
(1993) 07 CAL CK 0014
In the Calcutta High Court
Case No : Election Petition Case No. 4 of 1991

Pankaj Banerjee

APPELLANT

Vs

Prasanta Kumar Sur

RESPONDENT

Date of Decision : 20-07-1993

Acts Referred:

Conduct of Elections Rules, 1961 — Rule 54A, 56, 56A, 56A(1), 56A(2)

Citation : (1994) 1 ILR (Cal) 1

Hon'ble Judges : Ajoy Nath Ray, J

Bench : Single Bench

Advocate : R.K. Lala and U.R. Banerjee, for the Appellant; Salil Kumar Ganguli, Nirmal Kanti Chatterjee, Saibal Ganguli and Anuradha Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

Ajoy Nath Ray, J.—This is an election petition filed by Mr. Pankaj Banerjee, who was the Congress(I) candidate in the 11th Assembly Elections in the State of West Bengal for 150-Tallygunge Assembly Constituency.

2. The returned candidate in the said Assembly Election was Mr. Prasanta Kr. Sur, the present Health Minister, who is the first Respondent in the instant application.

3. The total number of votes cast was above 95,000. The number of votes by which the first Respondent won over the Petitioner, according to the declared result, is 322. By all standards this is a slender lead by which to win an election where the number of votes cast is as large as mentioned above.

4. The present election petition is and has been pressed and argued as a recounting petition. Mr. Lala, the learned Advocate appearing for the Petitioner, has pressed various grounds why, according to him, the entire votes cast need to be recounted and why, according to him, the said slender lead of the first Respondent needs again to be rechecked.

5. I shall give below cases upon which Mr. Lala relied, as well as the cases upon which Mr. Ganguli, the learned Advocate appearing for the first Respondent, relied. However, this is an appropriate point, even at the beginning of the judgment, to mention that a recounting petition is not bound to succeed, merely because the winning margin of the returned candidate is slender one. (See Satyanarain Dudhani Vs. Uday Kumar Singh and Others, It is also, in my opinion, equally settled law that the winning margin being a slender one, is a material consideration in determining a recounting application (see S. Baldev Singh Vs. Teja Singh Swatantar (Dead) and Others,

6. Some facts have now to be stated so that the law can be discussed in the light of these facts. The Returning Officer of the election in question was one Mr. Rajendra Kumar who came to give evidence under a subpoena served upon him by or on behalf of the first Respondent. He was the Returning Officer not only of the present election in question but also of certain other elections.

7. The voting took place in the latter part of May 1991, but the counting had to be postponed from May 27 to June 17, because of certain troubles that had unfortunately occurred at that time in Southern India.

8. The counting was carried on in two halls in a building at Tollygunge. The area for which the present election was conducted was also a portion of the Parliamentary Constituency, for which the said same two halls were also used. Miss Mamata Banerjee, previously the Sports Minister of the Congress(I) at the Centre, was returned by the said Constituency to Parliament by a margin of about 9,000 votes.

9. The two counting halls had tea tables each for the assembly and parliamentary counting. The number of tables for the assembly election, therefore, aggregated 20.

10. The number of assembly booths was 153. The results have been published in respect of all 153 booths and these are in the possession of the parties before me.

11. The counting was carried on by turning the votes cast in favour of the individual candidates in bundles of 50. The total number of votes secured were, thereafter, totalled on the basis of such bundles.

12. The case of the Petitioner is that the entire facts and circumstances of the case relating to the counting call for a recount. After the counting was over, and the result was about to be declared, the Petitioner approached the Returning Officer with a request for recounting. The Returning Officer gave the Petitioner a short time, which in the evidence has emerged to be about ten minutes or so, during which the Petitioner was asked to make out a recounting petition in writing. This was done. The said recounting petition, or more accurately, a copy thereof is annexed to the written statement of the Respondent No. 1.

