

(2002) 07 AP CK 0103
In the Andhra Pradesh High Court
Case No : EP No. 20 of 1999

Koneru Ranga Rao

APPELLANT

Vs

N. Swamy Das and Others

RESPONDENT

Date of Decision : 31-07-2002

Acts Referred:

Conduct of Elections Rules, 1961 — Rule 53
Representation of the People Act, 1951 — Section 80

Citation : (2003) 1 ALD 18

Hon'ble Judges : C.Y. Somayajulu, J

Bench : Single Bench

Advocate : B. Sudhakar Reddy, for the Appellant; A. Ramanarayana and Government Pleader for GAD, for the Respondent

Final Decision : Dismissed

Judgement

C.Y. Somayajulu, J.—This petition is filed to order inspection, scrutiny and recount of all the ballot papers polled in the election to 81-Tiruvuru Assembly Constituency held during 1999 AP General Elections to the Andhra Pradesh Legislative Assembly and set aside the election of 1st respondent on the ground of corrupt practices allegedly indulged in by the 1st respondent and irregularities allegedly committed during counting. 1st respondent filed Application No. 347 of 2000 to strike down paragraphs 7 to 11 of the election petition on the ground that they are vague and frivolous. Petitioner filed his counter contending that the allegations regarding the corrupt practices were made only as a passing reference, and that as a matter of fact he is not either relying or basing his claim on any of the corrupt practices alleged in the petition. After hearing both sides, by the order dated 25-4-2000, paragraphs relating to corrupt practices in the petition were ordered to be struck off. Thus the petition, now, is only on the ground of irregularities in counting.

2. The allegations, in brief, in the petition are, during 1999 A.P. General Assembly Elections to the Tiruvuru Assembly Constituency reserved for SC

candidate, petitioner and 1st respondent were the principal contestants on behalf of India National Congress (INC) and Telugu Desam Party (TDP) respectively. Though 2nd respondent contested on behalf of CPM Party, 3rd respondent as independent candidate and respondents 4 to 5 on behalf of Bahujan Front and Anna TDP respectively, their contest was only nominal. Out of 1,30,968 votes polled, 2623 votes were rejected and only 1,28,345 were counted as valid votes and out of them 60,123 votes were declared as polled in favour of petitioner and 61,206 votes were declared as polled in favour of the 1st respondent, and thus 1st respondent was declared elected by a margin of 1083. 1st respondent got posted the employees in the office of the Executive Engineer, Mylavaram named in the petition and the employees in Schools at Tiruvuru as the counting staff with a view to manipulate the counting of votes. Counting staff being influenced by the wife of the 1st respondent, who is the Divisional Accounts Officer, in the office of the Executive Engineer, (Roads and Buildings) Mylavaram, mixed the votes cast in favour of the petitioner with the votes cast in favour of the 1st respondent, in spite of protests made by the counting agents of the petitioner. The counting agents of the 1st respondent had easy access to the counting tables, but the counting agents of the petitioner were asked to sit ten feet away from the counting tables and so they were not able to verify the markings on the ballot papers to satisfy themselves as to in whose favour they were cast, and their validity. Though Manikyala Rao, an employee in the office of the Executive Engineer, R&B Department at Mylavaram, was appointed as a member of the counting staff, his son was permitted to act as the counting agent of the 1st respondent. Validly cast votes in favour of the petitioner were either declared invalid or were counted in favour of the 1st respondent. Since counting agents of the petitioner found that signatures on some of the ballot papers were child-like or made by an illiterate, suspecting rigging, Chief Election Agent of the petitioner requested the Returning Officer to invalidate those votes, but the Returning Officer allowed the counting staff to count them in favour of the 1st respondent. Because of the irregularities that took place during counting, the result of the election was materially affected and thereby 1st respondent was declared elected by a margin of 1083 votes. Had the counting taken place properly petitioner would have been declared elected because he was in the lead till sixth round of counting in spite, the irregularities committed in those six rounds. The Returning Officer declining to receive a representation for recount given by his counting agent, declared the result of election in a hurry. Hence the petition.

3. 1st respondent filed his written statement denying the material allegations made against him in the petition and alleging that neither he nor his wife had a role to play in the posting of counting staff. Out of the 11 persons named in para 9 of the petition, only one person is from the office of the Executive Engineer, R&B Department. He has no acquaintance with the teachers from Sarvodaya School who were posted as the counting staff. The averments in the petition that the counting staff, under his influence, mixed the votes cast in favour of the

petitioner with votes cast in his favour and that the counting agents of the petitioner were not able to see the markings on the ballot papers, and that his counting agents had free access to counting tables and that votes cast in favour of the petitioner were either declared invalid or were counted in his favour and that many ballot papers contained child-like or illiterate person's signatures and that those votes were also counted in his favour in spite of protests by the counting agents of petitioner are denied. The averment relating to the counting agent of petitioner giving a representation to the Returning Officer for a recount and the Returning Officer declining to receive the same and declaring the result is denied.

4. Respondents 2 to 5 remained ex parte.

5. In his written statement 6th respondent while denying the allegations made against him. specifically denied the allegation that counting staff were posted at the instance of 1st respondent. He alleged that he is not aware that the wife of the 1st respondent is the Divisional Accounts Officer in the R&B Department, and asserted that 6 out of the 11 persons named in the petition were posted as reserve staff and remaining 5 persons were posted as regular counting staff in usual course but not at the instance of 1st respondent or his wife. He denied the averments that counting staff, influenced by the wife of the 1st respondent, mixed the votes cast in favour of the petitioner with the votes cast in favour of the 1st respondent and that the counting agents of petitioner were made to sit 10 feet away from the counting tables while the counting agents of 1st respondent had free access to the counting tables. NSSRKVS Murthy, son of Manikyala Rao, of Tiruvuru village was the election agent of the candidate belonging to NTR TDP at Table No. 10, but was not the counting agent of 1st respondent and that nobody objected to his appointment as counting agent. All the counting agents affixed their signatures to the no-objection certificates at the end of each round of counting, and no objection was raised by any counting agent of the petitioner during counting. Neither the petitioner nor his Chief Election Agent Requested the Returning Officer for recount of votes in any round.

