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December, 19

JABAR SINGH

v.

GENDA LAL

(P. B. GAJENDRAGADKAR, A. K. SARKAR, K. N. WANCHOO, K. C. DAS GUPTA AND N. RAJAGOPALA AYYANGAR JJ.)

Representation of the People Act (43 *of* 1951), *ss.* 97, 100(1)(*d*) *and* 101(*a*) *and Conduct of Election Rules,* 1961 *r.* 57(1)—*scope of.*

The appellant was declared elected having defeated the respondent by 2 votes. Thereafter, the respondent filed an election petition. The respondent challenged the validity of the appellant's election on the ground of improper reception of votes in favour of the appellant and improper rejection of votes in regard to himself. His prayer was that the appellant's election should be declared void and a declaration should be made that the respondent was duly elected.

The appellant urged before the Tribunal that there had been improper rejection of his votes and improper acceptance of the votes of the respondent, and his case was that if recounting and re-scrutiny was made, it would be found that he had secured a majority of votes. The respondent objected to this course; his case was that since the appellant had not recriminated nor furnished security under s. 97 of the Act, it was not open to him to make this plea. The Tribunal rejected the objection of the respondent and accepted the plea of the appellant. The Tribunal re-examined the ballot papers of the respondent as well as the appellant and came to the conclusion that 22 ballot papers cast in favour of the respondent had been wrongly accepted. The result was that the respondent had not secured a majority of votes. The Tribunal declared that the election of the appellant was void and refused to grant a declaration to the respondent that he had been duly elected. Both the appellant and the respondent preferred appeals before the High Court against the decision of the Tribunal. The High Court dismissed both the appeals and the decision of Tribunal was confirmed. Hence the appeal.

Held: (i) The scope of the enquiry in a case falling under s. 100 (1)(d) (iii) is to determine whether any votes have been improperly cast in favour of the returned candidate or any votes have been improperly refused or rejected in regard to any other candidate. These are the only two matters which would be relevant in deciding whether the election of the returned candidate has been materially affected or not. At this enquiry the onus is on the petitioner to prove his allegation. Therefore, in the case of a petition where the only claim made is that the election of the returned candidate is void, the scope of the enquiry is clearly limited by the requirement of s. 100 (1)(d) itself. In fact, s. 97(1) has no application to the case falling under s. 100(1)(d) (iii); the scope of the enquiry is limited for the simple reason that what the clause requires to be considered is whether the election of the returned candidate has been materially affected and nothing else.

(ii) There are cases in which the election petition makes a double claim; it claims that the election of a returned candidate is void and also asks for a declaration that the petitioner himself or some other person has been duly elected. It is in regard to such a composite case that s. 100 as well as s. 100(1) would apply, and it is in respect of the additional claim for a declaration that some other candidate has been duly elected that s. 97 comes into play. Section 97(1) thus allows the returned candidate to recriminate and raise pleas in support of his case. The result of s. 97(1) therefore, is that in dealing with a composite election petition the Tribunal enquires into not only the case made out by the petitioner, but also the counter-claim made by the returned candidate. In this connection the returned candidate is required to comply with the provisions of s. 97(1) and s. 97(2) of the Act. If the returned candidate does not recriminate as required by s. 97, then he cannot make any attack against the alternative claim made by the petitioner. In other words the returned candidate will not be allowed to lead any evidence because he is precluded from raising any pleas against the validity of the claim of the alternative candidate.

