

(2001) 05 CAL CK 0010
In the Calcutta High Court
Case No : Election Petition Case No. 1 of 1996

Shri Dibyendu Biswas

APPELLANT

Vs

Robin Deb and Others

RESPONDENT

Date of Decision : 09-05-2001

Acts Referred:

Conduct of Elections Rules, 1961 — Rule 94
Constitution of India, 1950 — Article 226
Representation of the People Act, 1951 — Section 100, 119, 169, 64

Citation : AIR 2002 Cal 131

Hon'ble Judges : K.J. Sengupta, J

Bench : Single Bench

Judgement

K.J. Sengupta, J.—This election petition has been brought before this Court for the following reliefs :-

(a) That the declaration of the result of 152, Ballygunge Assembly constituency made by the respondent No. 1 on 11th May, 1996 declaring the respondent No. 7 as the elected candidate is void, invalid and inoperative and the same should be set aside and/or quashed.

(b) That there be a recounting of votes for the last election of 152, Ballygunge Assembly Constituency held on 7th May, 1996 under the supervision officer appointed by this Hon'ble Court, declaration should be made after such recounting that the petitioner has been duly elected in the said election for the said Assembly constituency and not the respondent No. 7.

(c) Ad-interim order directing the respondent No. 1 to produce used and unused ballot papers Including cancelled ballot papers, tender ballot papers and postal ballot papers of 152, Ballygunge Assembly Constituency for the election held on" May 7, 1996 before this Hon'ble Court and to Keep the same to the Registrar, Original side of this Hon'ble Court and the same may not be destroyed or tampered with or manipulated.

2. In the body of the petition as ground for seeking of the aforesaid reliefs the petitioner alleged corrupt practices resorted to by the original respondent No. 7 (now respondent No. 1 at the time of or immediately before the poll and the allegations of improper reception, refusal or rejection of votes at the time of counting.

3. It is alleged that the officers and persons those who were engaged in counting were under the control of original respondent No.7 CPI (M) nominee and they were the supporters of the Co-ordination Committee of the employees of the Government of West Bengal who are having allegiance to the ruling C.P.I. (M) party. In fact, at the time or before poll the allegation against the original respondent No. 7 by the petitioner is absolutely vague and devoid of any particulars for which any notice should not be taken by this Court.

4. From the tenor of the petition it seems to me that the petitioner has placed much stress upon alleged corrupt practices at the time of counting, therefore, this allegation is required to be stated in gist as follows :--

On the 10th May, 1996 counting of ballots was started at 8.00 hours, at the time of counting-several irregularities were detected by the election agent of the petitioner and was brought to the notice of the Returning Officer by written complaint on 10th May, 1996. But the Returning Officer as well as the Assistant Returning Officer of 152 Ballygunge Assembly Constituency failed and neglected to take note of the said objection. At the time of counting making bundle and mixing of bundles of ballot papers were not done in accordance with Conduct of Election Rules 1961. While making bundle of 50 ballot papers, at the instance of original respondent No. 7 and his agent 45 ballot papers were taken in case of the respondent No. 7, whereas in case of the petitioner 55 ballot papers were taken to make a bundle of 50 ballot papers as a result thereof the number of ballot papers were reduced in case of petitioner by this subterfuge and in case of original respondent No. 7 number of ballot papers were artificially increased.

5. At the instance of the original respondent No. 7 who went to counting both and dictated over Mobile Phone to the Returning Officer and Assistant Returning Officer and counting personnel to manipulate ballot papers which were in favour of the petitioner, to make the same to be the vote polled in favour of Sri Robin Deb. The Assistant Returning Officer Barun Das acted for Sri Robin Deb, because apparently he had political links and connection with Sri robin Deb, the returned candidate. The postal ballot papers though counted first, but no declaration was made by the Returning Officer or the Assistant Returning Officer as to how many postal ballot papers were issued in respect of that particular Constituency and how many ballot papers were received by them. Various objections were raised by the election agent of the petitioner against illegal and corrupt practices adopted by counting officials at the instance of the election agent of original respondent No. 7 but none of the objections has ever been paid any heed to or considered by any of the officials.

