

(2002) 07 PAT CK 0069
In the Patna High Court
Case No : Election Petition No. 1 of 2000

Sri Hari Shanker Prasad

APPELLANT

Vs

Shri Shahid Ali Khan and Others

RESPONDENT

Date of Decision : 16-07-2002

Acts Referred:

Citation : (2002) 07 PAT CK 0069

Final Decision : Dismissed

Judgement

Parsun Kumar Deb, J.—This election petition has been filed by the above named petitioner who was also a candidate in the fray challenging the returning of respondent No. 1 in the last Assembly Election held in the year 2000 in respect of 67 Sitamarhi Assembly Constituency of Bihar Vidhan Sabha. At the very outset it should be mentioned that difference of votes by which respondent No. 1 had been declared elected is only a margin of 35 votes from that of the election petitioner.

2. The election programme of the assembly election for 67 Sitamarhi Constituency was as follows:

1. Last date of filing of nomination - 3.2.2000 2. Date for scrutiny of nomination papers. - 4.2.2000 3. Last date for withdrawal of candidature. - 7.2.2000 4. Last date for preparation of list of candidates. - 7.2.2000 (after 3 p.m.) 5. Date of polling - 22.2.2000 6. Date of repelling of eight booths - 24.2.2000 7. Date of counting - 25.2.2000 & 26.2.2000 3. As per the aforesaid programme, election was held and lastly in total seventeen candidates had remained in the fray. All the candidates who fought election besides the election petitioner and respondent No. 1 had been made respondents in this election petition as respondent Nos. 2 to 16. The petitioner was a nominated candidate for recognized political party, namely, Bharatiya Janata Party while the returned candidate i.e. respondent No. 1 Shahid Ali Khan had contested the poll as a Rashtriya Janata Dal candidate and, as such, recognized symbols of Kamal and Lantern had been provided as the symbols of the election petitioner and

respondent No. 1 respectively. Similarly, the other candidates who had contested from recognized national party and non-recognized political party and also independent candidates have been provided with different symbols, the details of which have been given in paragraph 4 of the election petition. As per the programme, the election was conducted on 22.2.2000 but on receipt of certain report regarding booth capturing etc, repoll was held in eight booths, namely, booth Nos. 40, 66, 73, 227, 235, 250, 251 and 252 and the same was held on 24.2.2000. The counting started in the morning hours on 25.2.2000 and concluded in the evening hours on 26.2.2000 and the result was declared on 27.2.2000. As per the result-sheet the petitioner had received in all 58, 705 votes where as respondent No. 1 Shahid Ali Khan had received 58, 740 votes. A total number of 1, 545 votes have been shown to be rejected. In that way, respondent No. 1 was shown to have been elected by a margin of 35 votes. The grievance of the petitioner is that the result of the election is in gross violation of Rule 56 of the Conduct of Election Rules 1961 and settled law and norms. The same is required to be declared as void. According to the petitioner, if the counting had been done properly and the total votes polled in favour of the petitioner if counted properly then the petitioner would have been declared as elected by margin of more than 100 (one hundred) votes.

4. In this election petition the sole ground has been taken for challenging the election of respondent No. 1 as miscounting of ballot papers as the Returning Officer had acted in gross prejudicial and interested manner as the respondent No. 1 was a candidate of the ruling party at the relevant time in power. The main allegation of miscounting is in respect of booth No. 49 and booth No. 264. In respect of booth No. 49, the allegation is that in round No. 4 at table No. 7, 93 ballot papers which were found polled and marked in favour of the petitioner have been deliberately put in the hole of doubtful box, and ultimately been rejected by the Returning Officer at the central table which is in violation of Rule 56 of the Conduct of Election Rules, 1961. The ground for rejection was that polling mark made by the voters in those individual ballots was by the distinguishing mark supplied to them. Since the Presiding Officer or the polling staff had mistakenly supplied the distinguishing mark to the voters, such anomaly had happened but the intention of the voters could be very well understood and, as such, those ought not to have been rejected. According to the election petitioner, his polling agent and other counting agents had raised objection regarding rejection of such ballot papers but nothing was done and then the election agent of the petitioner lodged his protest in writing to the Returning Officer on 25.2.2000 during the course of counting itself. But no action was taken nor the counting was stopped rather the election agent was assured that the matter would be referred to the Election Commission for seeking instructions and then and then only the fate of those 93 ballots would be considered. It is further stated in the election petition that when the matter was brought to the notice of the Election Commission of India through fax message then the Returning Officer was asked to review the matter and if the seal was

mistakenly supplied by the Presiding Officer or the polling officials then those should be counted in favour of the candidate in whose favour the ballots were polled. But according to the election petitioner, no action, as per the direction given by the Election Commission of India, had been taken by the Returning Officer rather without the knowledge of the election petitioner the Returning Officer manipulated and written that he had reviewed the matter and rejection made earlier have been maintained. Thus, the contention of the election petitioner is that the earlier rejection by the Returning Officer was illegal and the direction of the Election Commission of India regarding review of his earlier rejection had also been rejected illegally without following the direction of the Commission and thus admittedly when those 93 ballots were in favour of the petitioner then if those would have been counted then the petitioner would have been declared as elected.