13. Four grounds were made out in the said recounting petition for substantiating

the Petitioner's case for recounting. Roughly speaking these are:

(i) Bundles of 50 were not properly made, that the bundles of the Petitioner contained more votes, and that the bundles of the Respondent No. 1 contained less votes than 50 ;

(ii) that counting of the votes in respect of the booths Nos. 149 and 150 was made irregularly because these booths were counted after the counting of the last booth No. 153, and these were not counted at the tables which would have been normally selected for their counting (the recounting petition is not as detailed as this in regard to these booths, and merely mentions that the last round counting of booths was not according to the declared system. But I have thought it fair to give some details which came out in the evidence before the Court) ;

(iii) that some wet ballots were there and this caused the identification thereof to be improperly made.

(iv) that there was serious chaos in the counting of several booths, by reason of which counting agents could not do their jobs.

14. The recount petition did not mention any complaint about postal ballots, but Mr. Lala has argued that irregularities in relation to postal ballots also call for a recount. I have dealt with the same below.

15. The Returning Officer rejected the petition of recounting and declared the ejection result after such rejection. I shall mention below some details about the events that transpired prior to the said rejection. However, this is an appropriate place where the basic law relating to recounting must be set out so that the facts given, hereafter, may be understood in that light.

16. The way or the manner in which a Returning Officer is to deal with a recounting petition is to be found from Rule 63 of the Conduct of Election Rules, 1961. The material portion thereof for our purposes is as follows:

63. Re-count of votes: (1) After the completion of the counting, the Returning Officer shall record in the result sheet in Form 20 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 or any of his counting agents may apply in writing to the Returning Officer to re-count votes either wholly or in part stating the grounds on which he demands such re-count.

(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 therefore.

(5) If the Returning Officer decides under Sub-rule (3) to allow a recount of the votes, either wholly or in part, he shall

(a) do the recounting in accordance with (Rule 54A), Rule 56, or Rule 56A. as the case may be;

(b) amend the result sheet in Form 20 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 complete and sign the result sheet in Form 20 and no application for a recount shall be entertained thereafter ;

Provided that no step under this sub-rule shall be taken on the completion of the counting until the candidates and election agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by sub-rule. (2).

17. It is clear from the reading of this rule and sub-Rule (3) specially that a recount petition cannot be rejected unless the Returning Officer finds that the said petition is either unreasonable or frivolous. Mr. Lala placed in this regard the Supreme Court case of Chanda Singh Vs. Choudhary Shiv Ram Verma and Others, He also placed the above-mentioned case of S. Baldev Singh v. Teja Singh Swatantra (Dead) (Supra) being a three-Judge decision of that Court.

18. In the manner I venture to read the dicta in the aforesaid two Supreme Court cases, material for our purpose, I come to this conclusion that where there are suspicious facts clouding the circumstances of the counting of votes and the margin of win is small (see para. 6 of the Chanda case), the Returning Officer would not be entitled to come to the conclusion that the recount petition is either frivolous or unreasonable, but must pass on appropriate order to clear up such suspicious circumstances.

19. It also follows from the above two cases that though a mere small lead might not be, by itself, sufficient for the success of a recount petition, yet a minimal lead as opposed to a huge lead is a relevant factor in the consideration of a recount petition.

20. The Returning Officer, therefore, has to judge whether the recount petition is unreasonable or frivolous. To my mind, the test is utterly different from judging whether the recount petition is to be allowed on a weighing of all circumstances or not. A recount petition is to be allowed unless it cannot but be rejected. If it is either unreasonable or it is frivolous then and then only can it meet the face of rejection. In other cases the Returning Officer must allow the recount.

21. The other question which will be equally material in the instant case, is what

the Court must do, if it comes to the conclusion, that the rejection of the recount petition by the Returning Officer was bad in law. Must it, in all cases where it comes to such a conclusion, automatically pass a recount order ? The answer to this question is clearly in the negative. Consider, for example, a case where the recount petition is unreasonable or frivolous. Assume further in that case that the manner in which the Returning Officer disposes of the said application suffers from serious defects and must, therefore, be set aside, Such defects might include a consultation with one of the candidates or it might be that the order has been passed by taking into consideration extraneous or irrelevant matters. In such cases the decision of the Returning Officer must be set aside. But that does not mean that, if the recount petition was originally made under circumstances unreasonable or frivolous, the Court must still grant such a petition because of the errors or misdirections committed by or suffered by the Returning Officer.

