number of witnesses to show that some of the voters who wished to exercise their franchise were labourers who had come early in the morning to cast their votes but could not do so because the polling had not commenced. The tribunal did not accept that evidence. Attempt was made before us to establish this, but we find on a reading of the evidence that there is nothing credible in it.

60. It is common knowledge that all polling days were declared holidays, and we can take judicial notice of the fact that every employer was instructed to allow all his employees a chance of exercising their franchise. In this state of facts it seems difficult to hold that these villagers would have come, as the Tribunal said, at the tick of 8.30 a.m. and gone away within a few minutes on finding that the polling station had not commenced its operation. In our opinion, they would have waited, or, at any rate, if they were going to cast their votes they would have been prevailed upon to return to the polling booth to cast their votes by the agents of the rival candidates in the neighbourhood, though placed at a distance of a hundred yards. It seems to us that no voter would have been allowed in these circumstances to go away without exercising his franchise. One other witness stated that voters had to go away because there was a marriage. But the marriage was later on in the day, and there was no hurry to go to the marriage without casting the votes. In these circumstances, though the point was argued as part of the cross-objection and has been dealt with by us here as part of the appeal, we do not think that we can reach any conclusion other than the one reached by the Tribunal.

61. This disposes of the appeal and brings us to the cross-objection. The cross-objection is based upon the breaches of the rules of the election law by the Returning Officer and his assistants, the Presiding Officers, the counting assistants etc. Reference was made to the refusal of a recount, to the refusal to give copies of all the relevant documents in time, and to the corrections which have been made in the record of the elections, even after the declaration of the result. In addition, certain corrupt practices are charged against the candidate Inayatullah, which includes the use of official agency for canvassing and for furthering his election prospects, the use of vehicles, both mechanically propelled and otherwise, and generally the influence which has been exercised in securing his election by the Returning Officer, Sardar Amarjit Singh (Collector of Sehor) Mahamood Hasan, Chief Executive Officer of the Sehore Municipality, and one Naseem, who is employed in the Municipality under the orders of Inayatullah. We shall deal with these matters in this judgement. We shall begin first by dealing with the breaches of the election law and the rules in so far as they have been made out in the cross-objection.

62. The learned counsel on behalf of Mahajan contended that the very first breach by the Returning Officer in the interests of Inayatullah was the acceptance of the nomination form of Nandal. According to him, the position was so clear after the Supreme Court ruling that the Returning Officer, had he cared to look into that ruling, could not have reached the result he did.

He contended that right from that moment onwards the Returning Officer displayed an interest and association with Inayatullah which greatly harmed the prospects of the rivals of Inayatullah. He drew our attention to the telephonic communications that were going en between Inayatullah on the one hand and the Returning Officer and also Mahmood Hasan, to whom We shall refer presently. He showed the telephone bills - which are exhibited in the case - to demonstrate that Inayatullah and the Returning Officer were in daily communication with each other on the long distance telephone. He also showed that same kind of interest was betrayed by Mahamood Hasan, who owed his appointment to Inayatullah. He pointed ant that those two officers were gazetted officers - a fact which was not denied before us - and therefore their conduct in supporting the candidature of Inayatullah amounts to a corrupt practice and also a violation of the Rules.

63. We have already found that the Returning Officer was in error in accepting the nomination, of Nandlal, who clearly was disqualified under section 7(d) of the Representation of the People Act. We have already said that whether it was due to the fact that he did not read the ruling or due to the fact that he did not understand it after reading it, it is obvious that he went against a decision of the Supreme Court in accepting Nandlal's paper. It is contended that there has been a breach of the Act inasmuch as a nomination form has been improperly accepted in breach of Section 7(d). In our opinion, when such a fact is proved the matter cannot be judged except under section 100(1)(d)(i). We cannot therefore treat it also as a breach of the election law hut must content ourselves with judging the result, accepting it as an improper reception of a nomination paper. We have worked out the result of such improper reception in accordance with the rulings of the Supreme Court, and we think that the matter must rest there. We cannot, however, help saying that this breach on the part of the Returning Officer was of a very patent nature and one which could easily have been avoided by him by being more circumspect in examining the ruling of the Supreme Court, which was indisputably before him and which was quite dear. We cannot but reprove such conduct on the part of a Returning Officer, who had to scrutinise very jealously the status of each candidate and to determine it in the light of the law as enunciated by the Supreme Court. We think that in not paying heed to the decision of the Supreme Court case the Returning Officer showed gross dereliction of duty and also a breach of the Constitution, which under Article 141 makes the Supreme Court decisions finding on all Courts and tribunals and on officers and authorities in India.