5. The other ground of challenging the election on the plea of miscounting is that during the course of counting in booth No. 264 in round No. 2 at table No. 20 a batch of fifty ballot papers which were polled in favour of the petitioner were not counted during the course of counting. According to the petitioner, ballot paper counting (Form 16, Part II) was illegally filled up by showing 50 ballot papers missing. Thus, gross irregularities were vehemently protested by the counting agents and others and also the election agent of the petitioner but of no avail and thus the Returning Officer had reduced the total number of votes polled at booth No. 264 in favour of the election petitioner. When on those grounds prayer for recounting made by the petitioner was refused to be taken by the Returning Officer during the course of counting on 26.2.2000 then those were sent to the Election Commissioner through fax. It has also been contended in the election petition that in the statutory report made by the Returning Officer had mentioned those while seeking publication of result but nothing was disclosed to the petitioner by the Returning Officer in course of counting and he got everything secret. Thus, the counting of the ballots were tainted with not only gross-irregularities but illegalities on the face of it and the victorious candidate has been made to be defeated in the election by the Returning Officer in most illegal manner. Thus, the petitioner has sought for a relief for setting aside the election and declaration of respondent No. 1 to be elected as void and then further declaration be made in favour of the petitioner to be validly elected candidate in place of respondent No. 1 after declaring 93 ballot papers of booth No. 49 as valid which were illegally rejected by the Returning Officer and also to add fifty votes more in favour of the petitioner in respect of booth No. 264.

6. The election petition has been contested mainly by the returned candidate respondent No. 1. In the written statement filed by him it was contended inter alia that the election petition is not maintainable in its present form and it is fit to be dismissed at the outset for non-compliance of the mandatory Provisions of Sections 81, 82, 83 and 117 of the Representation of People Act, 1951. It was also contended that the election petition is not maintainable and fit to be dismissed under Order, VII Rule 11 of the CPC read with Section 87 of the

Representation of People Act. The statement made in the election petition had been categorically denied from the side of the respondent No. 1. The objection etc. which has been pleaded to be raised from the side of the election petitioner, his son as election agent and the counting agents had been denied and it has been averred that the whole process of counting was done peacefully and properly under the supervision of the Election Observer appointed by the Election Commission of India and that the results of the election had been published not only after prior permission being taken from the election Commission of India rather also informing the Commission about the whole details regarding the process of counting.

7. It has further been contended that as per Rule 56(2)(b) of the Rules framed under the Act the mandatory duty casts upon the returning Officer to reject ballot papers which bears marks other than with instrument supplied for the purpose. It has further been contended that 90 ballots not 93 ballots as has been stated in the election petition of booth No. 49 were marked by instrument other than what has been supplied and, as such, when there was nothing to show in the diary of the Presiding Officer that wrong seal/stamp was supplied then there was no other alternative to the Returning Officer but to reject those votes. It has also been contended in the written statement that the in booth Nos. 47, 48 and 49 the election petitioner, his son along with other antisocial elements captured the same for sometime and committed corrupt practice of booth capturing as defined u/s 83 of the R.P. Act. For this the respondent had filed a recriminatory petition u/s 97 of the Act. In that way the rejection of 90 ballots of booth No. 49 were totally legal, proper and just.

8. Regarding the less ballots in respect of booth No. 264 it has been contended that there was no objection at any point of time when the ballot box was opened in course of counting as the same was found under proper seal and only on removal of seal the ballot box was opened and, as such, there was no scope of any manipulation from the side of the counting officials. It has also been contended that no objection was there with regard to the missing of 50 ballots when the same was done in presence of all and that when the ballot box was opened after breaking of seal, 50 ballots were found missing and, hence in Form No. 16(2), 50 ballots were shown to be missing. Everything was done in presence of the election agent and the counting agent of the petitioner and they had signed on the result being published after each round of the counting before the Returning Officer. Only for the purpose of filing this election petition grounds have been manufactured which were not at all real but imaginary on the face of it and, as such, it has been prayed that the election petition should be dismissed with cost.

9. The other respondent namely, respondent Nos. 4, 5, 6, 7, 8, 11, 12, 13 and 15 have filed written statement conjointly and they have supported the election petition and echoed the statement which had been made in the election petition itself. Similarly respondent Nos. 10, 14 and 16 had also filed a written statement

in the same and similar line as that of the other respondent as mentioned above supporting the contentions of the respondent No. 1.

10. Before filing of the written statement the respondent No. 1 had filed a recriminatory petition as per provision of Section 97 of the Representation of People Act, 1951 wherein it has been contended that the votes counted in favour of the election petitioner of booth Nos. 47, 48 and 49 were invalid votes in view of booth capturing by the election petitioner, his son and muscles men but the Returning Officer had not given ear to the protest made by the Returning Officer/ Assistant Returning Officer in respect of booth capturing of those booths. It is further stated that they should be allowed to adduce evidence in support of their contentions of booth capturing. Once the case was fixed for ex parte hearing as respondent No. 1 did not appear in the case even after receipt of summons/ notice. So in the recriminatory petition there was also prayer for setting aside of that ex parte order which was accordingly allowed and the petitioner was given permission to contest the election petition and the contents made in the recriminatory petition and the objections thereof from the side of the election petitioner were kept in abeyance for consideration after conclusion of trial and as permission has been sought the respondent No. 1 was permitted to adduce evidence in respect their contentions of booth capturing etc.