6. Basing on the above pleadings, the following issues were settled for trial:

1. Whether there was an illegality in counting of the valid ballot papers as contended by the petitioner?
2. Whether the alleged irregularity in the counting vitiated the election process?
3. To what relief?

7. In support of his case petitioner, besides examining himself as PW1, examined four other witnesses as PWs 2 to 5 and marked Exs.A1, X1 and X2. In support of his case, 1st respondent examined himself as RW1, but did not adduce any documentary evidence. No oral or documentary evidence was adduced on behalf of 6th respondent.

8. Issues 1 and 2:

As stated earlier, in view of the order in Application No. 347 of 2000 allegations relating to corrupt practices need not be considered. The irregularities in counting alleged by petitioner are-

1. 1st respondent influenced the posting of counting staff.
2. Petitioner's counting agents could not see whether counting was going on properly or not.
3. Votes cast in favour of the petitioner were mixed with those of the 1st respondent and some of the valid votes cast in favour of the petitioner were declared invalid.
4. Some ballot papers contained child like or illiterate's signatures and in spite of objection those votes were counted as votes in favour of the 1st respondent.
5. Son of Manikyala Rao, a Counting Supervisor, acted as the counting agent of the 1st respondent.
6. Representations or objection petitions given during counting and petition for recount were not received. It has to be seen if the evidence adduced by the petitioner establishes the above irregularities.
9. The evidence of the petitioner as PW1 is that he appointed 16 persons as his counting agents and that R. Mohan Reddy (PW5) was his Chief Election Agent and that he and PW5 were present in the Counting Hall at the time of counting and that the place allotted for seating the counting agents of the candidates, where chairs were laid in two rows, and the place for counting staff was separated by a mesh and that immediately after commencement of the regular counting at about 2 p.m., he heard a commotion and found his counting agent Prasad quarreling with the counting staff stating that the ballots polled in his favour were placed in the compartment allotted to the 1st respondent, and when he enquired the counting supervisor Manikyala Rao, Deputy Executive Engineer, informed him that it was done due to a mistake and assured that he would take care to see that such mistakes do not recur, and subsequently his counting agents complained to him that they are not able to see the counting and bundling of the counted votes properly and opined that there was misbundling of votes polled in his favour i.e., more than 25 votes polled in his favour were being bundled and are being shown as bundles containing 25 votes, and less than 25 votes polled in favour of the 1st respondent were bundled and are being shown as bundles containing 25 votes, and so he, after the fourth round of counting, requested the Returning Officer to verify some of the counted ballot bundles for finding out if the ballot papers in those bundles contain 25 ballot papers or less or more than 25 ballot papers, but the Returning Officer refused his request, and that in the meanwhile a person claiming to be an agent of an independent candidate came into the counting hall and started spreading a Rumour that TDP was leading in more than 200 Constituencies, and that during the fifth round of counting, at table No. 13 when the ballots polled in his favour were placed in the

compartment of the 1st respondent, on an objection raised by his counting agent, the counting staff expressing regret that it was done by a mistake, placed them in his compartment, and several instances like that occurred during the counting and that those irregularities occurred only because persons favourable to 1st respondent were recruited from Mylavaram Division of R&B Department at the instance of the wife of 1st respondent and Lecturers working in Social Welfare Junior College, Tiruvuru, teachers working in Mandal Praja Parishad Schools, who are all supporters of the 1st respondent were got appointed as counting staff and as such all the counting staff were acting favourably to 1st respondent, and because of the irregularity in counting, not less than 4000 votes polled in his favour were not counted in his favour, and that immediately after counting, he made a request to the Returning Officer for a recount, but his request was turned down on the ground that as per the Instructions of Election Commission no Returning Officer is to entertain any request for recount. During cross-examination for 1st respondent he stated that he contested Assembly Elections 4 to 5 times and also worked as Deputy Chief Minister and so he knows how to raise an objection during counting and that he and his Chief Election Agent (PW5) were going round the counting halls and were meeting and consulting each other now and then and that PW5 did not take any independent decision on that day without his knowledge, and that he did not make any representation to the Returning Officer or to any other election official requesting them not to post any of the employees working in the Department in which the wife of the 1st respondent is working as counting staff, and that he did not give any representation or complaint to anybody in the counting hall that the counting staff were partisan, and that immediately after completion of the counting, he gave a written representation to the Returning Officer requesting for recount. He admitted that there is no mention in the election petition about his counting agent Prasad quarrelling with the counting staff for placing of ballots polled in his favour in the compartment of the 1st respondent and about Manikyala Rao, Deputy Executive Engineer, expressing regret and assuring him that such mistakes would not recur and about the bundles of counted ballots polled in his favour containing more than 25 ballots and the bundles of counted ballots polled in favour of the 1st respondent containing less than 25 ballots, and about his request to the Returning Officer for a recount of ballot bundles for verification, after the fourth round of counting, and about the rumour the TDP was leading in many places being spread or about Tirumala Rao raising objection during the counting of fifth round.

10. The evidence of PW2, the counting agent of the petitioner at table No. 4 in Hall No. 1, is that as the tray for placing the marked ballots on the counting table was slanting towards the counting staff sitting opposite to him, he could not clearly see how the ballots were being placed in the compartments in the tray, and that some ballot papers in which marking was more than 3/4th of the place allotted to the petitioner were placed in the compartment of doubtful votes, and that more than 25 ballots polled in favour of the petitioner were bundled and

were shown as bundles of 25 ballots, but in respect of the ballots polled in favour of the 1st respondent less than 25 ballots were bundled and shown as bundles of 25 ballots, and on some occasions ballots polled in favour of the petitioner were placed either in the compartment of the 1st respondent or in the compartment of the independent candidates, ignoring his objection. During cross-examination for 1st respondent he stated that result of the election was declared about one hour after the end of regular counting, and that there was no scope for him to give any written complaint to the counting supervisor about the irregularities that were committed in the counting hall.