64. Leaving aside this breach of the law, we now go to other breaches which have been shown to us, but we shall decide which of them we should accept and which not. The first breach which is suggested is that the Returning Officer did not take Steps to recount the voting papers after such a recount bad been demanded. The question arose before us as to what is the stage at which a recount can be demanded. Reference was made to the rules on the subject, which unfortunately are not quite clear. The Election Tribunal also noted this flaw, and we endorse its view of the matter. Rule 58 deals with the counting of votes and ballot papers. It provides as follows :

> '(1) Every ballot paper which is not rejected under Rule 57 shall be deemed to be valid and shall fee counted :
>
> Provided that no packet containing tendered ballot papers shall be opened and no such ballot paper shall be counted.

(2) The returning officer shall maintain a result sheet in form 22 in respect of all ballot papers taken out of the ballot boxes.

(3) After the counting of ballot papers contained in all the ballot boxes used at a polling station has been completed and the entry in respect thereof made in form 22, the returning officer shall announce the particulars in such entry.

(4) After all the valid ballot papers found in each ballot box have been counted they shall be sealed and on which shall be recorded the following particulars, namely :-

(omitted)

(5) The returning officer shall place together all the packets referred to in sub-rule (4) in respect of each candidate into a separate container which shall be sealed up and on which shall be recorded the following particulars, namely :-

(omitted)

(6) Each packet of rejected ballot papers referred to in sub-rule (6) of R. 57 shall be sealed and the particulars specified in sub-rule (5) shall be recorded thereon.'

It will appear from this rule that as each polling station is taken up the ballot papers have to be taken out, sorted, checked, counted, and the result entered into form 22 and announced. There is nothing to show that the result as declared should immediately be finalised by signing and nothing further to show that if any recount is asked at that stage it should be refused or granted.

65. We then come to R. 64, which deals with the recount of votes. It provides as follows :-

'(1) After the completion of the counting, the returning officer shall record in the result sheet in form 22 the total number of votes polled by each candidate and announce the same.

(2) After such announcement has been made, a candidate or. in his absence, his election agent may apply in writing to the returning officer for a recount of all or any of the ballot papers already counted stating the grounds on which he demand such recount.

(3) On such an application being made, the returning officer shall decide the matter and may allow the application in whole or in part or may reject it in toto if it appears to him to be frivolous or unreasonable.

(4) Every decision of the returning officer under sub-rule (3) shall be in writing and contain the reasons therefor.

(5) If the returning officer decides under sub-rule (3) to allow an application either in whole or in part, be shall -

(a) count the ballot papers again in accordance with the decision;

(b) amend the result sheet in form 22 to the extent necessary after such recount; and

(c) announce the amendments so made by him.

(6) After the total number of votes polled by each candidate has been announced under sub-rule (1) or sub-rule (5), the returning officer shall otherwise complete and sign the result sheet in form 122 and no application for a re-count shall be entertained thereafter.'

66. A great dispute took place as to whether the re-count could be claimed after the result of each polling station was announced or after the completion of the total count. As the facts stand in this case the recount was claimed by Mahajan, not after the result of each 'round' was announced, but after the total count had been gone through. The contention of his learned counsel was that R. 64 required that this demand should be made after the completion of the counting, which would mean the completion of the counting of all the polling stations and not in between. According to him, the Returning Officer was bound to grant his request inasmuch as he made this demand before the final sheet was signed, and there was good reasons for a recount in view of the small difference in the poll and because there had been large cancellations of double ballot papers in a double-member constituency. The Returning Officer decided this application saying that the voting papers had been checked and rechecked and there was no mistake in them, that every opportunity was given to Mahajan to verify the results, and that his counting agents and he himself were there, and had watched the counting. He stated that Mahajan had given a good fight and must abide by the result of the poll, without making any complaint, and in the end he rejected the application. We find on an examination of only the votes of Ichchawar A that ballot papers of categories A and B were counted thereby converting one vote into two. This shows that in a ballot box which contained only 284 votes one vote at least was defective. We find also on a scrutiny of the result, sheets that in some of the polling stations there were more ballot papers found than were actually issued. Reference may be made in this connexion to forms 22 and 16 (Exs. 116 and 117). Form 16 shows the ballot papers which ought to have been in the ballot box. The figure is 1101, while form 22 shows that 1102 votes were cast in Ex. 117B, Form 116 (10), we find that according to the ballot paper account there should have been 663 ballot papers in the boxes, though actually 665 voting papers came out. It is obvious that more ballot papers were cast into the ballot boxes at these two stations than were actually issued or that there was error in counting. This would clearly demonstrate that some malpractice on the part of the voters - we give the benefit of the doubt to the candidates - was being practised.