11. During the course of evidence a petition was filed under Order 6, Rule 17 of the CPC read with Sections 81, 82, 83 and 117 of the Representation of People Act for dismissal of the petitioner at the outset and to decide the issue of maintainability as a preliminary issue but that petition, as evidence had already been started, had been kept pending for consideration and ultimately the maintainability issue has been ordered to be considered at the time of argument stage.

12. On the face of the pleadings of the parties following issues were framed vide order dated 18.1.2001:

- (i) Whether election petition is maintainable in its present form?
- (ii) Whether election petition is bad for non-compliance of the mandatory provisions of Sections 81, 82, 117 and 83 of the R.P. Act, 1951?
- (iii) Whether election of respondent No. 1 is bad for the irregularity and illegality committed in counting of ballot papers resulting in materially, affecting the election process itself?
- (iv) Whether the recriminatory petition filed is maintainable or bad in the eye of law?
- (v) To what relief if any, the election petitioner is entitled?

It should be mentioned here that as some typing mistake was there in the order-sheet dated 18.1.2001 while framing issues, the same was corrected afterwards vide order, dated 14.3.2001.

13. On the basis of the respective cases of the parties, they have adduced evidence of several witnesses. From the side of the election-petitioner six witnesses have been examined including the election-petitioner as P.W. 1. Other witnesses examined are P.W. 1/A Krishna Mohan Singh who was counting agent of the election-petitioner. He was in Table No. 7 wherein ballots of Booth No. 49 were counted. According to him, there were in total 450 ballots in Booth Mo. 49 and out of it 90-95 ballots which were cast in favour of the petitioner were not taken for counting as those were not having round rubber stamp. The evidence of this witness does not support much to the election-petitioner's case.

P.W. 2 is Rama Shankar Mishar. According to him, while the counting started with regard to Booth No. 264, 500 ballots were found on opening the ballot box. According to him, at the very first counting when 500 ballots were found then it was not known in whose favour such ballots were there. But, in course of the second round while bundles were being made then 50 ballots were found missing.

P.W. 3 Gauri Shankar Prasad was a voter in respect of Booth No. 49. According to him, casting of vote was peaceful and there was no booth capturing or nothing of this sort.

P.W. 4 Amarnath Prasad was the Polling Agent of Booth No. 49. He has also deposed that polling in Booth No. 49 was peaceful and there was no booth capturing.

P.W. 5 Awadesh Kumar was the Polling Officer No. 3 at Booth No. 49. He is vital witness for the election-petitioner on whose evidence the election-petitioner was relying much. He has stated that instead of the proper seal, wrong rubber stamp was supplied to him by the Presiding Officer and with the wrong rubber stamp voting continued for one and half house. But in his cross-examination he has stated that he did not give in writing that with wrong rubber stamp several voters had cast their votes. Regarding the wrong rubber stamp he has not mentioned anything to anybody. It was suggested to him that for the first time he is deposing so before this Court and it was not disclosed to anybody at any point of time and, as such, he has been influenced by the election-petitioner to say so.

P.W. 6 Sunil Kumar happens to be the son of the election-petitioner and his election agent. He has deposed supporting all the averments made in the election petition itself and, according to him, he has raised objection regarding the illegality/irregularity and miscounting not only to the Returning Officer but also to the Election Commission of India. This witness has been cross-examined at length from the side Of the respondent No. 1.

14. For and on behalf of the election petitioner several documents have been exhibited. Ext. 1 is the photocopy of the letter of the petitioner to the Chief Election Commissioner, India, dated 28.2.2000. Ext. 2 is the letter of the petitioner to the Chief Election Commissioner of India dated 28.2.2000. Ext. 3 letter of the petitioner to the Chief Election Commissioner of India, dated

1.3.2000. All these were filed after the result had already been published. Ext. 4 letter of the election agent of the petitioner to the Returning Officer, Sitamarhi, dated 26.2.2000. Ext. 5 letter of the election agent of the petitioner to the Returning Officer, Sitamarhi, dated 25.2.2000. Ext. 6 letter of the election agent of the petitioner addressed to the Chief Election Commission of India dated 27.2.2000. Ext. 7 photo copy of the letter of the election agent of the petitioner to Chief Election Commissioner of India dated 27.2.2000. Ext. 7/1 photo copy of the letter addressed to the Chief Election Commissioner dated 28.2.2000. Ext. 8 photocopy of the letter of the election agent of the petitioner to the Observer, dated 27.2.2000. Ext. 9 photo copy of the letter of the petitioner to the Returning Officer, dated 26.2.2000. Ext. 10 order-sheet of the Returning Officer dated 27.2.2000.