6. Another process of corrupt practice was resorted to by mixing counted ballot papers with the uncounted ballot papers. Despite objection the Assistant Returning Officer refused to stop counting and to take note of the said objection which is contrary to the counting procedure framed by the Election Commission of India. As the election agent of the petitioner raised objection against improper counting he was threatened by the election agent of original respondent No. 7 in presence of the Returning Officer with dire consequences in the event objection is not withdrawn. At the dictate of original respondent No. 7 Returning Officer changed the counting official at the midnight of counting and separate counting officers entered into counting centre and started counting ballot papers in place of working counting officers in spite of objection raised by election agent of the petitioner. Immediately after completion of counting, the election agent of the petitioner went to file a written complaint along with a prayer, for recounting before the Returning Officer but he refused even to accept the said objection on the Instruction and direction of original respondent No. 7 as a result of which the said petition could not be filed.

7. By an order dated 9th July, 1996 the Hon'ble Mr. Justice Shyamal Kumar Sen (as His Lordship then was) on the prayer of the petitioner, the respondent No. 1 to 6, viz., the Returning Officer of 152 Ballygunge Assembly Constituency, one Sri Narayan Bhowmik the Ex-Officio Returning Officer, One Sri P. K. Banerjee, District Election Officer, the then Chief Election Commissioner of India, the Election Commission of India, one Sri S. K. Magan, the then Chief Electoral Officer, West Bengal were deleted from array of the respondents. Therefore, the contesting parties to the instant petition are now Sri Robin Deb (hereinafter nominated as Robin) who was the respondent No, 7 and now the respondent No. 1, Sri Amitava Chowdhury, Sri Bijoy Dutta. Sri Dipak Kumar Ghosh, Smt. Gouri Chowdhury Sri Maheswar Das and Sri Ranjit Kumar Dey.

8. From the records I find none of the aforesaid contesting parties excepting Robin has filed any written statement. In his written statement he has denied and disputed allegations made in the petition not only against him but also against all the election officials. According to him there was no illegal or unfair procedure adopted by any of the election officials at the counting centre or at the time of counting of votes. The objections from time to time raised by the election agent of the petitioner though frivolous, were duly attended and disposed of in accordance with law by the concerned Assistant Returning Officer. In the written statement he has annexed certified copies of the respective complaints and orders passed by the election official thereon. According to him objections were duly attended to and disposed of with reasoned order with the result of overruling. This was done upon hearing of both the election agent of the petitioner as well as that of him. As far as application for recounting after declaration of result is concerned the same was not filed at the appropriate time and it was done long after signing of result in Form 20A. Therefore, he contends that there is no basis of this election petition and the same should be dismissed.

9. Besides filing written statement Robin also took out a petition of recrimination for giving evidence against the election petitioner as required under Sub-section (1) of Section 97 of the Representation of the People Act, 1951 and also relying on the ballot papers and all other documents used in the election. Consideration of his aforesaid application would have been inevitable but for the abandonment of portion of the relief claimed by the election petitioner at the stage of argument and this abandonment will appear from the written notes of argument advanced by Mr. Paritosh Mullick

10. In the written notes of argument the petitioner has stated amongst other that the petitioner, however, with all fairness and in absence of definite evidence does not press for other prayer, that he should be declared elected having received majority of votes. So other prayer for declaration in terms of prayer (a) is now required to be considered in technical sense, as practically granting of this relief will be futile excepting chances of disqualification in contesting future election, or depriving Robin of having benefit which has already been or might be received In future.

It appears from the records upon hearing of all the parties almost at the threshold on 11th June, 1996. His Lordship the Hon'ble Mr. Justice Shyamal Kumar Sen (as His Lordship then was) was pleased to pass an order directing the Returning Officer and the concerned authorities to preserve the ballot papers and records of 152 Ballygunge Assembly Constituency until further orders of this Court. The aforesaid order was reiterated on a subsequent order dated 9th July, 1996.

12. It will appear from the body of the petition that allegation of improper reception, refusal or rejection of any vote or the reception of any vote which is void in relation to and/or in connection with the counting of votes were directed against Robin and Election Officers at the counting centre. In substance the petitioner's anxiety was to establish that counting was not properly and lawfully done. So he prayed for recounting before the Returning Officer immediately after declaration of result and which was turned down wrongfully according to the petitioner.

