

(1997) 10 PAT CK 0034

In the Patna High Court

Case No : Election Petition No. 1 and 2 of 1995 (R)

Phatik Chandra Ganguly and K.P. Singh

APPELLANT

Vs

Raghubar Das and Others

RESPONDENT

Date of Decision : 03-10-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Representation of the People Act, 1951 — Section 123, 81, 82, 83, 86

Citation : (1998) 3 BLJR 1781

Hon'ble Judges : Prasun Kumar Deb, J

Bench : Single Bench

Judgement

Prasun Kumar Deb, J.—Both these election petitions arise out of the same Assembly election of 291 Jamshedpur East Assembly Constituency held in the year 1995.

2. Mr. Phatik Chandra Ganguly, who is the petitioner in Election Petition No. 1/95 (R) is a voter of that constituency having Serial No. 907, Part No. 147. He has challenged the election on the ground that the Returning Officer illegally rejected the nomination paper of Sri Vijay Kumar Dev and Sri Haldhar Soren.

3. In the Election Petition No. 2 of 1995 (R), the same election has been challenged by the election petitioner Sri K.P. Singh, who contested the election as a Congress candidate and according to him, he got majority number of votes but due to miscounting and so many irregularities and illegalities done at the time of counting, the Respondent No. 1 was declared elected on getting maximum number of votes although he did not get such number of votes.

4. Regarding the Election Petition No. 1, although the same has been heard analogously with the Election Petition No. 2, neither the election petitioner Phatik Chandra Ganguly appeared to depose in favour of his election petition nor he has adduced any evidence in support of his contention regarding illegal rejection of the nomination paper of Sri Vijay Kumar Dev and Sri Haldhar Soren. So, the Election Petition No. 1 becomes a redundant one having no evidence being

adduced in support of that election petition.

5. In the Election Petition No. 2, the Election petitioner contended, inter alia, that although in total 52 candidates were in the fray, the main contest was in between the Election Petitioner and the Respondent No. 1 Raghubar Das, who happens to be a B.J.P. candidate and because of the illegal and irregular counting, the Respondent No. 1 was declared as returned. In the whole of the election petition, no-where it has been stated as to by how much votes the Respondent No. 1 had won the election but in evidence it has come that the Respondent No. 1 had won the election by a margin of huge votes namely 1100 votes. All the candidates in the fray have been made parties in the Election Petition No. 2 of 1995, According to the election petitioner, he secured majority of valid votes in the impugned election but he was not declared elected on account of miscounting of ballot papers and thus the petitioner has been calling in question the election of the Returned candidate in order to protect the purity of the process of election. He has also prayed for inspection and then recounting of ballot papers in terms of the grounds taken in the election petition. Before going into the grounds, it must be stated that as per the notification issued by the Election Commission of India, the Sub-Divisional Magistrate, Dalbhum, Jamshedpur, who was the Returning Officer, had announced the election programme for the election in 291 Assembly Constituency for Jamshedpur East. The last date for filing nomination paper was 23.1.1995, the date of scrutiny of the nomination paper was 24.1.1995, the date of withdrawal of the candidature was 27.1.1995, date of allotment of the symbol was 27.1.1995, date of polling was 7.3.1995 but it was rescheduled to 11.3.1995. The petitioner, fifty one respondents and many others filed their nomination papers for the said election and on scrutiny, the Returning Officer, rejected the nomination papers of fifteen candidates and some candidates withdrew their candidature. After expiry of the period of withdrawal, in total 52 candidates remained in the fray. The list of those candidates with their affiliated party and symbols have been mentioned in a list in para 8 of the election petition. The election petitioner Sri K.P. Singh was in the Serial No. 49 while the returned candidate-Respondent No. 1 Raghubar Das was in the Serial No. 35 in the ballot paper. After the polling was completed on 11.3.1995, counting was announced on and from 29.3.1995 and the final result of the election was declared by the Returning Officer on 2.4.1995 declaring the Respondent No. 1 as elected candidate. It should be mentioned here that it has been stated in para 13 of the election petition about the new system adopted and introduced by the Election Commission of India regarding the counting of ballots. Previously, counting of ballot papers were done boothwise or polling station-wise, but in the new system counting of ballot papers have been done in two parts; firstly initial counting was done by taking ballots from all the ballot boxes on preparation of counting in Form-16 Part-II by only mentioning the total number of ballot papers found from the concerned ballot boxes of particular booth, then bundles of 25 ballot papers of the cast votes were made and after completion of the initial counting and making bundles of 25 ballots those were put in a big drum and

mixed together with the help of a soft wooden rod so that the ballot papers may not be damaged. Then second part comes in i.e., 40 bundles each of 25 ballots total 1000 ballot papers were put to each counting table for Counting of the ballots candidate wise. On each table, besides the counting Supervisor, two Counting Assistants were there and in each counting table there were pegs on holes of each candidate for keeping the ballots candidate wise after counting. The counting Supervisor had no authority to decide whether a particular ballot was valid or not but if a ballot was considered to be a doubtful one then the same was put in a separate box & then those doubtful ballots were sent to the Central table for the purpose of determination by the Returning Officer/Assistant Returning Officer as to the validity or otherwise of those doubtful ballots. According to the petitioner, whole method and system of counting was tedious, cumbersome, lengthy and hazardous and the counting continued for 76 hours in a stress as the counting started in the morning of 29.3.1995 and terminated on 1.4.1995. According to the election petitioner, the counting Assistant and other persons engaged in counting were badly tired, felt sleepy and were prone to commit various illegalities and irregularities in the counting of the ballot papers. Alertness of mind and brain vanished and fatigue overpowered. According to the election petitioner, in such an atmosphere purity of counting of ballots in the election was not protected and although the verdict of the electorate was in favour of the petitioner yet due to mis-counting even if not motivatedly but due to cumbersome process caused the defeat of the election petitioner.