11. The evidence of PW3, the counting agent of the petitioner at table No. 8 in Hall No. 2, is that as he was unable to see the markings on the ballot papers, he requested the counting staff to do the counting to his visibility, and found that the counting staff, while bundling the ballots polled in favour of the petitioner, bundling 27 ballots and were showing them as bundles containing 25 ballots, but in the case votes polled in favour of the 1st respondent only 23 ballots were bundled and shown them as bundles of 25 ballots, and so he raised an objection about the misbundling of the ballots, and on hearing his complaint, the Chief Election Agent of the petitioner (PW5) came to the table and verified the bundles of counted ballots and found that four bundles of votes polled in favour of the petitioner contained 27 ballots and four bundles of ballots polled in favour of the 1st respondent contained only 23 votes and thereafter the ballots were properly bundled as 25 ballots in that round, but from the next round of counting, the counting staff, in spite of his objection, continued misbundling of the votes, and were placing some ballots polled in favour of the petitioner in the compartment allotted to the 1st respondent, and were treating some of the ballots containing marking in favour of petitioner as doubtful votes, but ballots really containing doubtful markings were treated as votes in favour of the 1st respondent ignoring his objections, and that the son of the table supervisor i.e., Deputy Executive Engineer, R&B, Tiruvuru, acted as counting agent of the 1st respondent, and that some people came into the counting hall at the beginning of the 3rd round of counting and announced that TDP was leading in more than 200 Constituencies and is likely to come back to power and so he and the other counting agents of the petitioner got depressed and the counting agents of the 1st respondent were overwhelmed, and so the counting staff, who were drawn from the Panchayat Raj and PWD (R&B) and Irrigation Departments of the local areas started favouring the 1st respondent. During cross-examination he stated that while observing the counting process at his table, he was also witnessing the events, voices and happenings at the other counting tables in the counting hall, and denied the suggestion that the son of Manikyala Rao did not come as a counting agent of the 1st respondent and that no irregularities took place either in the counting or bundling of the ballot papers and that he was not present at the counting hall as agent of the petitioner.

12. The evidence of PW4, the counting agent of the petitioner at table No. 12 in Hall No. 1, is that as he was unable to see the markings on the ballot papers

being placed in the compartments in the tray on the counting table as bricks were placed underneath the tray and that on some occasions markings on the ballot papers were not shown to him and so he gave a written representation to the Chief Election Agent of the petitioner (PW5) bringing to his notice the happenings at the counting table and that PW5 in turn handed it over to the Assistant Returning Officer, but no action was taken by the Assistant Returning Officer and that even before the counting was complete, TDP workers came into the counting hall and informed the counting staff that TDP was leading in many Constituencies and on hearing that news, all the counting agents of the petitioner were disheartened. During cross-examination for 1st respondent he stated that he could not see the happenings at the Assistant Returning Officer's table from his seat and that he wrote the complaint sitting in the place allotted to him as counting agent of the petitioner, and sat in that place only through out the counting process and that chief election agent (PW5) came and took that complaint from him and that he informed PW1 about his writing and giving a report to PW5.

13. The evidence of PW5, the chief election agent of the petitioner, is that he is an Advocate by profession and as the counting agents of the petitioner complained to him that they are not able to see the markings on the ballots and their bundling, he requested the counting staff to arrange the table in such a way that the markings on the ballots can be seen by the counting agents, but the counting staff pleaded helplessness and even the Returning Officer, to whom he made a complaint, did not take steps to rectify the defects and by the time of completion of fourth round of counting, petitioner was leading by about 300 votes and at that time news that in many Constituencies TDP candidates were leading came, and from then onwards, the counting staff, ignoring the complaints of the counting agents of the petitioner, started misbundling of votes i.e., they started bundling more than 25 votes polled in favour of the petitioner and showed them as bundles containing 25 ballots and in case of the votes polled in favour of the 1st respondent less than 25 votes were bundled and were shown as bundles containing 25 votes, by taking care to see that the total ballots distributed to them for counting tallied with the bundled ballots, and that due to such misbundling only, during the fifth round of counting itself, 1st respondent got a majority of more than 500 votes, and since the 1st respondent was a sitting MLA at that time and as his wife was working as Accounts Officer in R&B Office at Mylavaram, employees in the R&B Department, Mylavaram who were appointed as counting staff, favoured the 1st respondent and as the son of Manikyala Rao, an employee of R&B Department who was appointed as a Counting Supervisor, came as a counting agent of the 1st respondent, and as teachers, who are supporters of the 1st respondent, acted as counting staff, he requested the Returning Officer to make a random check of ballot bundles, at least at one of the counting tables during the sixth to eighth round of counting, but the Returning Officer, on the pretext that even a random check amounts to recounting, refused to undertake such an exercise, and that on some of the