13. After hearing the learned counsel of the parties present and by consent on 11th November 1997 Justice Sen (as His Lordship then was) passed an order directing recounting and scrutiny of votes for the last election of the concerned Assembly Constituency. The Registrar, Original side of this Court was directed to take steps by deputing competent officials for the aforesaid purpose. So the petitioner's one of the reliefs was granted by this Court on consent. Therefore the result of recounting would be only basis and/or material as to whether the petitioner's allegation as to the illegal and improper reception and rejection of votes at the time of counting is substantiated or not. The allegation of the petitioner of improper behaviour and influencing the counting officials by Robin have not been proved by any evidence either documentary or oral. Therefore incident happened inside the counting centre as alleged by the petitioner cannot

be substantiated.

14. Mr. Paritosh Mullick the learned Senior counsel submits that though his client is not pressing relief for declaration in favour of his client being duly elected, the allegations of improper and illegal reception and rejection of votes at the time of counting are to be enquired into.

15. He contends that on 15th December 1997 when the recounting and scrutiny was started it was found after completion of first phase of recounting, that the actual counting and verification of total number of votes polled in the election was as per official record of Returning Officer (Form No. 20A). 1,48,975 but the physical verification revealed the total votes found in the sealed trunk was 1,46,002. Thus, 2,973 number of used ballot papers could not be found. At the second phase of counting it was found as per Form 16 part-II that the total number of used ballot papers was 1,47,781 whereas in final result sheet in Form 20A was 1,48,645 + 330 postal ballots and thus there was a difference of 864 + 330 ballots. Despite the order of the Court about 11,212 unused ballot papers were not produced for allegedly not being found which include both with signature and without signature. No explanation is forthcoming from the election officials as to whereabouts of those 11,212 ballots. After entire recounting and scrutiny 78 number of valid ballot papers could not be found. After recounting it was found the difference by the votes between the petitioner and the returned candidate has come down to 1329.

16. He further contends that it will appear from the report filed by the Officer of this Court on random sample checking that eight number of unused ballot papers out of 25,000 ballots were used as valid votes. It is clear from the report that eight number of unused ballot papers which were recorded in form No. 16, Part-I as being unsigned and unused, were used as valid votes. Therefore it is a clear case of manipulation. He contends that if all the used ballot papers are checked then there is possibility of unused ballot papers to be found being used. So it is absolutely clear that there were 864 number of ballots wrongfully and illegally received, and furthermore from the report of the random sample checking eight ballots were found to be improperly and illegally received. According to him the entire election is vitiated with improper and illegal reception of votes. 17. He contends while citing a decision of Supreme Court reported In Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others, that where a power is, given to do a certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are necessarily forbidden. In this case the votes were not lawfully received at least partially. Therefore it was not done in accordance with rules and law. So the entire thing is liable to be set aside.

18. Mr. Saibal Ganguly learned Advocate appearing for Robin submits that the allegations of the petitioner as against his client are absolutely false and frivolous and upon recounting it has been established that his client has been rightly declared to be elected. According to him though the margin has come down

marginally still then his client's election cannot be held to be void or illegal.

19. He contends that as far as the discrepancy between the number of votes as recorded in Form No. 16 and Form No. 20A is concerned there must be some mistake, and for this reason the entire election cannot be held to be Invalid or vitiated with illegal and improper reception of votes so as to declare void . Moreover, he contends, since principal relief claimed by the petitioner has been abandoned there is no point to proceed further in the election petition. Upon recounting it was found that his client has rightly been declared elected and there is no material change in the result.

20. Mr. Bikash Bhattacharjee learned Senior Advocate appearing on behalf of the election officials (though they are no longer parties) contends that there is error in calculation of the ballot papers in Form No. 16, Part-I & Part-II by the Presiding Officers. He drew my attention to a particular statement contained in Form No. 16 and contends that the same serial numbers of ballot papers have been recorded twice. He explains that the election officials have done their best, but having regard to the enormity of this challenging work and unsuitable working atmosphere prevailed in the counting centre some sort of mistake, it was normal that some sort of lapses and omissions are bound to occur. These are always permissible and the same are not so serious that any reasonable prudent man can take note of it. Thus, this should be excused by this Court.