15. For and on behalf of the respondent in total 12 witnesses have been examined including the respondent No. 1 as D.W. 10. D.W. 1 is Rajesh Kumar. According to him, he was scheduled to cast his votes at booth No. 22 at Sales Centre in the Bazzar Area. All the Booth Nos. 47, 48, 49 were situated nearby the Booth of Booth No. 22. After casting his vote at Booth No. 22 he went to the place where booth Nos. 47, 48 and 49 were situated. According to him, he found that those three booths were captured by the men of the election petitioner and in his presence sealing on the ballots was made by his musclemen. D.W. 1/a is Rajiv Kumar. According to him, he was to cast his vote at Booth No. 49 and when he was in the queue then some persons including the election petitioner, Hari Shankar Prasad, came there and asked the voters in the queue to go away as their votes had already been cast. D.W. 2, Shyambabu Paswan, was also a voter of Booth No. 49 as alleged by him and he also deposed in the same line as that of the above two witnesses. D.W. 3, Hira Ram, is also alleged to be a voter of booth No. 49 and deposed in the same line as that of the above mentioned witnesses. D.W. 4, Sajid Ali Khan, was the election agent of respondent No. 1. He was all along present at the counting hall and-according to him, during the course of counting no anomaly, irregularity or illegality were caused and, as such, no objection had been raised by any of the counting agents of the election petitioner or the election agent. He has proved the result-sheet as Ext. A. During the course of examination he has denied all the allegations as contained in the election petition and deposed in support thereof by the witnesses of the election petitioner. D.W. 5 is Bairam Singh, who happens to be the S.D.O. cum Returning Officer of 67 Sitamarhi Assembly Constituency. He has deposed about the objections being raised about the 90 ballots having no proper seal and he had rejected some of those ballots in the centre table. He has also deposed regarding information being given to the Election Commission of India and after that as per direction given he made verification of the matter and then retained his earlier order of rejection, and, according to him, he has mainly consulted the diary of the Presiding Officer of Booth No. 49 and then came to the finding that those ballots having not being properly sealed are fit to be rejected. D.W. 6, Dharendra Paswan, was the Anchal Adhikari of Dumrah, at Sitamarhi. During the relevant

time he was the Assistant Returning Officer. He also deposed on the same line as that of the Returning Officer, D.W. 5. D.W. 6/A, Hari Kishore Yadav, is a counting agent of respondent No. 1 at table No. 3. According to him, there was no irregularity in his table with regard to the counting in respect of booth No. 264 and no objections were raised by the counting agent of the election petitioner or the election agent. D.W. 7, Ajay Kumar Sahi, was the election agent of respondent No. 13, Naga Paswan. He has deposed about the objection being raised of ballots of booth No. 49. He has deposed in clear terms that those 90 ballots were in favour of the election petitioner, Hari Shanakar Prasad and having no round seal, those ballots have been rejected and that no objections were raised regarding such rejection either by Hari Shankar Prasad or his election agent. D.W. 8, Arun Kumar Yadav, was the election agent of respondent No. 11, Azimullah. He has also deposed in the same line as that of D.W. 7. D.W. 9 is the counting agent of respondent No. 13, Naga Paswan. He has also deposed about those 90 ballots of booth No. 49 and according to him, when no proper seal was there, no objections were raised from the side of the election petitioner about rejection. D.W. 10, Shahid Ali Khan is the respondent No. 1 in this case and he has deposed supporting his case denying all the allegations made by the election petitioner. This witness has been cross-examined at length but he had stood such rigorous cross-examination. 16. The following exhibits have been made for and on behalf of the respondent. Ext. A is the result-sheet. Ext. A/1 is the signature of respondent No. 1 Shahid Ali. The diary of the Presiding Officer of booth No. 49 has been marked as "X" with objection from the side of the election petitioner. Ext. B is the letter sent to the Election Commission of India by the S.D.O., Sitamarhi. Ext. B/1 is the signature of the S.D.O. Ext. C is the entire order-sheet maintained by the Returning Officer during the course of election and publication of its result thereof. Ext. C/1 is the signature of the Returning Officer.

17. The evidence adduced by these individual witnesses on behalf of both the parties had not been elaborately reiterated for the purpose of brevity. The cardinal evidence of individual witness shall be referred to as and when required for the purpose of discussing issues involved in this election case.

A petition was also filed by the election petitioner for inspection in respect of the ballots of booth Nos. 49 and 264 as contemplated under Order XI, Rule 15 of the Code of Civil Procedure. That petition was kept for consideration at the time of argument itself and while discussing the issues involved in this election, the said petition shall also be taken into consideration for a decision thereof.