ballots counted in favour of the 1st respondent he found the signatures of the Presiding or Polling Officers were child-like or illiterate's signatures, and so he requested the counting staff to invalidate those ballot papers, but his request was ignored, and that on some of the ballot papers name and symbol allotted to the petitioner were not found and so he requested the counting staff to invalidate those ballots, but the counting staff instead of invalidating those ballots, counted them in favour of the candidates in whose favour they were marked, and that about 2000 to 3000 ballot papers which ought to have been counted in favour of the petitioner were not counted in his favour, but were counted in favour of the 1st respondent and that after the counting process was finished, he made a request to the returning Officer for recount, both orally and in writing, pointing out the various irregularities that took place, but his request was turned down and so he walked out of the counting hall without affixing his signature to the declaration. During Cross-examination for 1st Respondent he stated that the petitioner, before filing of the election petition, consulted him and that he did not complain either to the Election Commission or to the Chief Election Officer of the State about the refusal of the Returning Officer to receive his representation, and that he knows as to when an application for recount can be filed, and that he gave only one representation at the end of counting and that earlier thereto he did not give any written representation, and that he brought to the notice of the petitioner about the wrong bundling of the counted ballots during the regular counting, and since he, at the beginning of the counting, was not having knowledge about the son of Manikyala Rao, a Counting Supervisor, being the counting agent of the 1st respondent, did not raise a protest and during the third round of counting only he came to know about that fact and since he left the premises after his request for recount was negatived, he does not know if the Returning Officer obtained the concurrence of Election Commission before declaring the result of the election, and that he did not inform the petitioner about the child-like or illiterate's signatures appearing on some of the ballot papers in any particular round, because he and the counting agents of the petitioner observed those on some ballot papers at random, and that he informed the petitioner about some ballot papers not having Hand symbol and his name. During Cross-examination for 6th respondent, he stated that he gave oral complaint twice or thrice to the Returning Officer about the wrong bundling of ballots during second phase of i.e., regular counting, and when those complaints were ignored, he gave a written complaint about the wrong bundling of ballots, but no action was taken thereon and since no election observer was present at that time, there was no scope for him to make a complaint to the election observers, and since the counting agents were threatened that they would be sent out if they do not affix their signatures to "No objection Certificates", the counting agents affixed their signatures to those Certificate at the end of each round of the counting in the second phase i.e., regular counting and after the counting agents informed him about the threats held out to them in the presence of the petitioner, he made a complaint only to the Returning Officer but not to the Election Observer.

14. 1st respondent as RW1 stated that no irregularities took place during counting.

15. The learned Counsel for the petitioner placing strong reliance on *Shashi Bhushan Vs. Prof. Balraj Madhok and Others*, , and *A. Neelalohithadasan Nadar Vs. George Mascrene and Others*, , contended that since purity of election should yield to secrecy, recounting in appropriate cases cannot be refused on the ground that it may result in violation of secrecy of the ballot. Relying on *Bhabhi Vs. Sheo Govind and Others*, , which was referred to and relied on in *S. Raghbir Singh Gill Vs. S. Gurcharan Singh Tohra and Others*, , he contended that, as the evidence on record establishes that there were irregularities in counting, inspection and recount of ballots may be ordered. The contention of the learned Counsel for the 1st respondent is that since evidence not supported by pleading has to be ignored, and since there is no plea regarding misbundling of the ballot papers, the evidence of PWs.2 to 5 regarding the wrong misbundling of ballot papers has to be rejected. Relying on *Vadivelu v. Sundaram and Ors.* 2000 (7) Supp 57, and *V.S. Achuthandan v. P.J. Francis and Anr.* 2000 (1) Supr 574, *Preet Mohinder Singh v. Kirpan Singh JT* 2000 (10) SC 472, *Mahant Ram Prakash Dass v. Ramesh Chandra and Ors.* 1999 (9) Supp 282, and *Smt. Ram Rati v. Saroj Devi and Ors.* 1997 (6) Supp 6 , *Charan Dass v. Surinder Kumar and Ors.*, *L Rahim Khan Vs. Khurshid Ahmed and Others*, , *Suresh Prasad Yadav Vs. Jai Prakash Mishra and Others*, , and *Quamarul Islam Vs. S.K. Kanta and others*, , he contended that the petitioner is not entitled to any relief.

16. Before considering the merits of the contentions raised with reference to the evidence adduced, it is necessary to refer to the decisions cited across the Bar. Supreme Court in *Raghbir Singh* case (supra) while referring to *Bhabhi* case (supra) held that petition for recount, after inspection of the ballot papers, should contain adequate statement of material facts on which the petitioner relies in support of his case, and the Election Tribunal must, prima facie, be satisfied that in order to decide the dispute and to do complete justice between the parties, an inspection of the ballot papers is necessary, but it cannot exercise its discretion in such a way as to enable the applicant to indulge in a roving inquiry with a view to fish out material for declaring the election void. In *Shashi Bhushan* case (supra) the election was challenged on the ground that it was rigged by process of chemical treatment of ballot papers. Since the question whether ballot papers were chemically treated or not cannot be decided without their being inspected, and since the said allegation can be proved or disproved only by inspecting the ballot papers, inspection of ballot papers was ordered. The said decision was referred to and considered in *A. Neelalohithadasan Nadar* (supra). The case of the election petitioner in that case, who lost the election by 21 votes, was that the names of the several voters were either wrongly or accidentally included in the electoral rolls of more than one polling station in the Constituency, and such persons, taking undue advantage of the inclusion of their names in two polling stations they dishonestly voted in both the polling stations. (As per Section 62(4) of the Representation of People Act, 1951, (the Act), if a

person exercises his vote more than once in the same Constituency in more than one polling Stations, all the votes polled by him would be void). Averring that he ascertained the names, roll numbers and other details of the 19 voters and the polling stations in which they had voted twice election petitioner furnished those details in Annexures I and I-A to the election petition. In order to find out if those 19 persons had voted in favour of the appellant, since it would be necessary to pick out those votes cast by those persons and to eliminate them from consideration, election petitioner sought inspection of those ballot papers. Two petitions for amendment filed by the petitioner to permit him to add 10 and 23 more names to the earlier list of 19 persons, as double votes were allowed. The elected candidate i.e., appellant before the Supreme Court, also filed a Recrimination Petition contending that there was double voting in favour of election petitioner also by some voters. Basing on the evidence on record, and in view of Section 62(4) of the Act, the High Court allowed the prayer for inspection of ballot papers, and set aside the election of the appellant before the Supreme Court. Holding that as purity of election is more important than secrecy of ballot, and secrecy of ballot should yield to purity of election, the Supreme Court dismissed the appeal filed by the candidate who was declared elected.