6. Grounds of irregularity and illegality have been enumerated by the Election Petition in para 16 onwards of the election petition. According to him, in total 2610 ballot papers of the petitioner were mixed and intermingled with the ballot papers of the Respondent No. 1 and counted in his favour at various tables and in almost in every round of counting. There was in total 14 number of tables for the purpose of counting and there were nine rounds of counting in total. Such intermingling of 2610 ballot papers and counted in favour of the Respondent No. 1 has been mentioned in a table in Para No. 16 of the election petition roundwise and table wise. Further it has been stated by the election petitioner that 1800 valid votes of three other candidates, namely, Dina Nath Pandey, Radhey Prasad Yadav and Haribansh Jha were illegally mixed with the ballot papers of the Respondent No. 1 and counted in his favour. Another table of these three candidates of 1800 votes tablewise and roundwise has been attached to para 17 of the election petition. The second ground of challenge of the counting is that about 900 (nine hundred) valid ballot papers of the petitioner were illegally and improperly rejected by the Assistant Returning Officer. It was detected by Sri D.M. Sinha, the counting agent of the petitioner, who was assigned to sit near the Central table. He raised objection to the Assistant Returning Officer regarding such illegal rejection but to no effect. Table wise and round wise such rejection of the legal votes has been given in a table under Para No. 18 of the election petition. The third ground taken by the petitioner is that the Ballot Box No. 1/3 of Booth No. 73 at the time of initial counting was found to be not having outer seal

and even the inner seal was tampered with and, as such, the paper seal did not contain either the signature of the Presiding Officer or any of the Polling agent. On this finding, the petitioner filed a petition on 29.3.1995 addressed to the Returning Officer, photo state copy of which has been annexed as Annexure-1, to the election petition and marked as Exhibit-1 by the election petitioner as P.W. 2. Such objection in writing was received by the Assistant Returning Officer but he did not take any action on it. It has further been stated that on 30.3.1995 bungling was detected made by the counting agents of the B.J.P. with the help of the counting authority and such counting agents/supervisor was caught red handed during the conspiracy in mixing the valid ballot papers of the petitioner with the ballot papers of B.J.P. candidate. Regarding this bungling, the petitioner was informed in the morning of 31.3.1995. He dictated the objection which was written by Mr. D.M. Sinha, the counting agent and the same was submitted to the Returning Officer. The Returning Officer at first did not want to accept it but on pressurisation he accepted it but declined to give any receipt. A photostat copy of such objection has been annexed as Annexure-2. This has not been exhibited in the case. On 1.4.1995 at about 5.00 a.m., the election petitioner filed another objection in writing, which has been annexed as Annexure-3 to the election petition and the same has been marked as Exhibit-2 by the election petitioner during the course of his examination as P.W. 2. When all these objections raised from the side of the election petitioner were not being taken care of and the request for re-counting had not been accepted to by the Returning Officer or by the Central Observers, who had visited the counting hall on several occasions then on beginning of 9th round of counting, the election petitioner with all his agents came out from the counting hall in protest against the illegal and irregular counting and sat at Dharna outside the counting hall, but such Dharna was withdrawn after the result of the election was published on 2.4.1995 after taking instructions from the Election Commission of India. It is also the case of the election petitioner that time to time he made known the Election Commission of India by Fax message about the bungs being made in course of counting and such copy of Fax Message have also been annexed with the election petition but the Fax message which was a long one is of 4.4.1995 by which time the result of the election had already been published.

7. After receipt of summons, Respondent No. 1 contested the election petition by filing written statement and also filed recriminatory petition as contemplated u/s 97 of the Representation of the People Act, 1951. Respondent Nos. 4, 5, 6, 16, 19, 21, 29, 37, 38, 40, 43, 45, 48 and 50 also filed written statements in the case and they have virtually supported the election petition stating the same thing which have been contended by the election petitioner in his election petition, but none of those candidates had came up before this Court at the time of hearing of the election petition to support their written statements. Thus, it appears that these written statements by the .above named respondents-candidates in fray had been filed only to support the case of the election petitioner and might be a procured one for and on behalf of the election

petitioner.

8. Respondent No. 1 Raghubar Das, the returned candidate has contested the election petition vigorously by filing written statement and recriminatory petition and contended, inter alia, that the election petition is liable to be dismissed for non-compliance of the mandatory provisions as contained in Sections 81, 82, and 83 of the Representation of the People Act, and that the election petition is liable to be dismissed forthwith for want of material facts required under the above sections of the Representation of the People Act read with Order VII Rule 11 of the Code of Civil Procedure. Verification and affidavit portion of the election petition has been challenged and it has also been challenged that the two copies of the election petition had never been made over to the Respondent No. 1 inasmuch as the authentication portion of the Oath Commissioner had never been made over to the Respondent No. 1 in its proper perspective. It has been submitted that the affidavit, as required, in Form No. 25 has not been accompanied with the copy of the election petition served on the Respondent No. 1, The facts stated and grounds taken challenging the counting of the election concerned have been vehemently objected to from the side of the Respondent No. 1 that these facts and grounds taken by the election petitioner do not reveal the material particulars and, as such, it is not possible by the Respondent No. 1 to give proper reply to it. The vague statement regarding intermingling and rejection of valid votes as alleged from the side of the election petitioner do not contain material particulars except vague table being submitted without disclosing the source of information and without giving number of ballot papers etc. It has been contended from the side of the Respondent No. 1 that for want of material particulars which could not be disclosed or revealed even by oral evidence also, this election petition is not maintainable and should be thrown out and he has prayed for dismissal of the election petition with costs.