21. On the question of non-availability of more than 11, 212 number of unused ballot papers are concerned he contends that his election was held along with the Parliamentary election and these unused ballot papers must have been mixed up with the ballot papers for Parliamentary Constituency. Actually those were not destroyed, despite sincere effort the same could not be traced out. There was no intention of any of the election officials not to produce the same. In any event non-production of the aforesaid number of unused ballot papers do not really and materially change the result of the election, as all the used ballot papers have been produced before this Court and upon recounting the result was found to be the same substantially.

22. Having heard the respective contentions of the learned counsel it appears to me because of the order of recounting and random sample checking passed by this court previously and the stand taken by the petitioner subsequently the scope of enquiry of this petition has been narrowed down to a great extent. The Officer of this Court who was incharge of recounting has submitted two unchallenged reports, the first one of dated 19th March. 1998 and the second one of dated 4th June, 1998. Apart from these two reports a report on random sample checking pursuant to orders dated 23rd April 1999 and 3rd May, 1999 has been prepared and filed by the officer of this Court on 15th February. 2001.

23. After the aforesaid report on random sample checking was filed an application had been taken out by the election petitioner for sample checking and scrutiny of rest of the entire used ballot papers in terms of the order dated 23rd

April, 1999,. This application was opposed by Robin as well as the election officials. One of the election officials, viz., Narayan Bhowmik by filing an affidavit has questioned the correctness of the report of random sample checking.

24. Therefore, my task would be to dispose of the aforesaid subsequent application to decide whether the entire ballot papers should be checked in the context of the report filed by the Officer of this Court or not.

25. It appears that the order dated 23rd April 1999 was passed at the suggestion of the election official and this suggestion was not opposed and rather accepted by the election petitioner. When a party has accepted one mode of order cannot be allowed to take stand otherwise subsequently. It appears that from time to time question of checking of all the used ballots was considered by the Court on previous occasion on similar prayer made by the petitioner before this Court. However, this relief of checking of all the ballots was not granted by this court. Therefore, I do not think it fit to pass order of checking of rest of the used ballot papers. However, the result of this random sample checking shall be applicable to rest of the ballot papers which were not checked. The very purpose of random sample checking is to give Implication of the result to rest of the used ballot papers.

26. Since an objection has been raised by the Returning Officer Narayan Bhowmik to the report of random sample checking I am to address myself to the question raised by him. In the affidavit he has stated that the Officer of this Court while making the aforesaid report has ignored patent calculation error in Form No. 16, Part-I as the concerned Presiding Officer has recorded twice the ballot papers bearing Numbers O65119 to O65150 as being unused. Therefore, the officer concerned should not have relied on the statement of the Presiding Officer in Form No. 16, Part-I. In my view the ground for setting aside of the report of random sample checking is baseless as even if error as complained of is over looked, statement in Form 16 is still acceptable to be correct and I ignore the same. Since there is no other objection to this report I am bound to accept the correctness thereof.

27. Now I shall deal with the reports of recounting first. In the first report it is mentioned that as per ballot accounts for used ballot papers in Form Nos. 16, Part-11, the total number of used ballots was 1,47,781 whereas as per recording in Form No. 20A that total number of votes polled excluding postal ballots was 1,48,645. It is pertinent to mention that statement in Form No. 20A was prepared at the time of final result by the Returning Officer concerned. So there was a difference of 864 ballot papers between the Form Nos. 16, Part-II and form No. 20A. However, at the time of recounting and scrutiny as per first report the total number of used ballot papers was 1,46,002. Therefore, about 2,109 ordinary used ballots were not found as per official result sheet.

28. In the second report filed after recounting and scrutiny it is mentioned that 1,48,033 used ballot papers were found. So, 2,031 ballots out of missing 2,109

were found and the same were taken into account subsequently.

29. From the two reports of recounting it appears to me that the margin of votes between the original respondent No.7 and the petitioner came down from 1,481 to 1,382. It further appears that 864 number of ballots were found excess at the time of counting. On the question of excess ballots Narayan Bhowmik the concerned Returning officer has sought to give an explanation in his affidavit dated 22nd April, 1998 that there had been calculation errors which unfortunately reflected in Form No. 20A. Upon checking of Form No. 16 (both Parts) it will appear that 864 ballot papers are not really missing but the said figure of 864 is result of calculation error. This is not a case of missing ballot papers, or unused ballot papers to be found elsewhere. This explanation in my view is wholly absurd inasmuch as upon actual recounting of the polled ballots were found by the officer of this court to be 1,48,033 which far exceeds the number of used ballots contained in Form No. 16 and nearly the same figure as in Form 20A. This official albeit has tried to put forward desperately a theory of calculation error in Form No. 20A having prepared it by himself at the time of declaration of result in his official and statutory discharge of duty. Even if for argument's sake it is mistake then he has exposed himself to be a thoroughly irresponsible official committing incorrigible mistake and he is not fit to act as Returning Officer.