67. The fact, however, remains that the counting was not as correct as it could have been. This arises from the fact that some of the ballot paper accounts themselves were not correctly maintained. We saw quite a number on which the appropriate entries were not made at all, and in some the entries were wrongly made and were corrected as late as 19-3-1957. Mahajan had applied for a copy of the ballot paper accounts as early as 3rd March, 1957. Though copies were furnished to him of 91 polling stations by the 4th March or 5th March, 1957, copies of the ballot paper accounts of the remaining 12 polling stations were not furnished to him till very late. There is an interesting correspondence to be found between the Returning Officer and the Chief Electoral Officer on this subject. The record shows that the copies were not given because the Chief Electoral Officer was addressed a letter by the Returning Officer on the subject. In Memorandum No. 1310/Election dated 8th March, 1957 (Ex. 92) the Returning Officer addressed the Chief Electoral Officer and expressed his own opinion about the withholding of the

copies of the ballot paper accounts of the 12 polling stations, which he said were incorrect. A reply was sent by the Chief Electoral Officer on 19 March, 1957 (D. O. No. 183/C.E.O). In that he stated that the ballot paper accounts should not be corrected but should be left as they were. He expressed his own opinion that copies of the forms as they were could be supplied, but he stated that since the matter was being referred to the Election Commission the reply of the Election Commission should be awaited. This letter, apparently, did not reach in time for the Returning Officer to withhold corrections, because on 19th March, corrections were made. On 20/21 March, 1957 the Returning Officer wrote a D. O. letter (Ex. P-94) to the Chief Electoral Officer saying that 'arithmetical errors' had already been corrected but copies of the 12 ballot paper accounts would be given after the Election Commission replied to the query. On 11th April, 1957 the Deputy Collector, who was the Assistant Returning Officer, wrote a D. O. (Ex. P-97) to the Collector enquiring what kind of copies should be given, whether with the corrections or without them. The Collector on that endorsed words to the effect 'Copies to be given. Ask the Chief Electoral Officer.' It was after this and after the corrections of the ballot paper accounts that the copies were furnished to Mahajan, and it appears that verification of the ballot paper accounts went on even thereafter till late into April, 1957, and we find endorsements on the ballot paper accounts showing the errors.

68. We regret to say that on a scrutiny by us even that verification in some of the cases was found to be inaccurate. It appears, therefore, that when the ballot boxes were opened and the voting papers taken out a correct statement of the ballot papers was not before the counting officers. For them to find out whether there bad been any malpractice in the casting of the votes it was absolutely necessary to. scrutinize the Presiding Officer's report and the ballot paper accounts. As the boxes of each polling station were opened they should have verified and incorporated the result of their investigations forthwith. If this had been done there would have been a contemporaneous record of what was sent out in the boxes and what was found in the boxes at the counts. Unfortunately, the verification took place so late and the papers remained in the custody of the Returning Officer for such a length of time that allegations could be made that they bad been tampered with. Whether they were tampered with or not is not easy to say, regard being had to the paucity of the evidence; but the fact remains clear that these papers which should have been kept in great security remained unsealed till the very end. We find even today that in spite of the rule that ballot paper envelopes should not be unsealed the ballot papers as received from the Returning Officer are found to be in unsealed envelopes.

69. We must say in fairness to the Returning Officer that the envelopes do bear the marks of seals, but the envelopes as they came before us were found open. We do not know whether the Election Tribunal caused these envelopes to be opened, and we hope that the Election Tribunal did. But if the Election Tribunal did not order the opening of these envelopes then there has been a clear breach of the rule which requires that all envelopes in which ballot papers are put shall remain sealed and such seals shall not be opened, except under the orders of the Court or the Tribunal. We cannot help saying this because the provision for sealing does not seem to be adequate, and there should be arrangement for proper sealing with seals of the parties, so that such allegations may not be made. The learned Tribunal did not record any finding as to the ballot papers, nor did it care to open them. We, however, were required to check up that which the Tribunal had left unchecked, and we found to our surprise that all the envelopes of Inayatullah were open and not sealed.