17. In P.H. Pujar Vs. Dr. Kanthi Rajashekhar Kidiyappa and Others, the case of the election petitioner, who lost the election by 138 votes was that 3872 votes were wrongly rejected, and that his counting agents were not provided with adequate opportunity to inspect the ballot papers. On the facts and circumstances of the case the Supreme Court, as an interim measure, ordered inspection of and recount of 3872 ballot papers by the Registrar of the Kamataka High Court in the presence of the Counsel for the appellant (elected candidate) and 1st respondent (the election petitioner). The subsequent events, as found in P.H. Pujar v. Dr. Kranthi Rajashekar Kidiyappa (Second case) 2002 AIR SCW 1201, show that the Registrar after complying with the above order of the Supreme Court, submitted his report, by which the margin of victory would stand reduced to 60 from 138 votes. Holding that that fact would not have material bearing on the result of election, the Supreme Court, relying on Vadivelu case (supra), allowed the appeal and dismissed the election petition on the ground that recount of votes cannot be ordered in a casual manner on the ipsi dixit of the election petitioner, or merely because the margin of defeat is meager without there being a proper foundation in the pleadings by setting out material facts, and proving those facts by adducing requisite evidence.

18. In para 14 of V.S. Achulhanandan case (supra) it is held that if a recount of the ballot papers is made in pursuance of the order of High Court, though those statistics could be used for deciding the election dispute, if the validity of the order passed by High Court permitting inspection of ballot papers and directing a recount is brought in issue before the Supreme Court, the result of recount cannot be relied upon by election petitioner to support his prayer for recount or to sustain the order for recount, if the pleadings and material available on record anterior to actual recount did not justify grant of the prayer for inspection and

recount. The same view is reiterated in Preet Mohinder Singh case (supra). In Charan Dass case (supra) it is held that inspection of ballot papers cannot be granted on vague ground that votes cast in favour of the petitioner were included in the votes of the returned candidate and when objected to were declared invalid. It is held that an election petitioner has to make precise allegations of material facts, as elaborate rules relating to counting should be deemed to be within the knowledge of the petitioner. The Supreme Court confirmed the order dismissing the election petition in view of the fact that the counting agents of the election petitioner signed the Certificates that they were satisfied with the conduct of counting also. In Suresh Prasad Yadav (supra) the Supreme Court laid down some of the instances where the Court would be justified in ordering a recount. In Mahal Ram Prakash Das (supra) the Supreme Court held that smallness of victory margin may not be a sufficient ground for recount and vagueness of allegations and the counting agents signing satisfaction memos at the end of each round of counting would be a ground for rejecting the prayer for recount. The principles laid down in these decisions will be kept in view for appreciating the evidence adduced by the petitioner.

19. There is not even a faint reference to misbundling of counted votes in the election petition. It is well known that no amount of evidence can be looked into on a plea not taken in the pleadings. The question as to whether there was misbundling of the counted ballots during the second phase of counting is but a "material fact". Section 83 of Act mandates an election petition containing "material facts". Since "material fact" of misbundling spoken to by the witnesses examined by the petitioner is not pleaded, that part of the evidence of PWs., relating to misbundling of votes has to be ignored. Even otherwise also I see not even a grain of truth relating to misbundling of votes. The procedure prescribed and adopted by the Election Commission through its instructions, for counting of votes is almost foolproof because it provides for many checks, rechecks and counter checks. The Instructions of the Election Commission on the subject "Procedure of Counting of Votes by mixing of ballot papers - revised Instructions" issued in Memo No. 470/95/J.S. II, dated 25th January 1996 are printed in the "Manual of Election Laws" by Bahri Brothers (1998 Edition) at pages 2.822 to 2.859. Paras 1 to 6 thereof are introductory paragraphs. Paras 2 and 3 which relate to the second stage or detailed counting, at page 2.824 of the Book read-

"2. At the counting table, the said 1,000 ballot papers contained in 40 bundles will be taken up for detailed scrutiny and sorting candidate-wise. The ballot papers contained in each bundle will be scrutinised for determining their validity or otherwise by taking each bundle one by one. It is not necessary to further mix all these 1,000 ballot papers before taking up such detailed scrutiny and sorting out candidate-wise, as was being previously done.

4. After the said 1,000 ballot papers supplied to a counting table have been scrutinized as to their validity or otherwise, and sorted and counted candidate-wise, the result of such counting at the counting table will be entered, in Part-II

of the Check Memo. It will be signed by the Counting Supervisor and, after the disposal of the doubtful ballot papers, by you (Returning Officer) also."

Paras 21.1 to 21.7 containing details of Second Stage of Counting of Votes are printed at pages 2.836 and 2.837 of the said Book. They contemplate 1,000 votes i.e., 40 bundles each containing 25 ballot papers being distributed for counting at each counting table for each round, with a check memo signed by the Officer in-charge of distribution.

Para 21.3 reads-

"21.3 A sample form of Check Memo duly filled in is given for your guidance at Appendix II. It should be noted that a separate Check Memo will be used for each round of counting at every table."

Appendix II containing the Check Memo in two parts is printed at page 2.854 of the Book. It reads-

"Check Memo for Counting of Vote"

House of the People

Election to the From Legislative Assembly 9 -Tezpur
(Constituency)

(73 Diagonal Assembly Segment)

PART I

Number of Table 10.....

Name and Designation of Supervisor. Shri Hari Ram, Senior Assistant Collector,
Darrang District.

Number of bundles Number of ballot papers in each bundle Total Number of
ballot papers

Number of ballot papers 30 25 750

*1 23 23

Total No. of ballot papers 773

Signature of Officer Distribution

Date.....

PART II- RESULT OF COUNTING

Name of Candidate No. of valid vote cast

1. A 350

2. B 301

3. C 117

Doubtful

Rejected ballot papers 5

Total 773

Signature of Counting Supervisor

Date:

Signature of Returning Supervisor

This shows that adequate care was taken to see that at each table, for each round of counting, all the 1000 ballot papers distributed for counting are properly accounted for. If 27 votes polled in favour of the petitioner are bundled and shown as a bundle of 25 votes, and if 23 ballots polled in favour of 1st respondent are bundled and are shown as 25 votes, neither party can be said to be prejudiced because the ballot papers in Part-I should tally with the ballots counted and shown in Part II. Probably after noticing the fallacy in the ground of misbundling got elicited through PWs.1 to 4, the Chief Election Agent of the petitioner as PW5 stated that while misbundling of the votes, the counting staff took care to see that the counted votes tallied with the votes distributed for counting. In fact para 21.4 and paras 24(n) and (o) in the Instructions dated 25-1-1996 referred to above and printed at pages 2.837 and 2.841 of the above Book are meant to prevent the situations of misbundling spoken to by PWs.I to 5. They read-