18. For the purpose of coming to a just decision in the case I shall take the case issue-wise.

Issue Nos. 1 and 2

Both these issues are taken up together for discussion and findings thereof as they are co-related. It has been categorically stated in the written statement and also in the petition filed under Order VII, Rule 11 of the CPC from the side of the

contesting respondent that the present election petition is not maintainable for non-compliance of the mandatory provisions of Sections 81, 82, 117 and 83 of the R.P. Act (hereinafter referred to as the "Act"). The present election petition has been filed challenging the result of the election on the ground of miscounting and rejection of valid votes in favour of the election petitioner due to inaction and misaction on the part of the Returning Officer. No where in the election petition any corrupt practice has been professed from the election petitioner rather the result of the election has been challenged on the ground of miscounting alone. On two grounds such miscounting has been pressed from the side of the election petitioner. In respect of booth No. 264 although as per Form 16, (1) the total votes polled were shown to be 500 but at the time of counting only 450 ballots were taken while 50 ballots were not counted and according to the election petitioner, those 50 ballots were in a bundle while counting being made in favour of the election petitioner, (ii) In booth No. 49, 93/90 ballots were illegally rejected on the ground of wrong seal being put by the voters being supplied inadvertently or mistakenly from the side of the election officials. For the purpose of Section 81 of the Act it requires that the election petition should be filed within the time frame. The time frame as mentioned in the Section has been totally complied with and the same has been mentioned at the time of the acceptance of the election petition itself and on this score, practically, there is no argument or pleadings from the side of the contesting respondent. The election in question and its result thereof have been challenged by the election petitioner, who was on the fray and all the persons who had contested the election have been made parties in the election petition. In that way, no defect is there as per Section 82 of the Act. Section 117 has also been complied with as the security for cost had also been deposited at the time of presenting the election petition before the Court by the election petitioner. Now only contest is in respect of Section 83 of the Act itself. Section 83 reads as follows:

83. Contents of petition.-(1) An election petition-

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleged including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

(Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.)

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

19. The present election petition falls within the criteria of Section 83(1)(a) as I have already stated that no corrupt practice has been pleaded and Sub-section (1)(a) requires a concise statement of the material fact. Material particulars are required only in respect of corrupt practice. There is sea-difference between the material facts and material particulars and this difference has been considered at many a time by different High Courts and also by the Apex Court and it has been consistently held that when the election has not been challenged on the ground of corrupt practice then only the material facts are to be pleaded and such material facts should be to such extent that that gives a prima facie case for foundation of the election petition for going into a trial. The two grounds of miscounting as has been pleaded in the election petition have been elaborated in paragraph 12 to 20 of the election petition itself. In paragraph 12 it has been stated that while the counting was going on in round 4 at table No. 7 of booth No. 49, 93 ballot papers which were polled and marked in favour of the petitioner were deliberately and with prejudicial motive were thrown into the pigeon hole of doubtful votes and then in the central table the Returning Officer had illegally and arbitrarily rejected those votes. It has been pleaded that the action of the Returning Officer was violative of Rule 56 of the Conduct of Election Rules. Then it has been stated in the subsequent paragraph i.e., paragraph 13 how the objections were raised. In paragraph 14 the pleadings are there in respects of non-counting of fifty ballot papers in respect of Booth No. 264 at table No. 2 and round No. 29 and in the subsequent paragraph it has been stated how those 50 ballot papers have been kept outside the scope of counting detrimental to the petitioner although, according to the petitioner, as mentioned above, the election petition has stated as to how all those objections were raised during the course of counting before the Returning Officer and when the Returning Officer did not allow for recounting then messages were sent to the Election Commission and then a direction came from the Election Commission for counting of 90 ballots of booth No. 49 in favour of the petitioner but still then the Returning Officer had rejected the same. So the grounds on which the election has been challenged have been elaborately stated in the election petition itself regarding the material facts. It is true that in the election petition it has not been stated specifically as to whose instance proper seal was not supplied to the electors but during the course of trial third Polling Officer had been examined to prove that at the start of the polling at booth No. 49 the Presiding Officer had supplied the wrong seal as a result of which the voters had to apply that wrong seal for the purpose of marking the ballots by the electors but after one or one and half hour the defect could be discovered and then proper seal was supplied to the voters. It has been strenuously argued by the senior Counsel appearing for and on behalf of the contesting respondent that this fact had not been specifically stated in the election petition itself, and thus the same suffers from suppression of material facts and hence the election petition is liable to be rejected holding the same to be not maintainable. On the other hand, learned Senior Counsel Mr. Sharma appearing for and on behalf of the election petitioner has stated by citing various rulings of the Apex Court that there is no scope of putting the evidence by way of

pleadings. Material fact it has been stated in the election petition giving scope to the respondent to know as to what point he has to reply the same is sufficient for the purpose of pleadings and the evidence by which those facts are to be established nowhere requires to be included within the pleading itself. I am also of the same view. Even in the case of *Raj Narayan v. Mrs. Indira Gandhi* (1972 SC 130) where corrupt practice have been pleaded and while pleading of material particulars some missing links were there but it was held to be not materially affecting for the purpose of Section 83(1)(b) of the Act. It is submitted by the learned Counsel for the petitioner that the case as reported in 2000 (1) SCC 16 *Mahendra Pas v. Ram Das Malanga* can have no application in the present case. In that case also the distinction between the material facts and material particulars have been considered. Some material facts were not pleaded in the original election petition and the same was attempted to be included by way of amendment after expiry of limitation. The Apex Court rightly held that the same is not permissible. There is similarity of the factual position in the present case with that of the reported case. In that case also the election petitioner had averred that there was difference of eight ballots of the total number of ballots issued to the voters and the total number of votes polled and counted and when such discrepancy could not be explained properly then recounting of ballot papers were rightly ordered. This point shall be considered in the subsequent material issue. Here concern is only with respect to the maintainability of the election petition itself. On the whole it could be found after going through the pleadings of the election petition closely that material fact on which the election petitioner is challenging the election has been elaborately stated in the election petition itself. As no material particulars are to be included as no corrupt practice has been pleaded then the question of giving material particulars in the present election petition are not necessary. In that way, I hold that the election petition is maintainable and does not suffer from any violation of the provision of the Act as pleaded from the side of the respondent. Thus, both issues are decided in favour of the election petitioner and against the respondents. 20. Issue No. 3:

It is the vital issue on which the fate of the election petition is rested. On two grounds of miscounting and inaction on the part of the Returning Officer the election of respondent No. 1 has been challenged. The prayer of the election petitioner is that on the allegations being made regarding miscounting and being established prima facie, there should be an order of inspection by this Court as contemplated under Order XI, Rule 15 of the CPC and Rule 93(1) of the Conduct of Election Rules in respect of the ballots with regard to Booth No. 264 and Booth No. 49 and on scrutiny of those ballots declaration be made in favour of respondent No. 1 as an elected candidate should be set aside and in place the petitioner should be declared as elected one.

21. Miscounting has been alleged on two scores namely, as per Form No. 16(1) of Booth No. 264 the number of ballots issued and polled are not being found at the time of counting. Rather, 5 ballots were found missing and in that way Form No. 16(2) had been filled up in respect of booth No. 49, 90/93, ballots had been

rejected illegally. Those were not being marked by proper seals by the electorates, although, those were polled in favour of the election petition and for no fault on the part of electors proper sealing was not there. But the intention of the electors could be very well understood.

22. On the other hand, there is contention from the side of the contesting respondent that Booth No. 49 along with the contiguous booths which were situated at the same place were being captured by the election petitioner and his musclemen and the ballots were being sealed by them meaning thereby that unscrupulous persons had cast votes by capturing the ballots and due to hurry wrong seals were being used by them. A recriminatory petition has also been filed on this count from the side of the respondent.

23. On the basis of the claims and counter claims both have adduced evidence as I have already mentioned above. Now, it is required to be considered whether the election petitioner could be able to prove the position and circumstances challenging the election or not. Side by side it should also be seen whether the contents of the recriminatory petition could be established.

24. First of all, let me take the case in respect of Booth No. 264. On the face of it, it is clear that there is some discrepancy in respect of filling up of the Forms 16(1) and 16(2). It also remains the admitted position that 50 ballots were found short at the time of counting of ballots of Booth No. 264 if the contents of Form No. 16(1) are true. According to the election petitioner, although, there is no specific averments in the election petition but it has been stated during the course of evidence that 50 ballots were left out for counting by the counting personnel, although, all the ballots which were polled had been found in the box itself. But the objections raised before the Returning Officer and the Election Commission of India by the election agent of the election petitioner shows that at the time of counting 50 ballots were found missing meaning thereby that when the boxes were being opened then 50 ballots were not there. There is also some discrepancy of the oral evidence of different witnesses of the election petitioner on this point. Some said that when the box was opened then all the votes polled as per form No. 16(1) were found in tact and only after words at the second stage of the counting when ballots were bundled of 25 each then packet of 50 ballots were kept outside the scope of counting and those ballots were in favour of the election petitioner. When there is discrepancy in the evidence and the objection raised then on scrutiny of the oral evidence, contents of the election petition, objection raised before the Returning Officer and the Election-Commission of India, it could be found that the fact was that when the ballot box of Booth No. 264 was opened it was found that 50 ballots were found short as per the statement made in Form No. 16(1). When objections were raised the matter was enquired into by the Returning Officer and on the objection petition itself it has been mentioned by the Returning Officer that when the ballot box was opened in Table No. 2 of Booth No. 264 the ballot box was found properly sealed. Paper seal was also in tact and the signatures of Presiding Officer was

also found in tact. In that way whatever ballots have been polled in the ballot box were found in tact, when the same was being opened at the counting Table. It was also mentioned that in the diary of the Presiding Officer of that polling Booth there was no point mentioned in this regard and when the seal was in tact then there might be an error in filling up Form No. 16(1). Whatever votes had been polled those have come in tact before the counting table and those were being counted and as such, when everything was found alright except some discrepancy or error in filling up Form 16(1), the Returning Officer has rejected the objection. When such objection was turned down by the Returning Officer then the petitioner had mentioned so before the Election Commission of India and in reply to it nothing has been stated by the Election Commission in respect of such objection with regard to Booth No. 264, although, he had given some direction in respect of the allegation made regarding Booth No. 49. The Returning Officer's rejection of the objection is there is writing in Ext. 4 itself. I do not find that the Returning Officer had committed any mistake in that way. The only conclusion from the materials on record it can be said that there was definitely some error in filling up Form No. 16(1) at the booth itself and whether the filling up of Form No. 16(1) regarding number of votes polled out and veracity thereof could only be explained by the Presiding Officer of that booth by tallying with other documents but P.O. has not been examined by the petitioner. Nowhere it could be found that the election petitioner had given any positive evidence to the effect that the so-called missing 50 votes were in favour of the election petitioner. In that way, regarding the allegation being made on miscounting in respect of Booth No. 264, I do not find that any case could be made out from the side of the election petitioner in respect of miscounting of ballots of that booth or that 50 missing (?) ballot papers were in favour of the election petitioner.