(iii) The pleas of the returned candidate under s. 97 of the Act, have to be tried after a declaration has been made under s. 100 of the Act. The first part of the enquiry in regard to the validity of the election of the returned candidate must be tried within the narrow limits prescribed by s. 100(1)(d) (iii) and the latter part of the enquiry which is governed by s. 101(a) will have to be tried on a broader basis permitting the returned candidate to lead evidence in support of the pleas which he may have taken by way of recrimination under s. 97(1). But even in cases to which s. 97 applies, the enquiry necessary while dealing with the dispute under s. 101(a) will not be wider if the returned candidate has failed to recriminate, and in a case of this type the duty of the Election Tribunal will not be to count and scrutinise all the votes cast at the election. As a result of r. 57, the Election Tribunal will have to assume that every ballot paper which had not been rejected under r. 56 constituted one valid vote and it is on that basis the finding will have to be made under s. 101(a). Therefore, it is clear that in holding an enquiry either under s. 100(1)(d) (iii) or under s. 101 where s. 97 has not been complied with it is not competent to the Tribunal to order a general recount of the votes preceded by a scrutiny about their validity.

Inayatullah Khan v. *Diwanchand Mahajan*, 15 E.L.R. 219 and *Lakshmi Shankar Yadav* v. *Kunwar Sripal Singh*, 22 E.L.R. 47 overruled.

Bhim Sen v. *Gopali and Ors*. 22 E.L.R. 288, relied on.

Vashist Narain Sharma v. *Dev Chandra*, [1955] 1 S.C.R. 509, *Hari Vishnu Kamath* v. *Syed Ahmed Ishaque*, [1955] 1 S.C.R. 1104 and

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Keshav Laxman Borkar v. *Dr. Devrao Laxman Anande,* [1960] 1 S.C.R. 902, discussed.

Per Ayyangar J.—(i) Section 100 of the Act casts on the election petitioner the onus of establishing to the satisfaction of the Tribunal that "the result of the election was materially affected by the improper reception or rejection of particular votes", but from this it does not follow that the returned candidate is powerless to establish to the satisfaction of the Tribunal that notwithstanding the improper reception or rejection of the particular votes alleged by the petitioner his election has not been materially affected. If the key words of the provision on the fulfilment of which alone the Tribunal is invested with jurisdiction to set aside an election are taken to be the words "the result of the election *has been materially affected*"; it is not beyond the power of the returned candidate to establish this fact which he might do in any manner he likes. The returned candidate might do this by establishing that though a few votes were wrongly counted as in his favour, still a large number of his own votes were counted in favour of the petitioner or that votes which ought to have been counted as cast for him, have been improperly counted as cast in favour of defeated candidates other than the petitioner. Without such a scrutiny it would manifestly not be possible to determine whether the election of the returned candidate has been materially affected or not. There is nothing in cl. (iii) which precludes the returned candidates from establishing this. As this clause does not speak of the person in whose favour or as against whom the improper reception or rejection has taken place, its content and significance have to be ascertained from the purpose of which the provision is intended *viz.*, to determine from a counting of the voting papers after a scrutiny whether the election of the returned candidate has been materially affected. The expression "any vote" in this clause has to be read as meaning "any vote cast in the election with which this petition is concerned" and not "any vote cast in the favour of the returned candidate".

(ii) Section 101(a) provides that there cannot be a declaration in favour of the claimant to a seat merely because the election of the returned candidate has been declared void but he must in addition have secured the majority of the lawful votes cast. It is obvious that for this purpose the Tribunal ought to scrutinise not merely the ballot papers of the claimant and the returned candidate but also of the other candidates. When the Tribunal has reached the conclusion after scrutiny of votes that the claimant has, in fact, received the majority of valid votes, the Tribunal embarks on the further enquiry as to whether there are any reasons why he should not be declared elected. And it is at this stage that the provisions of s. 97 in regard to recrimination came into play. If no recrimination is filed then on the terms of s. 101(a) the claimant would be immediately declared elected but if there is recrimination the provision of s. 101(b) is attracted. This construction would harmonise the provision of ss. 97, 100(1)(d) and 101 and would lead to a rational result.