70. In view of what we have said above it becomes very difficult to scrutinize the result of the polls. When we find that in some of the boxes more ballot papers came out than were expected and in some many less were found, we feel that the counting could well have been a little more careful. When we also discover that Form 22 had frequently to be corrected by overwriting and erasures, it shows that the counting was not all that is desirable in running elections. We feel that the rules on this subject, though they are elaborate, should be made more stringent and the penalty for this should be visited not upon the candidates who have run the elections but upon the officers whose duty it is to see that these rules are obeyed. We cannot do better than voice a caution to all officers connected with the running of elections that they act in breach of these rules at their own peril and that if sufficient cause is found for suspecting their *bona fides* this Court will never hesitate to report against them to their superior officers.

71. The recount which was demanded was refused and we think that regard being had to the close fight which had taken place between the two candidates a recount might well have been allowed. If a recount had been allowed at that moment, which the law contemplates, there would have been no room for the allegations which the Returning Officer and the counting assistants have to face. In our opinion, recount was validly claimed by Mahajan at the appropriate stage and that it was wrongly disallowed.

72. It was contended by the appellant that if allegations of corrupt practice of this type were to be made with regard to the conduct of the Returning Officer, he should have been joined as a party to the proceedings. Reference was made to Halsbury's Laws of England (Simonds' Edition, Volume 14), paragraph 466 at page 255, to show that the Returning Officer is generally joined in the proceedings if allegations are made against him. Unfortunately, the reports on which the passage is based were not available and have not been placed before us for our consideration. Reference is also made to section 99 of the Representation of the People Act to show that a Returning Officer should be joined, because the proviso says that no person who is not a party to the petition shall be named as having committed a corrupt practice unless and until he has been given notice to appear before the Tribunal and to show cause why he should not be so named. It was contended that inasmuch as the Returning Officer was charged with having favoured the appellant, it was necessary if he was going to be named that he should be joined to the proceedings. It is more surprising that neither the appellant nor the answering respondent cared to summon the Returning Officer. The allegations at that time were in the process of proof and it would have been better if the Tribunal had summoned the Returning Officer just as it summoned Shri S.S. Paranjpe, Presiding Officer of the Sevada Polling Station. It appears that such a contention was not raised before the Tribunal.

73. During the course of the hearing of this appeal, this Court received a telegram from Sardar Amarjit Singh in which he drew attention to several documents which .should be referred to clear him. We did not consider it necessary to pay any more heed to his request, inasmuch as all the documents connected with his work were already before us. We, however, sent a telegram to him, informing him of the date of hearing and leaving it to him to fake the next step. He has not chosen, to appear. Thus, there was notice to him of these allegations against him and he has refrained from attending this Court. We do not draw any inference from his failure to appear before us, but we are satisfied that he knows about the proceedings and has fair notice of what is happening.

74. In view of our finding which we have given, we do not think that any harm has been clone in this case by not joining the Returning Officer. His action in refusing to recount has been decided upon by us not as indicating any corrupt practice on his part but as indicating an improper exercise of judgment in a case of this character. We have held that he would have been well advised in view of the closeness of the contest to allow the recount and, if he had done it, all objections to the counting would have been avoided. It is manifest from what we have said that the counting was not properly done and there were errors in it. We have also shown that there was no verification of the votes cast at some of the polling stations, with the statement of ballot accounts.. This, in our opinion, was a violation of the rules and we leave it at that.

75. It was next contended that the returned candidate, Inayatullah, was guilty of several corrupt practices, chief among which was the hiring of vehicles to carry voters. Evidence on this point of the case was divided into two parts - the first part related to the hiring of tongas and the other to the employment of motor vehicles to carry voters. These two matters are separately dealt with in. Section 123 of the Act. It is contended that the hiring, of tongas by persons interested in Inayatullah and for and on his behalf amounted to corrupt practice. Reference was made to the 5th Sub-Section of section 123 which provides that the hiring or procuring, whether on payment or otherwise, of any vehicle or vessel by a candidate or his agent or by any ether person, for the conveyance of any elector to or from any polling station provided under section 25 or a place fixed under Sub-Section (1) of section 29 for the poll amounts to corrupt practice. It was contended that tongas were hired by Mahamood Hasan, Executive Officer, Sehore Municipality, who was interested in Inayatullah and who made the payment for the hire of these tongas and others.