9. In Election Petition No. 1 of 1995 (R), only the Respondent No. 1 has contested. In that case, the election petitioner only made the Respondent No. 1 as party-respondent. No other candidates have been made parties nor the persons whose nomination papers had been rejected have been made parties. Respondent No. 1 filed written statement and stated that the nomination papers were validly scrutinised by the Returning Officer and at the time of scrutiny, all the parties with their proposers and seconders were present at the time of scrutiny and when rejections were made no objection had been raised from the side of the candidates, namely, Vijay Kumar Dev and Haldhar Soren. The nomination paper of Sri Vijay Kumar Dev was rejected as his proposer Mr. D, Paul was not found to be legitimate voter. The serial number mentioned in the nomination paper of the above proposer was found to be not tallied with the printed voter list. In respect of Mr. Haldhar Soren and his proposer Mr Mahesh Ram Soren, the serial number of voters were wrongly written in the nomination paper and were not tallying with the printed voter list and, as such, their nomination papers were rejected. Such rejection was made in presence of both the candidates and their proposers but objection was not raised at the time of

scrutiny and rejection and now after ex the election is over, one person in the name of the election petitioner Phatik Chandra Ganguly has been set up by Sri K.P. Singh, the election petitioner of the other case for challenging the election itself, as has been alleged from the side of the Respondent No. 1. About this election petition, nothing much is required to be stated as it has already been stated that neither the election petitioner nor any body had came up in support of this election petition.

10. On the basis of the pleadings of the parties, following issues have been framed in both the case separately on 1.9.1995:

In Election Petition No. 1 of 1995 (R):

- (i) Is the Election Petition maintainable in its present form?
- (ii) Whether the Election Petition barred for non-compliance of Section 81, 82, and 83 of the Representation of the People Act 1951?
- (iii) Whether the nomination papers of Sri Vijay Kumar Dev and Sri Haldhar Soren were improperly rejected as alleged in the Election Petition and, if so, whether the whole election proceeding has been vitiated as such?
- (iv) What relief, if any, is the petitioner entitled to?

In Election Petition No. 2 of 1995 (R):

- (i) Whether the Election Petition is maintainable in its present form?
- (ii) Whether the Election Petition is barred due to non-compliance of Sections 81, 82, and 83 of the Representation of the People Act, 1951?
- (iii) Whether the incriminatory petition filed u/s 97 of the Act by the Respondent No. 1 is barred by limitation and as such fit to be rejected summarily?
- (iv) Whether there were illegality and irregularity committed in counting of ballot papers in the impugned election and, if so, whether it had materially affected the result of the election?
- (v) What relief, if any, is the petitioner entitled to?

11. On the ground of maintainability, namely, issue Nos. 1 and 2, a petition had been filed for and on behalf of the Respondent No. 1 to hear the same as preliminary issue. Objection was raised from the side of the election petitioner and after hearing both the parties it was decided that the maintainability issued would be heard as preliminary issue. After lengthy hearing of the parties, these preliminary issues i.e., issue Nos. 1 and 2 were decided by this Court vide order dated 5.1.1996 holding that the election petition is maintainable and the objection raised regarding the form and procedure had been turned down. Against that order of holding of the election petition being maintainable, the Respondent No. 1 took adjournment for going to the Apex Court but ultimately no order could be brought from the Apex Court and as such, the decision with

regarding to issues No. 1 and 2 became final.

12. During the course of hearing of the election petitions several document as called for from the Returning Officer had been received and on petition being filed parties were allowed to inspect those documents.

13. Both the parties adduced evidence. For and on behalf of the election petitioner, nine witnesses have been examined out of them P.W. 1 D.M. Sinha, was the counting agent of the election petitioner Sri K.P. Singh, P.W. 2 K.P. Singh is the election petitioner himself, P.W. 3 Rajni Singh, P.W. 4 Samanta Kumar, P.W. 5 Ram Janam Singh, P.W. 6 Surendra Sinha, P.W. 7 Bijay Kumar Dubey, P.W. 8 Mumtaz Ahmad Khan were the counting agents of the election petitioner in different tables, P.W. 9 Akhileshwar Singh is the election agent of the petitioner. All the witnesses attempted to support the case of the election petitioner. For and on behalf of the Respondent No. 1 total ten witnesses have been examined. D.W. 1 Satish Dey, D.W. 2 Tara Nand Kamat D.W. 3 Palash Kumar Ghosh were the counting agents of the Respondent No. 1 in different tables. P.W. 4 Jitendra Nath Mishra was the election agent of the Respondent No. 1, D.W. 5 Nimai Chandra Dey is a Government official, who was the Counting Supervisor of Table No. 12, again D.W. 6 Amod Kumar Singh was the counting agent of the Respondent No. in table No. 6. D.W. 7 Raghubar Das is the Respondent No.1 himself, D.W. 8 Sunil Kumar Singh is Executive Magistrate and he was the Assistant Returning Officer in the said election, D.W. 9 Birendra Prasad Yadav is an Assistant Engineer and he worked as Counting Supervisor in table No. 6 in the said election and D.W. 10 Bahadur Prasad was the Returning Officer of the said election.