30. I have no hesitation to reject this explanation and to add the same being false and absurd plea to cover up lapses either deliberate or in deliberate. So it has not been explained as to why and how 64 numbers of used ballots could be found excess while tallying two statements between Form No. 16 and Form No. 20A. It is inconceivable that it could not register in mind of the Returning Officer concerned that there was a difference between the number of ballot papers used for casting votes mentioned in Form No. 16 (Part I & II) and his own statement in preparation of result of Form No. 20A. Had he applied his mind even casually at the counting centre itself the proper explanation and/or reason could have been found as to why the aforesaid number of ballot papers was in excess. I have no doubt in my mind that the concerned Returning Officer indeed did not really address to the complaint raised by the election petitioner. The statements prepared in usual official course of business are always presumed to be correct and subsequent explanation is hardly believable. The ballot boxes and all the documents relating to the election remained in custody of the election officials. It is true that there is no allegation from any of the parties as to tampering with and or breaking seal of the ballot boxes at the time of opening of ballot boxes at counting centre. It is not clear to me as to who is responsible for this. It is for the election official to give explanation as they have special knowledge and it is their burden to do so u/s 106 of the Indian Evidence Act. Further enquiry could have been undertaken by the Returning Officer concerned immediately after counting without declaring result to ascertain the causes of excess used ballot papers being pushed in and by whom, so it automatically follows that those excess votes must have been mixed up illegally and stealthily from unused,

either signed or unsigned, ballot papers obviously because these were not cast by any genuine voter at the time of polling. This could have been found conclusively by this Court had those 11,212 unused ballot papers been brought.

31. In view of above findings. I have no hesitation to hold that there was improper reception of 864 number of ballot papers within the meaning of Section 100(d)(iii) of the said Act. From the report of recounting I find further that there is improper rejection of valid votes and similarly improper reception of votes which is void but this wrongful benefit has been given to the contesting parties concerned. However, number of such wrongful reception and/or rejection are so minimum which hardly have any impact.

32. From the report of random sample checking it appears to me that upon sample checking of 25,000 number of used ballot papers it was found that eight number of unused ballot papers have been used for casting votes. These eight number of ballot papers are bearing serial Nos. 065103, 065107, 065109, 065110, 065111, 065113, 065115 and 065116. These serial numbers can be found from the statements prepared in Form No. 16, Part-I under the heading "Without the Signature of Presiding Officer", prepared by the Presiding Officer concerned at the polling station, viz., Public Welfare Society and children School being Polling Booth No. 152/66. Mr. Bhattacharjee is right in saying that this Form 16 records a patent error as the serial numbers of ballot papers bearing numbers 065119 to 065150 have been accounted for twice. Even if I ignore this error still then the aforesaid eight number of ballot papers come within the range of 065101 to 065150. It is significant to mention that though it is recorded in Form No. 16 that those ballot papers were unsigned but at the time of checking it was found that these ballot papers were really signed by the same Presiding Officer. I have examined the signature on the aforesaid eight number of ballot papers and compared with the signature put by the person in Form No. 16 and I find that the signatures have been put by the same person. Therefore, it is clear that subsequently the aforesaid eight number of ballot papers which were recorded as being unsigned and unused, were subsequently after closer of poll signed by the Presiding Officer of Booth No. 152/66 either dropped in and/or mixed up with the used ballot papers.

33. The explanation given for non-production of more than 11,212 number of unused ballot papers in the affidavit is an astounding feature. In the affidavit dated 5th March 1999 it has been mentioned that not found unused ballot papers have got mixed up with other papers of other constituencies. It was not possible to identify such papers at the material point of time while shredding and destroying election papers of other constituencies for which no election petition was pending in terms of order No. 128-Home (Elec.) dated 9th January, 1998 of the Chief Electoral Officer, West Bengal and these likely to have been destroyed along with other ballot papers.