(iii) Rule 57(1) means that so far as the returning officer is concerned and for the purpose of enabling him to declare the result the ballot papers which are not rejected are to be deemed as valid. It is manifest that if that validity held good even at the stage of the election petition and for the conduct of the enquiry before the Tribunal that could really be no scrutiny of the ballot papers and s. 100(1)(d) (iii) would become meaningless. The validity of the Ballot Paper can be challenged in Election Petition by making proper pleadings and the Tribunal can declare any ballot paper as improperly received. Rule 57 does not bear upon the construction of s. 100(1)(d) (iii) or of s. 101(a).

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1042 of 1963.

Appeal by special leave from the judgment and order dated May 3, 1963, of the Madhya Pradesh High Court in First Appeal No. 46 of 1962.

S. K. Kapur, B. L. Khanna and *B. N. Kirpal,* for the appellant.

Homi Daji, R. K. Garg, S. C. Agarwal, M. K. Ramamurthi and *D. P. Singh,* for the respondent.

December 20, 1963. The Judgment of P. B. Gajendragadkar, A. K. Sarkar, K. N. Wanchoo and K. C. Das Gupta, JJ. was delivered by Gajendragadkar J. N. Rajagopala Ayyangar J. delivered a separate opinion.

Gajendragadkar J.

GAJENDRAGADKAR J.—The question of law which this appeal has raised for our decision is in relation to the nature and scope of the enquiry contemplated by sections 97, 100 and 101 of the Representation of People Act, 1951 (No. 43 of 1951) (hereinafter called the Act). The appellant Jabar Singh and the respondent Genda Lal, besides five others, had contested the election to the Madhya Pradesh Assembly on behalf of the Morena Constituency No. 5. This election took place on the 21st February, 1962. In due course, the scrutiny of recorded votes took place and counting followed on the 27th February, 1962. As a result of the counting, the appellant was shown to have secured 5,671 votes, whereas the respondent 5,703 votes. It is not necessary to refer to the votes secured by the other candidates. After the result of the counting was thus ascertained, the appellant applied for recounting of the votes and thereupon, recounting followed as a result of which the appellant was declared elected having defeated the respondent by 2 votes. The recounting showed that the appellant secured 5,656 votes and the respondent 5,654. Thereafter, the respondent filed an election petition from which the present appeal arises. By his petition the respondent challenged the validity of the appellant's election on the ground of improper reception of votes in favour of the appellant and improper rejection of votes in regard to himself. The respondent urged before the Tribunal either for the restoration of the results in accordance with the calculations initially made before recounting, or a re-scrutiny of the votes by the Tribunal and declaration of the result according to the calculations which the Tribunal may make. His prayer was that the appellant's election should be declared to be void and a declaration should be made that the respondent was duly elected.

The Election Tribunal found that 10 ballot papers in favour of the respondent had been improperly rejected and 4 had been improperly accepted in favour of the appellant. That led to a difference of 12 votes and the position of the votes was found to be the respondent 5,664 and the appellant 5,652 votes.

At this stage, the appellant urged before the Tribunal that there had been improper rejection of his votes and improper acceptance of the votes of the respondent, and his case was that if recounting and re-scrutiny was made, it would be found that he had secured a majority of votes. The respondent objected to this course; his case was that since the appellant had not recriminated under s. 97 of the Act, it was not open to him to make the plea that a recounting and re-scrutiny should be made on the ground that improper votes had been accepted in favour of the respondent and valid votes had been improperly rejected when they were cast in favour of the appellant. The respondent's contention was that in order to justify the claim made by the appellant it was necessary that he should have complied with the provisions of the proviso to s. 97(1) of the Act and should have furnished security as required by it. The failure of the appellant in that behalf precluded him from raising such a contention.

The Tribunal rejected the respondent's contention and held that in order to consider the relief which the respondent had cliamed in his election petition, it was necessary for it to decide whether the respondent had in fact received a majority of votes under s. 101 of the Act, and so. he re-examined the ballot papers of the respondent as well as the appellant and came to the conclusion that 22 ballot papers cast in favour of the respondent had been wrongly accepted. The result was that the respondent had, in fact, not secured a majority of votes. As a consequence of these findings, the Tribunal declared that the election of the appellant was void and refused to grant a declaration to the respondent that he had been duly elected.