14. During the course of hearing of the election petition, a petition under Order XI Rule 15 read with Section 151 of the CPC was filed by the election petitioners on 29.8.1996 for inspection and re-counting of ballot papers. Reply was also filed by the Respondent No. 1. The said petition came up for hearing before this Court on 24.9.1996 and after consideration of the contents of the petition and rejoinder thereof, this Court passed order for consideration of the prayer at the closure of evidence and at the time of argument. The evidence on behalf of the respondent was closed on 4.3.1997. According to the election petition, Rule 93 of the conduct of Election Rules 1961, gives jurisdiction and power to the High Court to grant permission for inspection of the ballot papers. In this respect, Rule 93 (1) of the Conduct of Election Rules, 1961 may be relevant. Thus, it is contended that Order XI Rule 15 read with Section 151 of the CPC together with Rule 93 (1) of the Conduct of Election Rule gives authority and jurisdiction to the Court for allowing or according permission to inspect the ballot papers for the purpose of re-counting. Various judgments have been passed on these matters by different High Courts and also by the Apex Court. Previously, it was the notion that sanctity of the election and the confidentiality/secrecy of the ballots would go against, if such petition for inspection is allowed, but it has been held that confidentiality/secrecy can not be the barrier if there is overwhelming evidence and materials to support the contention that there was definite bungling in the

counting of ballots and if such facts are before the Court then at the cost of confidentiality also, the inspection of ballots may be granted to maintain the sanctity of election. Now, by the change of rules, the confidentiality/secrecy as far as practicable has been maintained in such a way that even if the ballots are being inspected then also it would not be possible to find out from which booth those are coming as there is no boothwise counting now a days and all the ballots are being mixed up together at the preliminary stage of the counting as mentioned above. Thus, the petition under Order XI, Rule 15 C.P.C. is definitely maintainable but how far it can be applicable in a particular case would depend on the facts and circumstances of each particular case. On going through the different judgments of the different High Courts and that of the Apex Court it could be found that about the difference of votes by which the candidate has been returned is very small and at least to the number of that extent of the votes, the election petitioner could be able to show that there were clear bunglings in the counting of votes and then the Courts are allowing such inspection and then re-counting. Such inspection and re-counting was ordered by a Bench of this Court in the case of *Liander Tiru v. H.E. Harro* 1986 ELR 253. The said judgment of this bench has been confirmed by the Apex Court as reported in *N.E. Horo Vs. Leander Tiru and Others*, . It may further be mentioned that a recriminatory petition had also been filed in this case from the side of the respondents and it has been very much pressed from the side of the election petitioner that in the recriminatory petition the contention of the petitioner that there were bunglings in the counting had been admitted and that the Respondent No. 1 had also admitted in his evidence that he has no objection if the Court passed an order for inspection of ballots and re-counting thereof. But before going into such matters of merits, it is better to decide the whole case issue wise.

15. The first and second issues with regard to the maintainability of the election petition in its present form had already been decided by this Court as mentioned earlier but during the course of argument, again the matter has been brought because of a judgment of the Apex Court which was not considered by this Court at the time of passing of the order of maintainability as the same has been published on a later date. In the case of *Dr. (Smt) Shipra etc. etc. v. Shanti Lal Khoiwal etc. etc. with Jhammak Lal v. Laxminarayn Pande and Ors.* AIR 1996 SC 1691, it has been held by the Apex Court that Rule 94-A and Form 25 as per the Election Rules need that the copy of the affidavit supplied to respondent must be a true copy in its all entirety including the attestation by the prescribed authority and if attestation had not been supplied then such copies furnished to the respondent cannot be said to be a true copy of the election petition. The same view has been reiterated in *Harcharan Singh Josh Vs. Hari Krishan*, . It has also been held that in the election petition this defect regarding Form No. 25, which requires for the allegation of corrupt practice, has not been supplied with all attestation to the respondent then the said portion of the election petition should be struck off but all other issues wherein other grounds have been taken can go in for adjudication.

16. It has been submitted by Mr. Burnwal, appearing for and on behalf of the respondent that in the present case, the endorsement, signature and the seal of the Oath Commissioner had not been supplied to the respondent as the true copy of the election petition and, as such, on the basis of the decision, as aforesaid, the election petition is liable to be dismissed summarily u/s 86(1) of the Representation of the People Act. In the judgment of the Apex Court, it has not been considered about the Oath's Act and the provision thereof and that the Oath Commissioner is within his duty and jurisdiction to take oath of the election petitioner on the original election petition only. The same oath is not required to be taken by the election petitioner on each and every copies to be supplied to the respondent, otherwise the oath as meant under the Oath's Act would lose its meaning. In that view of the fact, it is not known how in the true copy also there should be an endorsement of the Oath Commissioner when the Oath Commissioner is not legally bound to sign on each and every copy of the election petition. By law and rules, the Oath Commissioner is only supposed to sign on the main petition i.e., the Election petition itself. Be it what it may, I am bound by the judgment of the Supreme Court. Regarding the oath and affidavit, it is only necessary in respect of Form No. 25, which is required only in respect of election petition wherein corrupt practices have been alleged. In other election petitions, where there is no allegation of corrupt practice but the election has been challenged on any other ground than corrupt practice then oath and affidavit is not a must as required under Form No. 25.

17. In both these Supreme Court's decisions, the allegations of corrupt practice were also there alongwith other grounds and, as such, in the case reported in AIR 1996 S.C.1691, it has been held that true copy being not supplied with the attestation of the Oath Commissioner to the respondent, the plea of corrupt practice should be struck off but other pleas challenging the election petition should go in for adjudication. According to Mr Barnwal, in the present case also, there are allegations of corrupt practice against the Respondent No. 1 as it has been alleged that the Respondent No. 1 in collusion with the officials had indulged in bungling of the counting and, as such, such allegation referred to corrupt practice and on the same nature of election petition with the similar nature of allegations, Election Petition No. 9 of 1995 has been rejected on maintainability issue alone by another Bench of this Court. In the present case, the maintainability issue was decided by this Court on 5.1.1996 and although some adjournments were taken from the side of the respondent to go in for appeal before the Supreme Court but ultimately, they had not gone so and, as such, the decision on maintainability matter has become final. But when two judgments of the Supreme Court have been published in the meantime on the maintainability issue, which might have affect on this election also, it has been urged by Mr. Burnwal to consider that aspect also. Although there is no scope for re-opening the maintainability issue, as has been submitted by Mr. Sharma, for and on behalf of the election petitioner, but when two decision of the Supreme Court have been referred to, I feel it is my duty to atleast consider those

decisions again when the election petition has not yet been disposed of as a whole.