76. The Tribunal gave a finding that the evidence which was led did not prove quite clearly that tongas were hired for and on behalf of Inayatullah and it gave the benefit of the doubt to the appellant. Two witnesses were examined with regard to the hiring of tongas. They are Ghanashyam (P.W. 10) and Manoharlal (P.W. 8). According to Ghanashyam, it was Mahamoodmiya (Mahamood Hasan) who had asked him to go to one Jamilmiya to take the voters to the Adalat polling station. He says that he made 10 or 12 trips in the morning and worked from 8 a.m. to 6 p.m. and was paid Rs. 6/- for his hire. He named four other tonga-drivers who were also similarly employed. There is nothing to corroborate Ghanashyam for the employment of his tonga, nor is there anything to show that any objection was lodged at the time of the polling with the Presiding Officer with regard to the hiring of the 'tonga'. The same is the evidence of Manoharlal who stated that it was Mahamoodmiva (Mahamood Hasan) who had engaged the "tonga". At that time, Tarzihsahib (appellant), Nasimsahib and Ahmedmiya were present. It seems impossible to accept that the appellant who was then a Minister would be personally present when the hiring of the 'tongas' took place. As the Tribunal had pointed out, these persons would be too astute to expose themselves and would not have personally spoken to the Tonga-driver. This witness also says that he made 10 or 12 trips and was paid by Mahamood Hasan. According to him, his 'tonga' brought the ladies to the poll and arrangements for the passengers were made by one Nasim. He also stated that six tongas were similarly employed for carrying voters. Here again, we find it difficult to believe that tongas would have been hired in this manner and their use would have been so patent. Needless to say that there is no corroboration of the evidence of Manoharlal, nor was any protest registered at the time with the Presiding Officer whose report does not make any such mention.

77. We have read the evidence of these two witnesses as well as the finding of the Tribunal on this part of the case and we cannot say that we are any more impressed by this evidence than the Tribunal was. It is a maxim of law that an appellate Court does not revalue and reassess the evidence unless something can be shown to it why it should do so. The evidence on this part of the case turns upon the trustworthiness of these witnesses. The Tribunal which had the chance of watching them in the witness-box did not consider them to be trust-worthy. In these circumstances, it will be wrong for us to substitute our judgment for that of the Tribunal, because there is not even the assistance of probabilities to reach a different conclusion. What we need is something definite and concrete. There is no balance in favor of the cross-objector. After an examination of the evidence, we think, we are not entitled to depart from the finding given by the Tribunal.

78. This brings us to the hiring of motor vehicles. In this connection two motor trucks were mentioned: one was B. S, 3708 and the other B. Section 2520. It appears that there was a complaint made at the spot with regard to truck No. 2520, though the number mentioned at that time was 2529. However, it is easy to make a mistake with regard to the digits in the number of the vehicle. There is ample evidence to show that a truck was in fact brought right upto the polling station and that in trying to reverse the truck, the driver fouled the ropes and a report was made to the Presiding Officer. There is, however, evidence that the driver was questioned and he stated that he had brought the ladies of his own household. It was contended that even this would be a corrupt practice under the proviso to Section 123(5) of the Act, because there it is provided that a mechanically propelled vehicle cannot be used for the purpose. The proviso deals with the hiring of a vehicle or vessel by an elector and there is nothing to show that the truck in question was hired by the appellant or even by the voter concerned. It appears that this truck was used by the driver for his own voting and for voting by the members of his family. The action of the driver in bringing the ladies of his household to the polling station does not fall either within Sub-Section 5 or the proviso and no point can be made of it.