22. In case the decision of the Returning Officer is set aside, the Court must itself transport its own mind to the time and day (or night, as in this case) when the recount petition was presented. The Court will be in a better position, no doubt, to judge the recount petition because in most cases a lot of evidence will also be before the Court at the time the consideration of the recount petition is, ultimately undertaken by it (See para. 10 in Dudhani's case(Supra). The question of remand of the matter to the Returning Officer does not arise at all because the same is thoroughly impractical. The Court must fill the chair of the Returning Officer and come to its own decision and substitute the same in place of the decision of the Returning Officer on a balance of all the circumstances and facts available to it at the time of final disposal of the recount petition. But even during that exercise, the test to be applied by the Court must be the same test as was to be applied by the Returning Officer, i.e. the Court must allow the recount, unless it finds the recount prayer to be frivolous or unreasonable.

23. On the above basis, the evidence, or some of it, as was relied upon by both sides, should now be looked into.

24. Three witnesses came and gave evidence on the part of the election Petitioner, they being himself, one Ujjal Biswas and one Radha Kanta Mukherjee. It was quite surprising that at the time when Mr. Lala argued the case of the Petitioner he did not place any question or any answer given by any of the witnesses of the Petitioner. In reply, however, he pointed out certain questions to which I shall make reference later.

25. Mr. Lala relied more upon the evidence of the witnesses called by Mr. Ganguli upon subpoena and Mr. Lala sought to point out the imperfections and lacunae in the evidence given by those persons so as to substantiate the case of the Petitioner.

26. Mr. Ganguli for the first Respondent examined several witnesses of whom I have already made the mention of Rajendra Kumar. All these witnesses for both parties were examined before another learned Judge excepting only the last, i.e.

Subrata Sen Chowdhury, a paid full time CPI(M) worker. The reason why the matter was released by the earlier Bench was that it was pointed out on behalf of the first Respondent that the presiding Judge was a voter in the constituency in respect of which the election case had arisen.

27. Be that as it may, from the evidence of the other witnesses examined by the first Respondent large tracts were placed before me especially that of Nityeswar Banerjee and Prabir Kumar Guha Roy who were both giving evidence in respect of counting in hall No. 1, and the evidence of Mukul Kanti Sarkar, who gave evidence in regard to what happened in hall No. 2. The evidence of one Kani Gopal Sarkar was also placed.

28. Nityeswar Banerjee, P. K. Guha Roy and Mukul Sarkar were Assistant Returning Officers. Nini Gopal Sarkar on the other hand, though an A.R.O., claimed to be the "Officer-in-Charge" of the election, but was principally concerned with sitting in a "control room" of the building (which had the two counting halls on the ground floor) and the said control room was located so as to receive calls from the outside, mainly the Writers' Buildings, the seat of the West Bengal Government.

29. Mr. Lala pointed out that before giving his decision upon the recounting petition, the Returning Officer Rajendra Kumar retired for consultation with Nityeswar and Nani Gopal. Such consultation was held admittedly in the absence of the election Petitioner.

30. It was sought to be alleged by the election Petitioner in his depositions from the box, which Mr. Lala did not actually placed but merely referred to, and which was also referred to by Mr. Ganguli, that Rajendra Kumar had retired for such consultation not only with Nityeswar and Nani Gopal but also with the first Respondent. Had I been minded to accept such evidence given on the part of the Petitioner the matter would have assumed a very different shape. But I reject the evidence of the Petitioner that the Returning Officer retired with the first Respondent for consulting upon his recounting petition. The many witnesses who came upon subpoena and were examined in chief by Mr. Ganguli could not be shaken one bit as to this part of the evidence and there is no support available which would bear out the evidence of the Petitioner that the Returning Officer was consulting with the first Respondent for disposal of his recount petition.

31. The Returning Officer has given a written order on the recount petition and the said written order, or a copy of it is also an annexure to the written statement of the first Respondent like the recount petition itself.

32. The principal reason why the Returning Officer rejected the recount petition was that there was no protest on any of the four counts during the time the counting was going on, or when booths 149 and 150 were allotted for counting, and that, on a whole appreciation of the events and circumstances of that day, it did not appear to him to be "justifiable" that the recounting petition should be allowed.