"21.4. At each round of counting, the ballot papers should be scrutinised for their validity by the Counting Supervisor and assistants. The valid ballot papers will be sorted candidate wise. The valid ballot papers of each candidate will be made up into bundles of 25 except one bundle which may contain less than 25 ballot papers. While making the bundles of counted ballot papers, the front side of the ballot papers containing voting marks of the electors and the symbols of the Candidate should be kept outwards so that a glance at each such bundle will show as to which candidate that bundle of ballot papers pertains to and no mistake is committed by placing that bundle in the tray of a wrong candidate. Each bundle of 25 or less ballot papers will be tied with a rubber band or string. All the bundles of ballot papers for each candidate will be tied together with a rubber band or string. A check slip will be placed on the top of the bundle of ballot papers for each candidate showing the name of the candidate and the number of ballot papers in the bundle. You may get these check slips for each candidate printed or cyclostyled. This check slip will be signed by the counting supervisor. Similarly, all the doubtful ballot papers, if any, at a counting table in each round shall be made into one separate bundle and tied with a rubber band or string."

"24(n) You must satisfy yourself that the bundles of valid ballot papers have

been correctly sorted and do not contain any ballot paper which ought to be rejected or ought to be placed in the bundle of valid ballot papers of any other candidate. To ensure this, you must make a test check of the bundles of valid ballot papers. This test check you may do by turning the ballot papers like currency notes keeping an eye on the symbol of the candidate in whose favour the votes have been cast. This will ensure that the bundle does not contain any ballot paper which ought to be rejected or which ought to be placed in the bundle of any other candidate. On turning the ballot papers in a bundle as above if you find that it contains ballot papers which ought to be rejected or ought to be placed in the bundle of ballot papers of any other candidate you should count all the ballot papers of that bundle, and if a- result of such counting you have reasonable doubt that the counting staff by whom that bundle has been counted might have committed similar mistakes in other bundles counted by them, then, you may direct a recount of those bundles by different set of counting staff. This test check must cover all the counting tables in each round.

24(o) To ensure further accuracy in the counting of votes, five per cent of the total number of bundles of valid ballot papers of the different contesting candidates shall be counted by you. You will make your selection of this five per cent in such a manner that it contains bundles pertaining to the different contesting candidates."

It is not even the case of the petitioner that the above mentioned instructions were not followed by the Returning Officer. It is not even alleged that there were irregularities at the tables of the Returning Officer and Assistant Returning Officer. In fact PW5 admitted that the counting agents of the petitioner signed the "Satisfaction Memos" at the end of each round of counting, but qualified it with a statement that they signed them under threat. None of PWs.2 to 4 stated that their signatures were obtained under threats. In fact petitioner did not even allege in the petition that signatures of his counting agents on the "Satisfaction Memos", were obtained under threats. It is also not possible to threaten all the counting agents of the petitioner in all the rounds of counting for obtaining their signatures, Therefore the evidence of PW5 that signatures of the counting agents of the petitioner on the satisfaction memos were obtained under threats cannot be believed, and it has to be taken that they voluntarily affixed their signatures to the Satisfaction Memos at the end of each round of counting.

20. The evidence of PW5 that some of the ballot papers did not contain the name or symbol of the petitioner cannot be believed or accepted because there is no such plea in the petition. A ballot paper not containing the name or symbol of a candidate, that too of a candidate belonging to a recognised political party, is not a valid ballot paper. Had the petitioner or his agents found ballot papers not containing the name and (or) symbol of the petitioner they would not have kept quite. They would have noted the serial number on such ballot papers and would have raised objection when it was treated as a valid ballot paper. Except making a bald statement PW5 did not give the details of the rounds and tables at which

such ballot papers were found. PW5, who is an advocate by profession, acting as Chief Election Agent of petitioner, would not have failed to note the serial numbers on such ballot papers, the tables and the round in which such ballot papers were found, the name of the counting staff and the counting agent who detected it, and would have mentioned those details to the election petitioner to enable him to detail them in the election petition, because they are "material facts" which give rise to a cause of action to question the election of 1st respondent. Non-furnishing of material facts is a defect which goes to the root of the matter. Hence the evidence of PW5 that the name and symbol of the petitioner were not found on some of the ballot papers has to be ignored.

21. The averment in the petition that the wife of the 1st respondent canvassed and solicited votes on his behalf, is not established by the evidence adduced by the petitioner. On which date she went out for canvassing and to which village she went, the vehicle number she used, are not mentioned either in the petition or in the evidence of any witness. The evidence of PW1 that the wife of 1st respondent along with her friends went in two cars and solicited votes cannot be believed or accepted because the particulars of the cars or their numbers are not mentioned in the election petition or by PW1. This apart, as stated earlier, the stand taken by the petitioner during the hearing of Application No. 347 of 2000 is that he is questioning the election of 1st respondent only on the basis of the irregularities in the counting but not on the ground of corrupt practices. Therefore this ground taken in the election petition can be ignored.