18. Proviso to Clause (c) of Section 83(1) of the Representation of the People Act, 1951, needs that where the election petitioner makes allegation of corrupt practice then the petition shall be accompanied by an affidavit in the prescribed form i.e. Form No. 25 in support of such corrupt practice and particulars thereof. The mode of swearing affidavit has also been enumerated under Rule 94-A of the Conduct of Election Rule, 1961, wherein it has been stated that the affidavit must be sworn before a Magistrate of the 1st Class or a Notary Public or a Commissioner of Oath in Form No. 25. It is the contention of Mr. Burnwal that in the present election petition also there is allegation of corrupt practice in the way that the returned candidate has been alleged to have taken the help of Gazetted officers, namely, the Returning Officer and the Assistant Returning Officer for the furtherance of success in his election by indulging in bungling of counting and, as such, the copy which has been served on the Respondent No. 1 having no Oath Commissioner's seal and signature, the election petition is liable to be dismissed on maintainability ground alone. In the Election Petition No. 9 of 1995 (R) also, the main allegation was of bungling in the counting and prayer was for recounting and there was allegation of same nature as that of the present case against the Respondent No. 1 of taking the help of Returning Officer and the Assistant Returning Officer. Now, whether this allegation of taking of help by the Gazetted Officers for furtherance of success in the election is an allegation of corrupt practice or not is the basic necessity to attract the decision of the Apex Court as mentioned above. Corrupt practice has been defined u/s 123 of the Representation of the People Act, 1951. Proviso to Section 123(7) of the Act enumerates that any person in the service of the Government and belonging to any of the classes aforesaid in the discharge or purported discharge of his official duty, makes any arrangement or provides any facilities or does any other act or think, for, to, or in relation to any candidate or his agent or any person acting with the consent of the candidate or his election agent, such arrangements, facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate's election. So, even if any help is taken from the Gazetted Officers, who were engaged in the election duty, shall not come within the purview of allegation of corrupt practice. Thus, the allegation made in the present election petition practically keeps outside the scope of corrupt practice as per proviso 7 of Section 123 of the Representation of Peoples Act. Hence, when there is no allegation of corrupt practice then the question of making affidavit in Form No. 25 does not arise and copy thereof with stamp and signature and official seal of the Oath Commissioner in true copy does not make the same vitiated and hence on that ground, the election petition cannot be held to be not maintainable u/s 86(1) of the Representation of the Peoples Act. It appears that this aspect of proviso of Sub-section 7 of Section 123 of the Representation of the People Act had not been considered or had not been argued before the learned Single Judge of this Court in the Election Petition No. 9

of 1995 (R) and hence my decision regarding non-maintainability of the election petition remains in tact in view of the discussions as mentioned above.

19. Hence, these two issues are decided in favour of the election petitioner.

20. Issue No. III of Election Petition No. 1 of 1995 (R)-On this issue, there is no evidence adduced from the side of the election petitioner regarding illegal rejection of nomination paper of Vijay Kumar Dev and Sri Haldhar Soren, and as such, there is no material to hold that the nomination paper of Bijay Kumar Dev and Sri Haldhar Soren had been improperly rejected. Although from the side of the Respondent No. 1 of the Election Petition No. 2 of 1995 (R), the Returning Officer was produced as D.W. 1 but not a single question or suggestion has been given regarding illegal rejection of nomination paper of Sri Bijay Kumar Dev and Sri Haldhar Soren. In that view of the matter, this issue is decided against the election petitioner of Election Petition No. 1 of 1995 (R).

21. Issue No. IV in Election Petition No. 2 of 1995 (R)-This is the vital issue for coming to a decision in this election petition. The election petitioner's main grievance is that because of the illegal and irregular counting of ballot papers, the whole counting was vitiated and as such the result of the election was illegally published in favour of the Respondent No. 1. The grounds for such illegality and irregularity may be summarised as follows as per the contents made in the election petition and also evidence adduced from the side of the election petitioner:

(i) the ballots in which seal was there in favour of the election petitioner had been illegally counted in favour of the Respondent No. 1 and similarly votes cast in favour of three other candidates, namely, Dina Nath Pandey, Radhey Pd. Yadav and Haribansh Jha had also been illegally counted in favour of the Respondent No. 1,

(ii) the ballot papers having proper seal on the symbol of the election petitioner had been illegally shown as doubtful ballots in the counting tables and were referred to the Central table and those had been rejected but similar ballots having similar nature of so called irregularity had been counted in favour of the Respondent No. 1 without rejecting the same as has been done in the case of the election petitioner.

(iii) although objections were raised at every stage when such illegality/irregularity were committed but those had been turned down by the Officers conducting the counting and had not been paid any heed to as a result of which the counting agents, election agents and the petitioner being fed up came out from the counting hall after the 8th round of counting and sat at Dhama.

22. In support of such contention being made as mentioned above, the election petitioner has referred to the particulars and materials in para 16, 17 and 18 of the election petition. In support of such contention being made in the election petition, evidence has also been adduced as mentioned already. As per para 16