33. The Returning Officer has given different reasons under each of the four heads in his disallowing order. However, the bare reading of the disallowance order shows that the Returning Officer had directed his mind not towards determining whether the recounting petition was either unreasonable or frivolous, but rather whether the recounting petition should be allowed or should be rejected, i.e., whether it is justifiable, upon the entire circumstances of the case. This was a misdirection of himself on his part. He applied to the petition a far stricter test than the law allowed him to. His mind was not addressed to the appropriate legal standards by which a Returning Officer must judge a petition for recount. On this ground alone, taking the decision of the Returning Officer as a quasi-judicial one (which it clearly is), I would be compelled to come to the conclusion that his order of refusal was bad.

34. Even if I come to that conclusion, as I have stated above, I cannot immediately jump to the conclusion that a recount order is an automatic consequence thereof. I have to-day to judge again the four grounds made out by the Petitioner in the recount petition and I have to come to a conclusion, as the Returning Officer also had to, on the date of declaration of the result, as to whether the recount petition was unreasonable or frivolous. In that regard I must be guided by further arguments made in Court, the way the case has been pressed and defended, as well as the evidence on record.

35. One point which is of considerable significance is the one of the making of no recorded protests during the time the counting was in progress. There is no law which calls specifically for such protests to be made either by the election Petitioner or by his counting agent during the time of counting. There is no specific law either that such protest, even in writing, cannot be made during the progress of such counting. It is not so much a matter of law as of keeping on record the contemporaneous events and the contemporaneous views and attitudes of persons actually present on the scene, which cannot later be altered in the light of the result of the election, about to be declared. It is quite a sound view that if a person waits until the end, and when having lost raises protests (consider challenging an arbitrator's jurisdiction after participation before him), his grievances are unreasonable.

36. Mr. Ganguli appropriately relied upon the case of Shri Jitendra Bahadur Singh Vs. Shri Kirshna Behari and Others, (Hedge J.) and placed para. 6 of the said judgment. The absence of any written objection during counting was taken note of by the Court in the said judgment, as was the absence of a recount petition before the Returning Officer. It is not a matter of law, but is a matter of common sense, which is not any the less important in disposal of election or other petitions, that if there are protests galore during the time of counting, the matter will assume a different colour and seriousness much more than if the protests are made only at the end after the election has been lost and won.

37. In regard to the first point, that the bundles were not actually bundles of 50 but were favoured bundles, leaning towards the first Respondent, there were no

complaints during counting and the same was taken note of by the Returning Officer in his rejection order. Mr. Lala placed no question of any of his client's witnesses in regard to this grievance during his argument, but only in reply he placed a few questions of the 2nd witness of the Petitioner being Radha Kanta Mukherjee. He placed Qs. 39 and 44 in examination-in-chief and Qs. 182 to 198 and 386 to 390 in his cross-examination. Radha Kanta Mukherjee "said that there were some bundles of the Petitioner which were 52 in number rather than 50 and that some were even 60 in number. Mr. Ganguli asked him in cross-examination as to the speed of counting the bundles, and compared the same with counting of currency notes in Banks. I think there is some substance in the cross-examination undertaken in that line. It is, however, quite unreasonable for a losing candidate to come forward and say that his bundles were not in 50's when not a single agent of him has made any contemporaneous protest. Radha Kanta Mukherjee was present on the scene. If he saw bundles of 60 being made out, it would be thoroughly unreasonable for him not to put on record at the very time as to which table was performing this serious mistake of turning the bundles into packets of 60 rather than packets of 50. A grievance much after the end, only in a Court of law, is thoroughly unreasonable and therefore unacceptable.

38. The second point was that booths 149 and 150, or more accurately, the votes that came from these two booths, were not counted in order. There were 153 booths and 20 tables in two halls. The declared order was that the booths would be taken up sequentially. I accept this part of the evidence relied upon by Mr. Lala. Thus, over seven rounds of full counting, 140 booths were to be counted, at the 20 tables seven times over, and the last 13 booths would go to the first 13 tables, that means, the 10 tables of room No. 1 and the first three tables of room 2. Booths 149 and 150 would, if this order were followed, have been counted at tables 9 and 10 set for the Assembly in room No. 1.