79. The next vehicle was also alleged to have been used for the purpose of bringing the voters to the polling station. Reference was made to two bills submitted by a petrol-dealer; Goverdhandas, who was supplying petrol on the authority of the appellant to this vehicle before. His evidence on this part of the case is also in general terms and has not been accepted by the Tribunal. We have looked through the evidence and we are not satisfied that we can reach any other conclusion but the one reached by the Tribunal. It is not that an appellate Court must review at large the evidence again to find out whether any other view could be taken of the matter. The rule with regard to the appraisal of evidence by appellate Courts are well settled. In *Govind Prasad v. Bala Kunwar*[14], and *Mt. Fakrunnissa v. Izarus Sadik*[15], their Lordships of the Privy Council have laid down the rules for the guidance of the appellate Tribunals. It is stated by their Lordships in the first case that the appellate Court is entitled to interfere if the Tribunal judges the credibility of the witness on a consideration of probabilities, but it is not open to the appellate Tribunal to reach a different conclusion if the trial Court has acted upon the demeanour of the witness or has commented upon his truthfulness. In our opinion, the latter of the two dicta is applicable here. The Tribunal has not rejected the evidence produced on a discussion of the probabilities only. It has rather decided upon their truthfulness and trust-worthiness, and once such a decision is given, then the appellate Court is not entitled ordinarily to reach a different conclusion. In the second of the cases mentioned, their Lordships say that it is the duty of every appellant to show that when everything is considered, there is a balance in his favour. In our opinion, when everything is

considered in this case, there is no balance in favor of the cross-objector for reversing the finding given by the Tribunal. We accordingly accept the finding of the Tribunal, that there is no adequate proof that trucks and tongas were employed in breach of the provisions of section 123(5) of the Act.

80. Reference was next made to a handbill, Ex. P-44 which was issued by the Municipal Committee over the signature of the Collector Sardar Amarjit Singh and Mahamood Hasan, Executive Officer of the Municipality, for the Cattle Mela held at Sehore sometime in the first half of January 1957. That handbill includes a symbol 'two bullocks with yoke', which was the symbol of the Congress Party for the election. It was contended that the issuance of such a handbill by Sardar Amarjit Singh and Mahamood Hasan with the symbol of the Congress Party on it was a suggestion to the people that they should cast their votes for the Congress Party.

81. We do not think that the utilisation of the symbol is of much importance. All the same, we must give due consideration to certain other facts. It was amply proved in this case that the same symbol was being used long before this election was fought and it had almost become a practice to put that symbol on such poster. In this view of the matter, we do not think that there was any intention, as has been imputed on the part of Sardar Amarjit Singh and Mahamood Hasan, though we cannot but say that they would have been well advised in view of the proximity of the election to leave out that symbol from the handbill. We wish to record here that the symbol should not figure in any official handbill or propaganda work.

It is likely to mislead the people and we think that Government officers should zealously see that such symbols are not utilised. In fact, such symbols should never be made part of any Governmental propaganda machine. Whether they belong to one party or the other, they should be completely left out. We, however, think that the printing of that symbol on the poster did not have the effect of turning the tide against Mahajan or the other rival candidates of Inayatullah. While we criticise the action, we do not think, the matter is large enough to be complained of.

82. The next point urged against the Returning Officer and the appellant was one of close association between them. It was the case of Mahajan that pressure was being put on him from the moment he announced his intention to contest the election to withdraw. According to Mahajan, it was Sardar Amarjit Singh, who, as Collector of Sehore, approached him in this matter. The evidence on this part of the case come from D.G. Modi (P.W. 11), who is the Secretary of the Officers' Club. According to him, Sardar Amarjit Singh asked him to speak to Mahajan to withdraw from the election. Modi says that he conveyed this information to Mahajan and that he told him that this was being done under pressure. According to Mahajan, this amounted to a corrupt practice inasmuch as Government agency was employed to make him withdraw from the contest. This part of the case, however, is not complete. It only proves what Modi told Mahajan. It cannot prove what the Returning Officer told Modi. For that purpose, something more concrete was necessary. Of course, under the Evidence Act, a witness can depose to what he has seen and what he has heard. The matter cannot be judged on admissibility, but when credibility is involved, one would like to have better evidence than that to establish that it was Sardar Amarjit Singh who had in fact spoken to Modi to approach Mahajan. Sardar Amarjit Singh was not examined in this case and had no say in the matter. In view of this, we think that we should not depart from the finding which the Tribunal has given on this part of the case. Similar allegations were made by Modi with regard to the Block Development Officers, it

was the case of the cross-objector that these persons had used their influence upon him to withdraw from the contest. For the same reason, that part of the evidence of Modi cannot be accepted.