25. Regarding Booth No. 49, I find that not 93 ballots as has been pleaded in the election petition rather only 90 ballots polled in favour of the petitioner had been rejected by the Returning Officer not only on the objection being raised from the side of the election petitioner and his election agent but also after review as per direction given by the Election Commission of India. Admittedly, those ballot papers did not bear the mark of the instrument supplied for the purpose. Rule 56(2)(b) of the Conduct of Election Rules provides, if it bears no mark at all or, to indicate the vote, if bears a mark elsewhere than on or near the symbol of one of the candidates on the face of the ballot paper, or it bears a mark made otherwise than with the instrument supplied for the purpose then the Returning Officer shall reject such ballot paper. So, mandatory direction is there on the Returning Officer to reject a ballot which does not bear the requisite mark of instrument supplied for the purpose.

26. It has been pleaded for and on behalf of the election petitioner that for the mistake committed on the part of the Presiding Officer or polling officials proper seal was not supplied and, as such, marking was made by a wrong seal. But those ballots clearly show the intention of the voters and when such intention

was clear, then such ballots ought not to have been rejected.

27. On the other hand, it has been stated from the side of the respondent that such plea of supply of wrong seal by the third Polling Officer is only an after thought as the same does not find place in the pleadings of the election petitioner. It is true that the admitted fact remains that by a wrong seal the voters have marked against the symbol of the petitioner showing thereby that the votes were polled in favour of the petitioner. But definitely wrong marking is there in the ballots and it goes the sole jurisdiction with mandatory right to the Returning Officer to reject such votes unless it could be proved that wrong seal was supplied by the Presiding Officer or his polling officials. Neither in the election petition nor in the objection raised it has been specifically mentioned that wrong seal was supplied by the third Polling Officer whose duty was to supply the seal to the voters. But the third Polling Officer for the first time comes before this Court to depose that the Presiding Officer had supplied the wrong seal to him and as such, he had given so to the voters and, thus, anomaly has crept in. But the duty of the third Polling Officer remains that seal being supplied by the Presiding Officer, he is required to check up the same by putting the seal on the blank paper and then on being satisfied supply it to the voters. In the evidence of third Polling Officer, namely, P.W. 5 Awadhesh Kumar, he has never stated that he has done his duty by checking the same which was supplied to him by the Presiding Officer before making over the seal to the voters. Moreover, the evidence of this witness P.W. 5 being star witness for and on behalf of the election petitioner has not been supported by anybody else. The petitioner could have summoned the Presiding Officer to prove that fact. The Presiding Officer's diary is totally silent on this point. Nowhere it appears that regarding supply of wrong seal P.W. 5 had given anything in writing, rather he has admitted that he did not disclose this fact to anybody and for the first time in the Court he was disclosing so. If such anomaly was there then the same ought to have been mentioned in the diary of the Presiding Officer. But, admittedly the diary of the presiding officer is silent on this point. Until and unless it is being proved that wrong seal was being supplied by the Polling Officials then rejection of those ballots by the Returning Officer cannot be said to be illegal. Rather he has rightly performed his duty as enshrined under Rule 56(2)(b) of the Conduct of Election Rules.

28. Let me now consider the legal aspect of the matter. It has been strenuously argued by Sri S.N.P. Sharma, learned Senior Counsel for the petitioner that the contents made in Form 16(1) shall be construed to have been done properly and correctly as the same was done by the polling officials at Booth No. 264 in course of discharge of their official duties and there is no scope to deviate from the same.

29. On the other hand, it has been submitted by learned Senior Counsel for and on behalf of the contesting respondent that if such legal presumption is to be taken, then the same can be taken in respect of Form No. 16(2) also. The same

has also been done by the counting officer and the Returning Officer in discharge of their official duties. It should be mentioned here that the prescribed forms are being filled up by the officials. There might have been presumption that those were correctly being done but on the face of it when discrepancy could be found on the number of ballots on opening of the box then presumption also comes regarding the total number of votes might not have been correctly written. Human error cannot be ruled out. So, on this score, no case could be made out. Moreover, when objection had been raised by the election agent/counting agents of the petitioner at the counting hall itself then it was verified in presence of them that seal of the box was in tact, when the box opened in the table meaning thereby, whatever, votes have been polled in the polling booth came in tact before the counting table and on that ground the Returning Officer had rejected the objection. The judgment of the Returning Officer cannot be said to be wrong on the face of it. The election petitioner could have produced the polling officials to prove the veracity of the filling up of the portion of Form No. 16(1) by tallying with other documents available for the purpose. But the same has not been done. In that way, legally also it cannot be said that the objection raised from the side of the election petitioner in respect of 50 ballots is sustainable. Moreover, when there is no convincing evidence that those 50 ballots have been polled in favour of the petitioner in that booth and when there was no existence of such ballots in the ballot box when the same came to the counting table, there is no scope to hold that the petitioner could be able to prove prima facie case for the purpose of inspection of ballots of Booth No. 264.