39. The evidence is clear that these booths were not counted at these tables in room No. 1. The evidence is also clear that these two boxes for these two booths were counted at the tables of the A.R.O.s and not at the tables set for counting.

40. There is also some discrepancy in evidence in this regard which must be mentioned, if only to pay a tribute to some 50 days of hearing which this election petition has consumed. Rajendra Kumar, the Returning Officer, disclaimed responsibility about allotment of these two boxes to the tables of two Returning Officers rather than to tables 9 and 10 of counting hall No. 1. The Assistant Returning Officers, on the other hand, gave evidence from the box that such distribution of the boxes to the tables of the A.R.O.s was made by the Returning Officer himself. When pressed, the Assistant Returning Officers did not say that they counted the two booths themselves. They said that the counting was done by the counting officers but at the tables of the A.R.O.s.

41. Mukul Kanti Sarkar said that the two boxes were first sent to room No. 2 for counting. As these boxes would not be for room No. 2, he shuttled the same back to room No. 1. The evidence given by the other two A.R.O.s mentioned

above and mainly Nityeswar Banerjee is that the counting officers in hall No. 1 were all tired. So the counting was undertaken, one at the table of Mukul Kanti Sarkar, and one other at the A.R.O.'s table in room No. 1, because Mukul Kanti refused to have both counted in hall No. 2.

42. The further case of the election Petitioner is, that having come to know of the result of counting of booth 153, most of his election agents, if not all, went out, being under the conviction that he had already won the election. Indeed, if the margin of win of the first Respondent in respect of booths 149 and 150 were both left out, the result of the election would be a slight margin in favour of the Petitioner. It might be recorded that the votes polled in favour of the Respondent No. 1 in booths 149 and 150 were 503 and 350 and those in favour of the Petitioner were 175 and 226 respectively.

43. To dispel any doubts, it must be also mentioned that such large gaps of voting as in these two booths 149 and 150 were not present only in these two booths but there were other booths with almost" equal gaps which admittedly were counted in order. To mention but one of these, in booth No. 125, the Respondent No. 1 polled 515 votes whereas the election Petitioner polled only 219. It is not necessary to multiply these instances, and since the ultimate result was only 322 plus for the Respondent No. 1, there were naturally similar booths where the election Petitioner had also scored large victories over the Respondent No. 1.

44. This counting out of order was the second ground of the recount petition. To my mind this was the most serious of the four grounds taken by the Petitioner, although even this ground, in my opinion, for reasons state.d below, does not qualify to be at all a reasonable one.

45. I must explain why I say so. The allegation of the Petitioner made before the Returning Officer was in respect of the counting out of order of these two booths, and in respect of the counting out of order only. No attempt has been made to prove before me that these boxes contained false votes, i.e. like votes where the ballot paper did not contain the genuine signature of the Presiding Officer of the two respective booths 149 and 150. The allegation is also not this, that while the A.R.O.'s tables were busy counting the two booths 149 and 150, some miscreants smuggled in false votes and caused the same also to be counted. Such suspicious without foundation were not even aired in arguments before Court.

46. It was said in argument in Court, though not in the recounting petition before Rajendra Kumar, that the counting at the A.R.O.'s table itself was irregular. That argument has also to be given its due weight. Indeed counting at the A.R.O.'s table was irregular, if regularity to include only the following of the declared system that the booths would be counted sequentially at the 20 tables in the two rooms. If, however, irregularity is meant to include the breach of any law or any election rule, then it must be pointed out that neither the A.R.O. himself nor the

table of the A.R.O. is debarred from counting the votes instead of the counting officers. If by some superhuman methods the Returning Officer himself were alone to perform all election duties including counting, sorting and declaration of result, there would be no law against it save only God's laws which set a limit to the power of human functioning.