This decision led to two cross-appeals before the High Court of Madhya Pradesh, No. 46 of 1952 and No. 1 of 1963 respectively. The appellant challenged the conclusion of the Tribunal that his election was void, whereas the respondent disputed the correctness of the decision of the Tribunal that no declaration could be granted in his favour that he had been duly elected. In these appeals, the main question which was agitated before the High Court was about the nature and scope of the enquiry permissible under sections 100 and 101 of the Act. In dealing with this question, the High Court based itself upon its own earlier decision in *Inayatullah Khan* v. *Diwanchand Mahajan and Ors.*(1)., as well as the decision of this Court in *Bhim Sen* v. *Gopali and Ors.*(2) and held that the grievance made by both the parties in their respective appeals was not well-founded and that the decision of the Tribunal was right. In the result, both the appeals were dismissed and the decision of the Tribunal was confirmed. Against this decision, the appellant has come to this Court by special leave. Later on, the respondent filed an application for leave to appeal to this Court, but the said application was filed beyond time. When the said application came on for hearing before this Court, the delay made by the respondent in preferring his application for special leave was not condoned, and so, the decision of the High Court against the respondent has become final and is no

(1) 15 E.L.R. 219. (2) 22 E.L.R. 288.

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longer open to challenge in this Court. When the application for leave filed by the appellant was argued and admitted by this Court, it was urged by Mr. Kapoor on his behalf that the observations made by this Court in the case of *Bhim Sen*(1) on which the High Court substantially relied required reconsideration. That is why the appeal has been placed before a Bench of five Judges for final hearing.

In dealing with the question raised by Mr. Kapoor before us, it is necessary to refer to the provisions of the Act in regard to the presentation of election petitions and the prayers that the petitioners can make therein. Section 81 provides that an election petition calling in question any election on one or more of the grounds specified in sub-section (1) of s. 100 and s. 101 may be presented to the Election Commission by any candidate or any elector within the time specified by the said section. It is thus clear that when a person presents an election petition, it is open to him to challenge the election of the returned candidate under s. 100 (1) and claim a declaration that the returned candidate's election is void. He can also claim a further declaration that he himself or any other candidate has been duly elected. In other words, if the election petition contents itself with claiming a simple declaration that the election of the returned candidate should be declared to be void, the petition falls under s. 100 and the Election Tribunal can either grant the said declaration in which case the petition is allowed, or refuse to grant it in which case the petition is dismissed. It is also possible that the election petition may claim two reliefs, one under s. 100 (1), and the other under s. 101. In this category of cases, the Tribunal first decides the question as to whether the election of the returned candidate is valid or not, and if it is found that the said election is void, it makes a declaration to that effect and then deals with the further question whether the petitioner himself or some other person can be said to have been duly elected. The scope of the enquiry which the Tribunal has to hold in such cases would obviously depend upon the nature of the reliefs claimed by the petition.

There is another fact which it is necessary to bear in mind in dealing with the controversv before us in the present ap-

(1) 22 E.L.R. 288.