30. In an election in the democratic set up secrecy of the ballots is of paramount importance. Just on filmsy ground the same nation of secrecy cannot be broken. Moreover, the materials produced before the Court must be of such nature that the same could appeal to the judicial conscience of the Tribunal or the Court to grant permission for inspection of ballots giving go-bye to the paramount importance of secrecy of the ballots.

31. In respect of 90 ballots with regard to Booth No. 49, it has come in evidence that those were polled in favour of the petitioner as the marking was there against his symbol. But the marking stamp was totally different than that which was supplied for the purpose. I have already held that the Returning Officer had found that there is nothing in the Presiding Officer's diary regarding supply of wrong seal by him to third polling Officer which caused such marking by a wrong seal. It is also found that except third Polling Officer none has come to depose on this line and the third Polling Officer for the first time said so in the Court. Definitely, such an important matter cannot be relied on the sole testimony of a person unless supported either by oral evidence or by any other documents. The oral evidence of third polling officer is completely belied as the Presiding Officer's diary is totally silent on this point. If it is presumed that the Presiding Officer had inadvertently did not mention the fact in his diary then he could have been brought in the dock in support of the evidence of the third polling officer. But the same has not been done. When objections were raised then a direction had been

given by the Election Commission of India to the Returning Officer that the matter could be reviewed by him and guideline had been given to that effect that if wrong seal had been supplied and with that seal electors had put their marks in favour of the petitioner, then those could be construed to be the votes polled in favour of the candidate (the petitioner). This was done rightly as there was an observation by the Apex Court in a judgment that only for a wrong seal the ballots ought or should not be rejected under Rule 55(2)(b) of the Conduct of Election Rules because this will give disrespect to the electors' opinion if it is found that a wrong seal was supplied by the Polling Officials. But there I have already said that except the third polling officer nobody has adduced evidence in support of the election petitioner on this important factum. On getting instructions from the Election Commission of India the Returning Officer had considered the matter again and put reliance on the Presiding Officer's diary and finding no materials till then that wrong seal was supplied by the Presiding Officer to the electors, then he rightly rejected the objections by applying his mandatory right under the provisions of Rule 56(2) of the Conduct of Election Rules.

32. The matter can also be construed in another angle. There is allegation from the side of the contesting respondents that the election petitioner with his musclemen had captured the booth and in that process wrong sealing might have been done because, although, factum of booth capturing could not be proved, but still then the matter could be considered in that context also as the burden becomes more on the election petitioner to prove the allegation on the face of such counter allegation. But except the third polling officer none has come to support so and that third Polling Officer has disclosed that fact only for the first time before this Court.

33. It has been strenuously argued that for the purpose of inspection of documents as contemplated under Order XI, Rule 15 read with Section 93 of the Act the burden of the election petitioner is to prove prima facie the case and not to prove it to the hilt and if a prima facie case could be proved then Tribunal or the Court should not hesitate to pass an order for inspection of the documents. In this respect reliance has been put on a decision *Martin Burn Ltd. Vs. R.N. Banerjee*, Although, that case relates to Industrial Dispute Act but the nature of enquiry for the purpose of prima facie case seems to be the same. Here in the present case from the evidence adduced and the materials collected it could not be said that a prima facie case has been established from the side of the petitioner for passing an order for inspection of ballots giving go-bye to its secrecy. Regarding inspection of ballot papers reliance has been placed on a decision reported in AIR 1972 SC 125 *Shashi Bhusan v. Balraj Madhok*. There also it has been held that, although, the secrecy of the ballot paper is to be maintained. But paramount importance is of doing justice and if it is found prima facie that there is some discrepancy, then the Court should not hesitate to pass an order for inspection of ballots. But I have already held that prima facie also it could not be established from the side of the election petitioner. In that way,

there is no scope to pass any order for inspection of ballots as prayed for by the election petitioner in respect of Booth Nos. 264 & 49.

34. Regarding the recriminatory petition and the allegation made thereof regarding the booth capturing by the election petitioner, although, oral evidence had been adduced by both the sides but it could not be proved to the satisfaction of this Court that there was actually a booth capturing, such sort of booth capturing had never been raised by respondent at any point of time. If such objection could have been raised then the Election Commission of India could have considered the same because in this constituency itself there was order of repelling in respect of several booths. So it appears that only to safeguard the result in favour of the respondent No. 1 on the allegation being made for recounting by the other side/such plea for plea's sake has been taken by the respondent No. 11 do not find any substance in such prayer made in the recriminatory petition.

ORDER

35. In view of the above discussion and finding thereof it is held that no case could be made out by the election petitioner either for the purpose of recounting nor a case of inspection of ballots papers of both the two booths on which allegations of miscounting have been raised. There is also no force in the prayer made in the recriminatory petition by the contesting respondent regarding booth capturing of Booth No. 49 and its analogous Booths. This election petition is dismissed with cost of Rs. 1000/-.