83. Then comes the allegation with regard to three persons who have been specifically named before. They are Sardar Amarjit Singh, Mahamood Hasan and one Nitsim. With regard to Sardar Amarjit Singh, the catalogue of his interference with the fair running of the election is large. It begins with his efforts to make Mahajan withdraw from the contest. to which we have just now referred. There were telegrams issued by Mahajan to show that Sardar Amarjit Singh was taking undue interest in one of the candidates and that he was manoeuvring for his success. That Mahajan entertained this suspicion is true enough and there are certain actions on which the conduct of Sardar Amarjit Singh does not stand scrutiny. A patent fact in this connection is the number of telephonic conversations he had with Inayatullah. one of the candidates. The trunk telephone bills have been produced to show that Inayatullah and Sardar Amarjit Singh were almost daily in communication with each other., Similarly, the bills of the Municipality show that Mahamood Hasan was equally in communication with Inayatullah. While Mahamood Hasan was in a different position from Sardar Amarjit Singh, we cannot help saying that Sardar Amarjit Singh must have been embarrassed by the repeated telephonic conversations which were inflicted on him by Inayatullah. If Sardar Amarjit. Singh had been only the recipient of telephones from Inayatullah, nothing could be said against him. But we find that during the vital period Sardar Amarjit Singh also had trunk telephonic conversation with Inayatullah.

84. It is true that as Collector of Sehore he might have had other matters to talk to Inayatullah, Taut we think that Amarjit Singh would have been well advised in addressing letters instead of having telephonic conversation, allegations about which he cannot now disprove. The inference which is sought to be drawn against him is an inference upon the facts which are there. We cannot leave the subject without saying that this conduct of Sardar Amarjit Singh was not quite correct. In running elections, fairness should not only be there but should, be seem to be there.

85. Next, it is contended that Sardar Amarjit Singh did not seal the envelopes containing the voting papers, did not allow the recount and also withheld the copies. We have dealt with these matters. We do not approve of his conduct on most of these occasions and some of them have received criticism at our hands.

86. The next conduct is that of Mahamood Hasan. It appears from the record that Mahamood Hasan was removed from service by the Municipal Board, but was reinstated under orders of the Chief Commissioner, and as Minister for Local Self Government Inayatullah noted on the file and forwarded the papers to the Chief Commissioner. When the Board received the order of the Chief Commissioner reinstating Mahamood Hasan, it declined to follow it. As a result, the Board was superseded and Mahamood Hasan was reinstated. From this it would quite easily appear that Mahamood Hasan would be favorably inclined towards Inayatullah. The learned member of the Tribunal has quoted a passage from Willis, J. to show that influence is different from its exercise. That Inayatullah had some influence on Mahamood Hasan because of the reinstatement of the latter is quite obvious enough, but whether Inayatullah approached Mahamood Hasan and influenced him is quite a different thing. It is on the latter part of the case that we have to find and we are in agreement with the learned Tribunal that there is no evidence to give a finding but room for suspicion. If Mahamood Hassan out of gratitude did something, it would not be the

direct result of the exercise of influence by Inayatullah upon him, and that is what the law requires to be proved. In connection with Mahamood Hasan, there are two or three things mentioned. The first is that he hired the tongas. We have dealt with that earlier. The next is that he issued the handbills bearing the symbol of the Congress Party for the Cattle Fair. We have also dealt with that. The third is tint Mahamood Hasan was present in the counting hall even though he was not a counting assistant. It appears that he went to the counting hall, but on an objection by Mahajan, he withdrew. It seems to us that Mahamood Hasan's zeal for Inayatullah led him to the counting hall and it resulted in allegations being made about him. But he withdrew from the counting hall after the objection and this could demonstrate that he was not anxious to stay if his own conduct was being called in question. We feel that Mahamood Hasan must have desired, as the Tribunal said, in the heart of hearts for the success of Inayatullah. But unless there is anything to show that he took active share and interest in the conduct of the election, we cannot charge him with having unfairly taken part in the election. The general allegations that he was canvassing on behalf of Inayatullah were not placed before us nor was any evidence on that part of the case brought to our notice. We accordingly, as did the Tribunal, hold that Mahamood Hasan liked Inayatullah to succeed, but that there is no proof to show that he took any part in the contest.