22. The first irregularity in the counting alleged is that the 1st respondent influenced the posting of election staff through his wife, who is working as Divisional Accounts Officer in the Executive Engineer's Office, Mylavaram. 6th respondent, who is a Divisional Forest Officer, was the appointing authority of the counting assistants and supervisors as per Rule 53 of Conduct of Election Rules, 1961 (the Rules). It is difficult to believe that a Divisional Accounts Officer in the office of an Executive Engineer can influence the Divisional Forest Officer in posting of the counting staff. In fact 6th respondent, in his written statement, stated that he is not aware that the wife of the 1st respondent is working as Divisional Accounts Officer in R&B Department at Mylavaram and that she never came to his office with regard to posting of counting staff and that out of 11 persons whose names are mentioned in para 9 of the petition, six persons were posted as reserve staff, and the remaining five persons were posted, not on the influence of 1st respondent but in route course. In para 4 of his written statement 1st respondent alleged that out of eleven names mentioned in the petition, only one person is from the office of the Executive Engineer, R&B Department and some are Teachers of Sarvodaya School with whom he has no acquaintance. For reasons best known to him petitioner did not produce the proceedings issued by the 6th respondent appointing the counting staff, and did not specifically state which member of the counting staff came from what Department and how they came under the influence or control of the 1st respondent or his wife. In para 11 of the petition it is alleged that the counting staff, influenced by the wife of 1st

respondent mixed the votes cast in favour of the petitioner with the votes cast in favour of the 1st respondent in spite of protests by the counting agents of the petitioner. Significantly none of PWs.1 to 5 spoke about the presence of the wife of 1st respondent in the counting halls. So her influencing counting staff does not arise. Petitioner who admittedly contested 4 or 5 elections earlier, and was the Deputy Chief Minister of the State for sometime, would not have failed to object to the appointment of counting staff who are supporters of 1st respondent, when he knew that some of the counting staff were appointed at the instance of the 1st respondent or his wife. As an ordinary prudent man 1st respondent would not have failed to give a written complaint to the 6th respondent and (or) the State and Central Election Authorities disputing the appointment of partisan counting staff, when he knew that they were partisan. Admittedly no written complaint was given either by the petitioner, his chief counting agent (PW5) alleging that the counting staff were partisan, or were acting prejudicial to the interest of the petitioner during the course of counting. Except PW1 baldly stating that the counting staff are all supporters of 1 st respondent, nothing substantial is produced to establish that fact. When he knew that the counting staff, are the supporters of 1st respondent, nothing prevented the petitioner from giving a written complaint to the 6th respondent objecting to their appointment at or before the counting, because names of counting staff, who would have to attend training classes, would be known to the candidates several days prior to the date of counting. Therefore the contention of the petitioner that the 1st respondent or his wife influenced the posting of election staff and that the counting was vitiated on that ground cannot be believed or accepted.

23. The second irregularity alleged by the petitioner is that his counting agents could not see the markings on the ballot papers properly and when PW5 gave a representation to 6th respondent complaining about the same, he refused to receive the same on the ground that he has orders not to receive representations. The said allegations cannot be accepted or believed because PW5 during cross-examination admitted that he gave only one written representation at the end of counting and earlier thereto he did not give any written representation. He also admitted that he did not inform either the Election Commission or the Chief Election Officer of the State about the Returning Officer refusing to take action on his representations. In fact this contention of the petitioner that his counting agents could not see the markings on the ballot papers is inconsistent with the other averment that the votes cast in his favour were placed in the votes of 1st respondent and counted as his votes. Both cannot be true. So I see no substance in this ground.

24. The third irregularity alleged relates to mixing of votes. Except baldly alleging that votes cast in his favour were mixed with the votes cast in favour of the 1st respondent and were counted as the votes in favour of 1st respondent, details as to on which counting table, in which round of counting, how many votes polled in favour of the petitioner were mixed with the votes of 1st respondent are not alleged in the petition and details of those alleged irregularities are not spoken to

by PWs. If such irregularities are committed, written complaint would have been given to the Returning Officer and also to the Election Observer. Petitioner also could have sent a complaint to the Election Commission, if no action was taken by the Returning Officer on his complaints. As stated in para 19 supra, the procedure prescribed in para 24(n) of the Memo dated 25-1-1996 of the Election Commission, extracted in that para, provides a safeguard to check if the votes cast in favour of one candidate are mixed with the votes cast in favour of another candidate. It is not even alleged in the petition, and no PW stated that, that procedure was not followed. Therefore I am unable to accept the contention that votes polled in favour of the petitioner were mixed with and counted as the votes of the 1st respondent.

25. The other irregularity alleged is some doubtful votes which ought to be invalidated were counted in favour of 1st respondent and some votes which were cast in favour of petitioner were treated as invalid votes. Decision on the validity of doubtful votes would be taken at the tables of Returning and Assistant Returning Officers but not at the counting tables. Doubtful votes received from the counting tables would be scrutinised by the Returning Officer or Assistant Returning Officer. Para 24(1) of the Instructions of Election Commission dated 25-1-1996 referred to above and found at pages 2,839 and 2.840 of the Book, "Manual of Election Laws" reads-

"Reject a ballot paper only;

(i) when there is no mark at all on the front, or the mark is made otherwise than with the instrument supplied for the purpose; or

(ii) when the mark is in blank area, that is to say, at the back or entirely in the shaded area; or

(iii) when there are marks against two or more candidates; or

(iv) when there is any writing or mark by which the voter can be identified; or

(v) when the ballot paper is mutilated beyond recognition; or

(vi) when the ballot paper is not genuine or it is spurious.

You should endorse on every ballot paper which you so reject the word "Rejected" and the ground (s) for such rejection in abbreviated form either in your own hand or by means of rubber stamp. You should also initial each such endorsement but you need not give the date.

A rubber stamp in the following form specifying the various reasons for rejecting a ballot paper may be used. In that case what you are required to do is to affix this stamp which mentions all the reasons and make a tick mark (/) against the particular reason for which the ballot papers is to be rejected and then affix your initial.

Rejected

1. No marking.
2. Mark on blank area.
3. Multiple voting.
4. Mutilated.
- 5, Not genuine.

Returning Officer

Before finally rejecting any ballot paper give a reasonable opportunity to the candidate or his agents present at your table to inspect it.

If the agents want to note down the serial number of any ballot paper on the ground that it is of doubtful validity for any reason or wrongly rejected by you, you may allow them to do so. But you may reject any unreasonable demands in this regard.

Do not, however, allow them to handle any ballot paper physically."