34. This explanation is ridiculous firstly because under Rule 94 of the said Rules these are supposed to be preserved at least for six months unless contrary

direction is given. Rule 94 is reproduced hereunder.

"94. Disposal of election papers. Subject to any direction to the contrary given by the Election Commission or by a competent Court or tribunal -

(a) the packets of unused ballot papers shall be retained for a period of six months and shall thereafter be destroyed in such manner as the Election Commission may direct;

(b) the other packets referred to in Sub-rule (1) of Rule 93 shall be retained for a period of one year and shall thereafter be destroyed:

Provided that packets containing the counterfoils of used ballot papers shall not be destroyed except with the previous approval of the Election Commission;

(c) all other papers relating to the election shall be retained for such period as the Election Commission may direct."

35. The said order of Election Commission was of dated 9th January, 1998 whereas this Court passed order on 11th June, 1996. Besides the said order of Election Commission does not permit to destroy the papers of election in respect of which litigation is pending. A theory of mixing up of ballot papers of the Parliamentary Constituencies has been put forward. But not a single ballot paper was found along with the other unused ballot papers of Assembly Constituency produced before the Court, of Parliamentary election. Therefore, it is difficult to believe the story of mixing up.

36. As far as story of destruction and/or shredding is concerned it is not mentioned on which date the same were destroyed. It is mentioned incidentally that this Court on 11th June 1996 directed to preserve the ballot papers and records of 152 Ballygunge Assembly Constituency. But it appears that substantial portion were kept but a portion is said to have been destroyed. The theory of destruction is wholly unacceptable to this Court. Moreover, it is not clear to me as to why the papers were allowed to be destroyed according to the version of the election official when there was order of preservation of this Court passed within one month from date of declaration of result.

37. I conclude that the Returning Officer concerned failed to discharge his duty by not entertaining the application for recounting at the time of declaration of the result. In my view there were sufficient grounds for undertaking such task in order to maintain impartiality and purity of the election process. Under the Scheme of our Constitution in order to constitute legislative and executive wing of the Government Parliamentary democracy has been evolved. The Election Commission and/or its officials has very crucial constitutional role to play to ensure fair and impartial election of candidates either an Assembly segment or in Parliamentary segment so much so the mandate and/or wishes of the electorates alone are reflected in the result. The act and conduct of all the persons including election officials involved in the election process right from the stage of preparation of electoral rolls up to stage of preservation of all the ballot papers

and election papers after election is over should be such that evoke confidence not inference, of the electorate, of impartiality and purity of the election process. Any departure at any stage of the election process particularly at the time of counting gives rise to doubting impartiality and purity of election and may result in gross interference with exercise of franchise.

38. I find from the affidavit of election official Narayan Bhowmik that there is no compliance in terms of, rule for preserving the ballot papers and other election documents In relation to any constituency where election petition is not pending, Non production of more than 11,212 unused ballot papers tantamounts to an offence u/s 204 of the Indian Penal Code. These ballot papers are very vital evidence for Identifying serial number of ballot papers improperly received in the vote.

39. Upon analysis of all evidence adduced and examining all records and in the context of the aforesaid findings I come to conclusion as follows :--

1. As per final result of recounting Robin Deb being the original respondent No. 7 is still a successful candidate but the margin has come down to 1,382.

2. As many as 864 number of ballot papers were improperly and Illegally received I at the time of counting and the same have been used in arriving at a result of the election, however, this wrongful and Illegal reception of votes do not materially affect the result of the election as even if 864 ballot papers which are found to be excess are excluded from the total number of votes polled in favour of Robin still then he will have to be accepted as an elected candidate, however, the margin would be reduced, "Material affectation" in my opinion is complete reversal of the result. In the decision of Supreme Court reported in Bashir Ahmad Magrey Vs. Ghulam Quadir Mir and Others, it is held amongst other in paragraph 11 thereof at page 236 -

"..... It would appear from the figures set out above that, excluding all the votes which were found to have been improperly received by the appellant and also giving credit to the respondent for 59 votes which were found by the High Court to have been improperly rejected at the time of counting the net result still is that the appellant has a lead of 38 votes over the respondent. There is, therefore, no escape from the conclusion that the election of the appellant should be upheld. In an election petition founded upon the ground that the re- suit of the election was materially affected by the improper reception or rejection of votes, the Court has first to decide whether certain ballot papers were improperly received or were improperly rejected. Once that controversy is resolved, the rest is purely a matter of arithmetical calculation. If the result of arithmetical calculation is that the returned candidate has still a lead over his nearest rival, his election would not be declared to be void on the ground of improper reception or, improper rejection of votes. Improper reception or improper rejection of votes can result in invalidating an election only if such improper reception or improper rejection materially affects the result of the election."