87. We cannot leave the subject of Mahamood Hasan without referring to Naseem. He was appointed under orders of Inayatullah to the Sehore Municipal Board as a servant. The order directed that he would be employed from the date on which he joined his duties. It appears that this order was issued as early as January 1957, but Museum did not join till May 1957. In between, it appears that he did some piece work for the Municipal Board in connection with the Mela and he was paid by way of advance and remuneration during this period. It is quite obvious from the record that Naseem did work for Inayatullah. In fact, Inayatullah had given him authority to purchase petrol in his account and Naseem was going about canvassing for Inayatullah. The contention of the cross-objector was that Naseem was virtually a municipal employee and as such there is evidence of corrupt practice by employment of governmental or quasi-governmental agency. If Naseem had joined his service when the orders were passed, all this would have been true. No doubt, Naseem had an order in his pocket for employment with the Municipal Board, but he did not take charge and worked for Inayatullah till the election was over. He then took the job in the Municipal Board and during the interval he cannot be deemed to be a municipal employee. In this view of the matter, we are satisfied that the Tribunal was correct in not drawing an inference against Inayatullah.

88. Lastly, it was contended chat influence was brought to bear upon the voters by Sardar Amarjit Singh and Mahamood Hasan by closing a road to heavy motor traffic from dawn to sunset. It was contended that this ban was imposed to influence indirectly the petrol-dealer Goverdhandas whose petrol-pump was situated on this road and who made much income during the crushing season when sugarcanes are transported to the Sugar factories. Correspondence in respect of this part of the case was brought to our notice. We find, however, that a largely signed application was made to the Collector through the Executive Officer for the closure of this road to heavy vehicular traffic. This was immediately after a child had been run over and killed. It was at this time that the heavy vehicular traffic was stopped. Later on, the ban was partly released on the representation of Goverdhandas, who submitted that this ban was affecting his trade. It was suggested that this ban was first imposed to put pressure upon Goverdhandas and it was later released because of his becoming more amenable to the candidature of Inayatullah. The

suggestion here is certainly ingenuous, but it does not take into account the death of the unfortunate child and the largely signed petition which had been presented by the people of that locality. We have looked into the petition and we find that the public of that locality were protesting against the plying of heavy motor vehicles partly because that was the road for the children to go to school and colleges and partly because of the accident. The ban was probably imposed in order to allay the feelings of the public of the locality which must have been considerably aroused due to the death of an unfortunate child. Later, when the representations were made, the ban was only very slightly lifted and we see nothing Sinister in it. When election takes place, every action of every officer is hound to be criticized and looked upon with a good deal of suspicion, but suspicion cannot take the place of proof in these matters. Reference was made before us to the decision of their Lordships of the Supreme Court that the trial of an Election Tribunal is in the nature of an accusation and is a quasi-criminal action. If the same test is applied, there would be a presumption of innocence and direct proof would be required before persons charged are held to be responsible. We do not think that that standard was reached in the allegations or in the proof that was tendered. We accordingly agree with the Tribunal on this part of the case as well.

89. This brings us to the end of the allegations which were brought to our notice by the cross-objector. While we have criticised the conduct of Sardar Amarjit Singh and have not approved of the conduct of Mahamood Hasan, we cannot say that they were working at the instance of Inayatullah. In other words, corrupt practice by employment of Government officers has not been established in the case. Similarly, corrupt practice alleged, namely the utilisation of tongas and trucks, was not successfully established in the case. The cross-objection was divided into two parts. The first part was against Umraosingh whose election was challenged by him. That part of the cross-objection was abandoned by Mahajan and we say no more about it. The second part dealt with the corrupt practices which we have analysed and on that part of the case we find against the cross-objector.

90. The result, therefore, is that we think both the appeal and cross-objection should fail and should be dismissed. We accordingly order the dismissal of both the appeal as well as the cross-objection. In the circumstances of the case, we think, we should make no order as to costs in the two proceedings before us. The security deposits shall be returned to the respective parties.

91. Before we leave the case we must record the request of both sides for expunging certain remarks in the order of the Tribunal. These remarks reflect upon counsel and parties. We find ourselves unable to expunge the passages, but we can only say that in the conduct of the case before us Shri Dube and Mahajan gave us no cause for complaint.

Appeal dismissed.

Cases Referred.

1AIR 1954 SC 210
2AIR 1954 All 419
3AIR 1940 Lah 438
4AIR 1950 Mad 379
5AIR 1940 Nag 292
6ILR 41 Mad 904

7ILR (1948) Nag 340 : AIR 1948 Nag 377
8AIR 1950 Cal 372
9ILR 39 Mad 617 at p. 624 : (AIR 1916 PC 21 at p. 23)
10AIR 1954 SC 513
11ILR (1954) Nag 341 : AIR 1954 Nag 217
12AIR 1954 SC 236
131905-2 IrR 590 at p. 608
14AIR 1934 PC 12
1517 Nag LR 72