47. The question, therefore, formulates itself to this, was it reasonable for the Petitioner to, ask for a recount because booths 149 and 150 were not counted in order at the previously appointed tables. If the election agents of the Petitioner chose to leave the hall after the counting of booth 153 was over, and if they chose, not to keep track during the counting that booths 149 and 150 had not until then been counted, then it is entirely their business. Unassailable evidence has come on record that during the counting the counting agents of the Petitioner were present in the counting halls from the first to the last and in one question the Petitioner referred to them surprisingly as his "Chickens". Mr. Ganguli sarcastically commented that that is how a great leader addresses his followers. If these counting agents or most of them leave the hall too early convinced of the victory of the person for whom they were working, then the declared result cannot be said to be vitiated for that reason.

48. If the entirety of the allegation as to counting out of order is accepted as such, even then the same does not touch the number of votes polled by a candidate, unless there is added thereto certain other facts like smuggling of votes, improper behaviour by any of the Assistant Returning Officers themselves of some such other feature. After listening to the parties at length, and after looking through the evidence also at some length, I have been unable to find any cogent evidence wherefrom it can be deduced or even prima facie suspected that non-maintenance of the order in counting was premeditated by anybody, or that it was brought about to do some election mischief, for which the Assistant Returning Officers or others were lying in wait, so as to give the Respondent No. 1 some slight slender winning margin if the going ultimately turned out to be too bad for him. Such a conclusion would sound like an interesting story no doubt, but the conclusion completely lacks any foundation upon which it can rest, and these foundations must be traced out from the documents on record and evidence on record.

49. It would be thoroughly unreasonable, in my opinion, to order a recount, even of these two booths 149 and 150, merely because these were not counted in the previously declared order and merely because there has been discrepancy in evidence in regard to the shouldering of responsibility as to who took the initiative in the matter of endorsing the recounting of these two boxes out of order.

50. One thing I must also mention before I pass on to the next point. Mr. Sur in his written statement has alleged that there was some error in counting, and that by such error some of his votes were given to Mr. Banerjee. Mr. Lala says that he can claim a recount on this admission alone. This, with respect, is a wrong

argument. Not all matters can be settled by admissions in parties' pleadings. A will cannot be probated without the Court's independent satisfaction. A contempt matter cannot be settled by parties, and Court must be satisfied in the matter. Similarly, an election is a public process, and the contestants do not exhaust the parties interested in the election process. The voters are involved, the country is involved. I reject Mr. Sur's allegation that any votes of his were given to Mr. Pankaj Banerjee. There is no support for this statement in the evidence on record, and it is, at least, unfortunate that such an allegation should have been made against the officers conducting the election, who did, on the whole, an excellent job.

51. The third point was the point of wet ballots. Again not much evidence was placed of any of the witnesses of the Petitioner by Mr. Lala when he concluded his arguments at first. He had placed, however, certain questions of Nityeswar Banerjee especially the questions 334 to 386 where Mr. Banerjee said that if there was an allegation of ballots becoming unidentifiable because those were wet, then it is a serious allegation. Indeed, the seriousness of the allegations is not in the dispute. Nobody disputes that if bundles are not of 50 and if ballots are smudged or wet beyond identification, then these are serious allegations. But any allegation, however serious, before its proof, calls for scrutiny from the authority called upon to judge upon the same. It is very serious to allege that X has murdered A. But the allegation does not become true just because it is admitted to be a serious allegation. It has to be proved. The opinion of a witness that an allegation is serious is irrelevant in law.

52. In reply, when placing more evidence regarding the wet ballots, Mr. Lala placed Qs. 211 and 222 of Rajendra Kumar where he admitted that the ballots at least in one box were wet. Mr. Lala also placed the evidence of M. K. Sarkar Qs. 567 to 568 and that of Nityeswar Banerjee who said in Q. 385 that though the ballots might have been wet those were not damaged.

53. Again, there was no protest during counting as to ballots being wet and thus unidentifiable. It has not been specifically pointed out to me as to ballots in which box were found to be wet, or at which table these were counted, or which counting agent of the Petitioner noticed the table number and the booth number. In the mass of evidence before the Court there might be these details, but these were not emphasized before me by highlighting of the same in argument.