of the election petition, it is the contention of the election petitioner that in total 2610 valid ballot papers of the petitioner were mixed with the ballot papers of the Respondent No. 1 and counted in his favour at various tables and in almost in every round of counting and details of such illegalities in the counting have been mentioned in that para of the election petition itself in a chart tablewise and roundwise. This para 16 has been verified in the election petition to the effect that informations of these contents had been given by the counting agents of the different tables names of whom had also been mentioned and it has been stated that these contents are true according to the belief of the election petitioner. It is submitted by Mr. Sharma on behalf of the election petitioner that not only the particulars with all materials have been given in the election petition in this respect but over and above these contents have been brought on record by putting the election agent and counting agents on the dock and they have verified the statement in the chart on oath before this Court itself. On the other hand, it is the submission of Mr. B.S. Lal, for and on behalf of the Respondent No. 1 that the materials as supplied in the election petition is not sufficient for the purpose of re-counting for convincing a Court in that light. According to him, although such materials have been put in a tabular form but the sources have not been properly stated or annexed with the election petition. His contention is that the election agent or the counting agents had given information about such irregularities to the election petitioner but how those had been collected by the counting agents and what was the source by which such informations had convinced the election petitioner that irregularity was committed had not been supplied nor stated in the election petition nor any document to that effect has been annexed to this petition. Mr. Sharma has submitted that the material particulars required on the allegation of corrupt practice is not the same as that of challenging of election on other grounds. So, the material particulars which have been given in the election petition itself being supported by oral evidence have become sufficient for the election petitioner to get the relief of re-counting in the case. Regarding the sources of the chart it has been stated that the counting agents had deposed to the effect that in each and every round of counting they were taking notes in slips of paper regarding such irregularities and then those were given to the election agent and, in turn, the election agent had given to the election petitioner. But about those slips, it has been stated that those are not in existence and those have been destroyed. The election petition has been filed soon after the election was held and the election petitioner was definitely contemplating just after 8th round of counting to challenge the election then those slips of paper which were the vital documents for the purpose of substantiating the allegations brought regarding the illegal and irregular counting should have been retained and filed as annexures to the petition. It has further been stated and objected by Mr. Barnwal S. Lal that nowhere it has been stated about the serial number of the ballots which had been illegally counted in favour of the Respondent No. 1. from the evidence it comes that the counting agents demanded to note down serial number of those ballot papers but they had not been given that scope and the matter was hurriedly being done by the Counting

Assistants at the advice of the Counting Supervisors. In the evidence, it has come that some of the counting agents could not be able to note down the serial number because of the distance but those counting agents were not being given the scope to note down the serial number of the ballots. This had come only at the time of evidence and not in the election petition regarding the allegation as contained in para 16 of the election petition as regards the illegal counting, on that score, as alleged. In para 16 it has not been stated that the counting agents had not been given the scope to note down the serial number although same allegations were made regarding the other forms of illegality as contained in paras 17 and 18. According to Mr. Sharma, meticulous particular regarding booth etc. could not be given because of the new system of counting as all the ballots of all the booths are being mixed together and then counted and so only in respect of table number and round number meticulous particulars can be given by the election petitioner regarding such illegality as contained in para 16 of the election and also in tabular form roundwise and tablewise and hence it cannot be said that the election petition suffers from non-disclosure of material particulars. To avert the submissions of Mr. Barnwal S. Lal, he has submitted that when round number and table number has been given regarding particular illegal counting being received from the counting agents of different tables then nothing more particulars can be wanting in the election petition for the purpose of recounting and when such allegations could be prima facie proved by adducing evidence and according to him, evidence adduced has totally supported the contents of the table; as mentioned in para 16. Similar is the submission for and on behalf of the election petitioner regarding para 17 and 18 of the election petition. Para 17 has also been attached with a chart. Therein it has been stated that 1800 valid ballot papers of three candidates, namely, Dina Nath Pandey, Radhey Prasad Yadav and Haribansh Jha were illegally mixed with the ballot papers of the Respondent No. 1 and counted in his favour and such illegality was committed in every round and almost in each of the counting tables. Regarding this paragraph also, as stated above, verification and affidavit has been filed stating that those informations have been received from the counting agents. Generally, the counting agents of particular candidates take care of the ballots in favour of their candidates and their nearest rival. How the counting agents of the election petitioner had taken track of the ballot papers of these three candidates also have not been stated specifically in the election petition. The notes and slips which were maintained by the counting agents must be in respect of their own candidates. It has not been stated that those informations have been received from the counting agents of those three candidates and none of the counting agent of those three candidates have been examined for and on behalf of the election petitioner, although those candidates as respondents by filing written statements have supported the contention of the election petitioner but by such support alone, it can not be said that those informations have been given by the counting agents of the candidates themselves. So, this material particular regarding para 17 and the chart there of cannot be said consistent with material particulars required for the purpose as is submitted by Mr. Barnwal S. Lal, for and

on behalf of the Respondent No. 1.

23. Mr. Sharma, appearing for and on behalf of the election petitioner submitted that the material particulars as required have been given and over and above these material particulars, it is not possible for the election petitioner to furnish more. On the other hand, Mr. Barnwal S. Lal, appearing for and on behalf of the Respondent No. 1 by referring to a decision in the case of Ram Singh v. Kazi Mohiuddin and Ors. AIR 1988 All. 210, submitted that the material particulars given in the election petition must prima facie satisfy the Court that general doubt had been created in respect of improper counting and according to him, material particulars given are not at all sufficient to create any doubt not to speak of ingenuity regarding the counting of ballots in improper way. Mr. Barnwal S. Lal has submitted that the statements made in the election petition are said to be based on the notes being prepared, by the counting agents and those notes were said to be destroyed. He posed a question that such sort of plea of destruction can not be believable as definitely when the election petition was prepared those notes given by the counting agents were before the election petitioner or in his custody then what debarred him in annexing those notes alongwith the election petition as a part of it and then and then only there would have been a scope for verification by the Court regarding such allegation of illegal/improper counting.

24. As per previous procedure, Form No. 16 was required to be filled up but now law has been changed and check-memos are there for finding out any improper counting but nothing has been stated regarding those check-memos either in the election petition or in the evidence adduced by the parties. Thus, it is found that for creating a genuine doubt regarding improper counting, there must be some materials apparent on the face of it which can prima facie play in the mind of the Court regarding improper counting. As regards improper counting of the ballots of three other candidates, the chart supplied have any basis could not be shown by the election petitioner and regarding para 16 about the illegal counting of ballots of the petitioner in favour of the Respondent No. 1, there is no source of it except the chart, which is said to be prepared on the basis of slips prepared by the counting agents at the time of counting but those notings have not been produced. In the evidence, various counting agents have stated that they were deposing on the basis of their memory. How such memories were being carried for two years is not known rather their evidence is parrot-like. Moreover, these counting agents are definitely partisan witnesses as they were engaged by the election petitioner and they have stated that they very much wanted that their candidate should win the election.