40. In view of this later decision of Supreme Court on the identical point the earlier decision Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others, cited by Mr. Mullick is not acceptable.

41. Before parting with this case I feel it expedient in view of the statements made in affidavit by Narayan Bhowmik as to the manner and method of preserving of the election papers and documents and ballot papers both used and unused, to ensure fairness and impartiality and purity of counting of ballot papers I give following directions to the Election Commission of India and the Chief Electoral Officer, West Bengal who shall circulate the same to all the election officials involved in the counting and also the District Election Officers for compliance.

1. All the ballot papers both used and unused including postal ballots, rejected ballots, cancelled ballots, tender ballots, wherever ballot papers are used in any election and all the documents and papers relating to the election shall be preserved separately for each Constituency whether Parliamentary segment or Legislative Assembly segment in a sealed trunk and/or receptacle and/or packets whichever may be convenient, Immediately after counting for a period of at least 45 days from the date of declaration of result irrespective of the provision of Rule 94 of the Conduct of Election Rules, 1961 and litigation being pending in relation to any Constituency.

2. In the event there be any substantial discrepancy in numbers recorded in Form 16 Part I and Part II and Form 20A (20) In case of use of ballot papers then on any application being made by any of the parties for recounting it shall be duty of Returning Officer to entertain such application and dispose of and if necessary shall undertake recounting in appropriate cases.

3. The Returning Officer shall ensure that under no circumstances ballot papers both used and unused including postal ballots if ballot papers are used in election shall get mixed up with other constituencies after counting is over.

42. If the above measures are taken then destruction and/or causing disappearance of evidences for the trial of election petition can be eliminated to a large extent. It is desirable that Chief Electoral Officer should not utilize services of Narayan Bhowmik as Returning Officer in any election. Any enquiry shall be made by the Chief Electoral Officer, West Bengal as to why the unused 11,212 number of ballot papers were not preserved according to Rule 94 of the said Rules and shall take appropriate step against the person and/or persons responsible to be found upon inquiry for destruction and /or misplacement of unused ballot papers numbering 11.212 in this case, and file report to this Court of compliance within six months from date of communication of this order.

43. The learned Registrar General of this Court is directed to communicate forthwith the aforesaid directions to the Chief Election Commissioner of India and the Chief Electoral Officer, West Bengal for taking necessary action. A copy of the judgment as a whole shall be communicated to the respective statutory

authorities as required under the Representation of the People Act, 1951.

44. After the Judgment is delivered, Mr. Ganguly prays that i should pass an order dismissing the Election Petition u/s 98 of the Representation of People Act. 1951 and he also prays that costs of this application should be paid to his client since no relief has been granted to the petitioner. Mr. P. Mullick opposes this prayer and contends that at least this Court has come to a finding that there are Improper reception of votes at the time of counting. Therefore, his client has become successful at least partially. Under such circumstances, no further order should be passed.

45. Having considered the respective submissions of the learned counsel I am of the view that save and except the aforesaid directions, observations and findings in the judgment, the petition is deemed to be dismissed. However, so far as the cost is concerned it should not be awarded to any of the parties. Therefore, both the parties would be entitled to get back their deposited cost from the Registrar, Original Side.

46. Mr. Ganguly has drawn my attention as regards the payment of cost to Section 119 including proviso of the said Act. I am of the view that since I have not dismissed the petition in its entirety I have come to a certain findings of Improper reception of votes, therefore, by exercising my discretion under the aforesaid Section 1 have passed the aforesaid order.

47. The Registrar General of this Court shall act on the signed copy of the operative portion of this judgment and order.

48. All parties concerned are to act on a xerox signed copy of the operative portion of this judgment upon usual undertakings, if any.