Therefore it is clear that before giving a decision on doubtful votes, candidates or their agents will have opportunity to inspect those ballot papers and the S.No. of such ballot papers can also be noted by them. Therefore petitioner, or PW5 or the counting agents of petitioner could have noted the serial numbers on the doubtful ballot papers which were improperly rejected, or counted in favour of 1st respondent and given those details in the petition. By making a bald statement without, furnishing the details of serial number of the ballot papers, round number and counting table on which the said alleged irregularities took place, petitioner seeking an inspection and recount amounts to an exercise for fishing out material for declaring the election void. Such attempts for fishing out evidence cannot be permitted as laid down in *Bhabhi (supra)*, *Raghubir Singh (supra)*, *V.S. Atchuthanandan (supra)*, *Charandaas (supra)* and *Suresh Prakash (supra)*.

26. The other irregularity alleged in para 11 of the petition, is that the counting agents of the petitioner found some ballot papers containing signatures made by young boys or illiterates and found such signatures on as many as 20 ballot papers on each counting table and ignoring the request of the Chief Election Agent of petitioner (PW5) to invalidate such ballot papers they were counted as votes in favour of the 1st respondent. The details as to in what round those ballot papers were seen and the serial numbers of those ballot papers are not mentioned in the petition. PW5, during cross-examination, stated that he did not inform the petitioner about the child-like signatures appearing on some ballot papers in any particular round and that the counting agents of petitioner also observed such signatures. None of the counting agents of petitioner examined by him i.e., PWs 2 to 4 spoke about their seeing such ballot papers. Admittedly PW5 did not give any written representation objecting to counting of such ballot papers, which allegedly contained illiterate's or child-like signatures. Therefore I

am not able to accept the contention of the petitioner that some ballot papers contained child-like or illiterate's signatures. This apart, by a mere look at a signature it is not always possible to say if it was made by a child or an illiterate person. It is not even the case of the petitioner that there was rigging. In fact no evidence is adduced by the petitioner to show that there was booth capturing or rigging, and no polling agent is examined to speak to the fact that persons other than polling or Presiding Officers signed the ballot papers in any particular polling booth. Merely because PW5 felt that some signatures on some ballot papers were "child-like" or looked like the signatures made by illiterate persons, without anything more, even if such ballot papers were really found, genuineness of those ballot papers cannot be doubted. So it cannot be said to be an irregularity in the counting.

27. I feel it necessary to refer to the averment in para 10 of the petition that on the polling day i.e., 18-9-1999, supporters of 1st respondent poured ink in the ballot boxes in Rajupalem Polling Booth and so repolling was ordered and that repolling took place on 21-9-1999. In his written statement 6th respondent alleged that some persons in a drunken state came to the polling booth and snatched away the ballot boxes and all those people were arrested and a criminal case was registered against them. Since repolling took place, and since that incident of snatching ballot boxes has nothing to do with counting, and since the petitioner is basing his claim to recount only on the alleged irregularities in counting, the incident at Rajupalem polling booth has no relevance in deciding this petition.

28. The other irregularity alleged is that the son of Manikyala Rao, a Counting Supervisor, was the counting agent of the 1st respondent. 6th respondent in his written statement asserted that the son of Manikyala Rao was the counting agent of the candidate belonging to Anna TDP but not of the 1st respondent. 1st respondent denied that he appointed the son of Manikyala Rao as his counting agent. Judicial notice can be taken of the fact that Anna TDP is a break away group of TDP, and became its rival party. So counting agents of Anna TDP would not support the TDP candidate and vice-versa. Since 1st respondent denied that the son of Manikyala Rao was his counting agent, petitioner has to prove that the son of Manikyala Rao acted as the counting agent of 1st respondent. Except the ipsi dixit of the petitioner, there is no documentary evidence on record to show that the son of Manikyala Rao acted as the counting agent of the 1st respondent. Though he could produce the certified copies of the lists of counting agents of the candidates, petitioner did not choose to produce the list of the counting agents of the candidates, to establish his contention by documentary evidence. If son of Manikyala Rao helped the cause of 1st respondent during counting, petitioner or PW5 or any of the counting agent of petitioner, could have made a request for either the son of Manikyala Rao or Manikyala Rao withdrawing from the counting hall or would have given a written complaint to the Returning Officer or Assistant Returning Officer or the Election Observer and (or) could have sent a complaint to the Election Commission. No such report is produced. So I do not accept the

contention of the petitioner that the son of Manikyala Rao acted as a counting agent of the 1st respondent. The evidence adduced by the petitioner does not show that the presence of the son of Manikyala Rao materially affected the result of the election. Therefore, mere presence of the son of Manikyala Rao in the counting hall is not a ground for ordering recount or inspection of ballot papers.

29. The last irregularity alleged is that various written representations given were not received or were ignored. It is too vague an allegation to be countenanced as a "Material fact". The details as to in which round, which counting agent gave what representation to which counting staff are not mentioned. As stated earlier petitioner who was the Deputy Chief Minister and who contested several elections earlier, cannot be believed have remained a mute spectator when irregularities in counting were taking place. He would not have failed to report the irregularities, and the alleged refusal of the Returning and Assistant Returning Officer receiving written complaints to the Election Observer and would have also sent complaints to the Election Commission. But he did not do so. The specific evidence of PW5 is that he gave only one written complaint after counting is completed. The written request for recount after completion of the counting, said to have been prepared by PW5, which was allegedly refused to be received by the 6th respondent, is not produced by the petitioner. Since the reckoning in a Court of Law in respect of things not in existence and documents not produced into Court is the same, it has to be taken that there was no written request for recount by the petitioner or PW5. Since in Smt. Ram Rati case (supra) and V.S. Atchutanandan case (supra) Supreme Court held that condition precedent for maintaining of an application for recount is the candidate filing a petition for recount before the Returning Officer stating the reasons on which he is seeking recount, and since there is no documentary evidence on record to show that petitioner or his counting agents gave a petition in writing to the Returning Officer for recount, the prayer for recount cannot in any event be allowed.

30. Technicality apart, for the reasons mentioned above, on merits also petitioner is not able to establish that irregularities were committed during counting and that counting was vitiated by irregularities. Therefore, the two issues are answered against the petitioner.

31. Issue No.3

In view of the findings on Issues 1 and 2, I find no merits in this Election Petition and hence the same is dismissed with costs.