25. Regarding the evidence, it could be found that there are discrepancies in the oral evidence and the chart supplied. P.W. 3 Smt. Rajni Singh is the counting agent of Table No. 1, as per chart in total 287 valid ballots were intermingled of the petitioner with the Respondent No. 1 but as per the evidence it is 290. Similarly, regarding intermingling of ballots of other three candidates, her

evidence is not consistent, as per chart 47 ballots of Dina Nath Yadav had been intermingled with that of the Respondent No. 1 but as per the evidence, the number is 50. Similar discrepancy is there in respect of other two candidates. The same discrepancy is there in respect of the evidence of P.W. 4 Samanta Kumar, who was the counting agent in Table No. 4, P.W. 5 Ram Janam Singh, who was the counting agent in Table No. 9 P.W. 6 Surendra Sinha, who was the counting agent in Table No. 8 could also not support the material particulars about the charts given in para 16, 17 of the election petition. The evidence of P.W. 6 Surendra Sinha, P.W. 7 Vijay Kumar Dubey, P.W. 8 Mumtaz Ahmad Khan also suffers from such sort of discrepancy. It may be stated although not argued on this point that these witnesses have deposed from their memory and, as such, there is every possibility of discrepancy in the oral evidence and what has been stated in the chart. But, now a question poses to the Court for forming an opinion with regard to a prima facie case regarding the genuinity of counting, the Court shall base on what? Whether on the materials and charts supplied in the election petition or on the oral evidence. When there is discrepancy then the case of in ingenuity of the election petitioner cannot be said to be prima facie satisfactory.

26. Again, the allegations which have been brought by the elector, petitioner have been denied not only in the written statement but also in the oral evidence. The charts in support of which the counting agents have been examined from the side of the petitioner tablewise, in the same way the counting agents from those tables from the side of the Respondent No. 1 have also been examined and they have denied all the allegation brought by the election petitioner and his counting and election agents. If oral evidence of both the parties are read side by side then the Court can find out that the evidence is balanced and it can be said safely that the counting agents of both the parties are the partisan witnesses. When partisan witnesses have deposed in balanced way then it cannot be said that the petitioner could be able to substantiate his allegation. Moreover, in this election, it must be borne in mind that the difference of votes by which the Respondent No. 1 has won the election is more than one thousand. In that case, unless something concrete materials could be shown from the side of the election petitioner, then recounting with such sort of balanced evidence on both the sides, the petition filed under Order XI, Rule 15 C.P.C. for the purpose of inspection of document can not be entertained. Besides the balanced evidence of partisan witnesses, there are evidence of the official witnesses who have been produced from the side of the Respondent No. 1 and they have also denied about the allegations being raised. It has been stoutly stated by the Returning Officer, who has deposed as D.W. 10 regarding the allegation, that no such allegations were raised regarding irregularity and impropriety in the counting during the course of counting before him. The objection petitions, which have been annexed and proved in the case, do not disclose any materials which have been averred in the election petition except vague statements that there was miscounting of ballots. Two types of miscounting were said to have happened, namely, (i) mixing of

ballots and miscounting and (ii) rejection of ballots illegally. As I, have stated and discussed earlier, none of these grounds could be proved prima facie for the purpose of recounting and for allowing the petition filed under Order XI, Rule 15 C.P.C. Another ground was taken that the Counting Supervisor of Table No. 6 was caught red handed while mixing ballots of the petitioner with that of the Respondent No. 1, but that Counting Supervisor has been examined and nothing could be proved regarding the allegation from his mouth, although he has been cross-examined at length. This fact has also been denied by D.W. 10. He said that at the initial stage, some sort of allegations were brought regarding such sort of mixing and then the grievances were settled to the satisfaction of the petitioner in his presence and there was no such allegation afterwards. This fact has not been denied from the side of the election petitioner. Regarding the siding of the Officers with that of the Respondent No. 1, that remained as allegation for allegation's sake only and nothing could be brought on record, in this regard. Exhibit-2 has been much relied on regarding the objection being raised in writing, which was said to be filed on 30.3.1995 but its actual date is 1.4.1995. Moreover, it is the case of the election petitioner that after 8th round of counting in protest against the irregularity and illegality in the counting, they had come out from the counting hall and sat at Dharna. In this respect, D.W. 10, has stated that after the counting was over, some defeated candidates raised Hallah that there was mixing of ballots which are generally been raised by the defeated candidates. On the other hand, it is the case of the Respondent No. 1 that after the 8th round of counting when the election petitioner could understand on calculation that he has no scope of getting through in the election, he came out from the counting hall and then started raising Hallah about the miscounting. About Exhibit-2, it is the specific evidence of D.W. 10 that after the counting was over then Exhibit-2 was filed and as such he did not mention about it in the order-sheet maintained by him and proved in the case as Exhibit-6. In my view the Returning Officer had not committed any mistake in view of the special instruction being given by the Election Commission in this respect. Before the publication of the result, he got clearance from the Election Commission of India and then declared the same. Thus, the evidence adduced and the particulars given in the election petition, in my opinion, do not justify any recounting to be ordered in the case.