54. The point taken about the ballots being merely wet was not one upon which the recount could reasonably be called for. If the wetness of the ballots was used in some way only to help the Respondent No. 1 and against the interest of the Petitioner in some other way, then that should have been at least pointed out, and preferably recorded at the time those were seen in the counting hall by the Petitioner or his counting agents. Such recording or contemporaneous protests are entirely absent from the records.

55. Regarding the postal ballots, the election petition before the Court proceeds

on the basis that the ballots did not have the authenticating marks. Unfortunately, the postal ballots do not contain any more authenticating marks than do the ballots cast in the booths by voters who come personally to vote there. The authentication is contained in other papers enclosed in the envelope which is opened at the time of counting. This slip in pleading was taken advantage of in the written statement and it was stated that no postal ballot contained any authentication. Such taking advantage of infelicitous pleading is neither wrong nor improper in any manner.

56. Mr. Ganguli has further pointed out that there are serious discrepancies in the annexures to the election petition and the exhibits (see e.g. Exs. 5, 6, 7, K, L), regarding the letters written by allegedly aggrieved persons asking to vote by post. Mr. Ganguli has again and again said that his client might be inclined to press the matter further in a criminal Court after obtaining the proper leave or sanction both in regard to these discrepancies as well as those with regard to the discrepancy contained in Exs. 1, 3 and J, Ex. 1 being Annex. "B" to the election petition. These matters would have to be examined, not now, but as and when such further steps, if any, are actually chosen to be taken in future and are, thereafter, in fact taken.

57. Suffice it to say that in regard to the allegations about the postal ballots, the complaint of the Petitioner, made in the election petition, in my opinion, is not only unreasonable but frivolous, and the frivolity has been exposed in the shape of the letters which were dated allegedly long after the voting process was completely over.

58. Mr. Ganguli has also pointed out mistakes made by the witnesses of the Petitioner from the box is that they were confused about the colour and size of the ballot papers for the Assembly voting and the Parliamentary voting and also that there was a mistake made by one of them about the hall in which counting of postal ballots actually took place.

59. About the complaint of the Petitioner against chaos, during counting of several booths, I find again that there is no contemporaneous recorded complaint. It is not enough generally to refer to allegations of rigging, booth jamming and the like, but the Petitioner had to show that he had a reasonable right to have a recount because the counting was likely to have been affected because of chaos in the counting hall. One Rohit Tarafdar was allegedly beaten up in one booth; he was not called to the box; it would be thoroughly unreasonable to connect such issues, which are mere matters of prejudice to the case of a recount. The counting agents of the Petitioner were all along in the hall and I do not find from the evidence any proof they could not do their duty in the manner they were pleased to discharge the same. These observations of mine are to be read in this light, that the present petition has been pressed and argued only as a petition for recount, and not one for setting aside the declared results for violence in the booths, or capturing of booths and preventing access of voters, and the like.

60. Mr. Ganguli, the learned Advocate appearing for the Respondent No. 1, wanted to rely upon certain cases in answer to Mr. Lala, but I cut him short, promising to hear him further if I decided to hold against him, because after hearing Mr. Lala during his opening, and after hearing Mr. Ganguli up to that point, I had come to the conclusion that no further examination of legal propositions would be of any use to the Court. I gave Mr. Lala full permission to reply, thereafter, and Mr. Lala did avail himself of that opportunity ; he pointed out certain additional evidence on record in reply and both commenced and concluded his reply before midday recess today.

61. Under these circumstances, in my opinion, this election petition should be dismissed and the same is, hereby, dismissed. In my opinion, there was nothing to come to Court for, excepting the mere slenderness of the margin of the win. The Respondent No. 1 will, therefore, be entitled to the costs of this application. All interim orders, passed in this matter, shall stand vacated with immediate effect. The boxes containing the voting papers, which were brought to Court, shall be returned by the learned Registrar, Original Side, to the authorities from whom the boxes were originally brought. All other papers than the ballot papers in the boxes also shall be similarly returned to the authorities from whom those were originally taken possession of. A stay of the operation of this judgment and order is asked for by Mr. Lala, but the same is refused.

62. All parties and others concerned including the learned Registrar, Original Side, are to act on a xerox signed copy of this judgment and order.