27. It has further been submitted by Mr. Sharma, for and on behalf of the election petitioner that there is admission in the recriminatory petition from the side of the Respondent No. 1 that there were some miscounting and in his evidence also he stated that he has no objection, if there is recounting of ballots. On this, Mr. Sharma's submission is that when there is admission from the side of the Respondent No. 1 then this Court can issued order under Order XI, Rule 15 C.P.C. for inspection of documents. On going through the recriminatory petition and the evidence of the Respondent No. 1. I do not find any such specific admission. It is true that it has been vaguely stated in the recriminatory petition regarding the miscounting but no specific case has been given regarding

irregularity or illegality in the course of counting. In the evidence, he stated that if the Court gives an order of recounting, he cannot have any objection. These do not amount to any sort of admission from the side of the Respondent No. 1. In this connection, various decisions have been referred to. In the case of Shri Jitendra Bahadur Singh Vs. Shri Kirshna Behari and Others, , it has been held by the Apex Court that the scrutiny of the ballot papers u/s 93 of the Representation of the People Act read with Order XI, Rule 15 C.P.C. can only be permitted when there is statement of material facts being supported by prima facie evidence regarding such allegations. Similarly, in the case of Satyanarain Dudhani Vs. Uday Kumar Singh and Others, , the Apex Court further held that recounting of votes cannot be ordered as a matter of course considering the importance of secrecy of ballot papers. If no evidence adduced supporting the commission of irregularities and illegalities and no objection has been raised in that respect during the course of counting then recounting should not be ordered. In this case, I have already stated that regarding objections on illegality and impropriety in counting, there was no such objection raised during the course of counting, although there is oral evidence to that effect by the parties and witnesses but the written objection filed did not contain such specific objection. Moreover, the objection, which was filed after the counting was over, cannot be taken into consideration for the purpose of order of inspection of the ballots papers. I have already held that the Court must be satisfied that there was bungling in the course of counting or atleast create a genuine doubt in the mind of the Court regarding improper counting then and then only inspection can be allowed and if anomalies found thereafter then for recounting. The case as reported in Jildar Ram Vs. Gouri Shankar Pandey and Another, , as submitted on behalf of the petitioner can be distinguished as in that case there was specific allegation of rejection of ballots due to double impression on the ballot papers in the course of folding it for entry into the ballot boxes but there is no such specific allegation in the present case. Tabular charts have been very much relied on from the side of the election petitioner, but I have already held that these tabular charts can not be much relied on as there is missing link of the specific sources for not producing or annexing the slips of the counting agents. When the difference is of more than thousand votes then at least there must be some specific evidence to satisfy the Court prima facie that there was bungling on large scale in the course of counting. In the new system of counting, videography is being done so that there can be specific evidence regarding such sort of bungling or the Court can be satisfied, if such videography is being produced to show that there was bungling and objections were being raised in support of what has been stated in the election petition but the election petitioner did not take any steps for production of such videography before this Court to satisfy the Court about the allegation of bungling. About the material particulars in the election petition, it is true that more meticulous particulars are required in respect of allegation of corrupt practice as the trial in that respect is in the form of quasi criminal proceeding. But for the allegation of other nature, such sort of meticulous particulars may not be necessary but even then the particulars must be there in

the election petition alongwith the sources so that this Court can be prima facie satisfied regarding the bungling, illegal and irregular counting so that the Court can pass orders for inspection of ballots even at the cost of paramount importance of secrecy of ballots.

28. With regard to the specific allegation, we can refer the Supreme Court's decision in the case of. Shashi Bhushan Vs. Prof. Balraj Madhok and Others, . Mr Sharma has strenuously argued for and on behalf of the election petitioner that atleast strong doubt could be created by the material particulars given in the election petition and the evidence adduced in support of it for the purpose of inspection of documents as contained u/s 93 of the People's Representation Act read with Order XI, Rule 15 C.P.C. and in that context, inspection must be ordered so that there may not remain any doubt either in the mind of the petitioner or the electorates and the Court also that there was no such bungling and the election petitioner is ready to face consequence of such inspection. But I have already held that the election petitioner could not be able to create strong doubt for the purpose of inspection vis-a-vis for recounting. Much stress has been given by Mr. Sharma on the decision of a Hon''ble Single Judge of this Court in the case of Leander Tiru v. Nirmal Enem Horo and Ors , ELR 252, wherein inspection was ordered after considering all the materials on record and the same has been upheld by the High Court although recounting was not ordered on some other grounds. In that case, difference of votes was very small in number and the election petitioner could prove both by documentary and by oral evidence prima facie the case of improper counting and as such for giving direction for inspection of documents but the facts and circumstances of that case are totally different. Particulars were there in that case and generally, when smaller number of difference is there and then if some evidence comes on, the Court may be satisfied prima facie for the purpose of inspection of documents but here the difference is large and in such large difference, if such sort of vague allegations are entertained regarding illegalities and irregularities then almost in each and every case inspection of documents shall have to be allowed consequence thereof in the recounting. I am satisfied that the petitioner could not be able to make out a case of inspection of documents for the purpose of recounting and hence this petition is rejected. This vital issue is decided in negative against the election petitioner.

29. Issue No. III-This issue has not been pressed much at the time of argument and practically, this issue becomes redundant also in view of the decision in the foregoing issues.

30. After the petition for inspection of document is rejected then practically, the election petition becomes non est as the whole prayer is for recounting on the basis of inspection of documents.

31. Regarding the other election Petition No. 1 of 1995 (R), I have already stated that the same has been filed only as a fancy and no proper steps and nothing of the sort and no evidence have beeri adduced regarding the scrutiny of the

nomination papers or allegation of illegal rejection of nomination papers and hence there is nothing to be decided issue-wise in that election petition.

32. Although in the written argument it is mentioned that it was submitted only on limited question of inspection of documents but practically the whole case is based on recounting to be ordered after inspection of documents. When inspection is rejected then the Election Petitioner has got no case for recounting as no independent evidence is there for the purpose of recounting as already discussed and held.

33. In the result, both the election petitions are hereby rejected having no force but in the circumstances of the case, no cost is awarded to either of the parties.