peal. When elections are held, the declarations of the results are governed by the statutory rules framed under the Act. The counting of votes is dealt with in the relevant rules under Part V. Rule 55 deals with the scrutiny and opening of ballot boxes. Rule 56(1) requires that the ballot papers taken out of each ballot box shall be arranged in convenient bundles and scrutinised. R. 56(2) provides when the returning officer has to reject a ballot paper; the grounds for rejection are specified in clauses (a) to (h). Rules 56(3), (4) and (5) prescribe the procedure for rejecting ballot papers. When the ballot papers have been taken out of the ballot boxes and have been scrutinised, counting follows and that is dealt with by r. 57 and the following Rules. R. 63 provides for recounting of votes; R. 63(1) lays down that after the counting has been completed, the returning officer shall record in the result sheet in Form 20 the total number of votes polled by each candidate and announce the same. R. 63(2) permits an application to be made for a recounting and if that application is allowed, a recounting follows. If a recounting is made, then the result is declared once again on the sheet in Form 20. In pursuance of the result of counting thus announced, the result of the election is declared under r. 64 and a certificate of election is granted to the returned candidate. It is significant that r. 57(1) provides that every ballot paper which is not rejected under r. 56 shall be counted as one valid vote, which means that after the ballot papers have been scrutinised and invalid papers are rejected under r. 56(2), all voting papers which have been taken into the counting by the returning officer shall be deemed to be valid under r. 57(1). Similarly, when the scrutiny of the nomination papers is made by the returning officer under s. 36 of the Act and as a result, certain nomination papers are accepted, s. 36(8) provides that the said acceptance shall be presumed to be valid. In other words, when an election petition is filed before an Election Tribunal challenging the validity of the election of the returned candidate, *prima facie* the acceptance of nomination papers is presumed to be valid and the voting papers which have been counted are also presumed to be valid. The election petition may challenge the validity of the votes counted, or the validity of the acceptance or rejection of a nomination

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paper; that is a matter of proof. But the enquiry would commence in every case with *prima facie* presumption in favour of the validity of the acceptance or rejection of nomination paper and of the validity of the voting papers which have been counted. It is necessary to bear in mind this aspect of the matter in dealing with the question about the scope and nature of the enquiry under sections 100 and 101 of the Act.

Let us now read the three relevant sections with which we are concerned in the present appeal. Section 97 provides :

"(1) When in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election.

Provided that the returned candidate or such other party as aforesaid shall not be entitled to give such evidence unless he has, within fourteen days from the date of commencement of the trial, given notice to the Tribunal of his intention to do so and has also given the security and the further security referred to in sections 117 and 118 respectively.

(2) Every notice referred to in sub-section (1) shall be accompanied by the statement and particulars required by section 83 in the case of an election petition and shall be signed and verified in like manner".

Section 100, sub-section (1) reads as under:—

(1) Subject to the provisions of sub-section (2) if the Tribunal is of opinion—

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act; or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(i) by the improper acceptance of any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void; or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

the Tribunal shall declare the election of the returned candidate to be void".

Section 101 provides that:

"If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the Tribunal is of opinion—

(a) that in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes,

the Tribunal shall after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected".

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Mr. Kapoor contends that in dealing with the cases falling under s. 100(1)(d)(iii), section 97 can have no application and so, the enquiry contemplated in regard to cases falling under that class is not restricted by the prohibition prescribed by s. 97(1). He suggests that when the Tribunal decides whether or not the election of the returned candidate has been materially affected by the improper reception, refusal or rejection of any vote, or the reception of any vote which is void, it has to examine the validity of all votes which have been counted in declaring the returned candidate to be elected, and so, no limitation can be imposed upon the right of the appellant to require the Tribunal to consider his contention that some votes which were rejected though cast in his favour had been improperly rejected and some votes which were accepted in favour of the respondent had been improperly accepted. Basing himself on this position, Mr. Kapoor further contends that when s. 101 requires that the Tribunal has to come to the conclusion that in fact the petitioner or such other candidate received a majority of the valid votes, that can be done only when a recount is made after eliminating invalid votes, and so, no limitations can be placed upon the scope of the enquiry contemplated by s. 101(a). Since s. 100(1)(d)(iii) is outside the purview of s. 97, it would make no difference to the scope of the enquiry even if the appellant has not recriminated as required by s. 97(1).

On the other hand, Mr. Garg who has addressed to us a very able argument on behalf of the respondent, urged that the approach adopted by the appellant in dealing with the problem posed for our decision in the present appeal is inappropriate. He contends that in construing sections 97, 100 and 101, we must bear in mind one important fact that the returned candidate whose election is challenged can face the challenge under s. 100 only by making pleas which can be described as pleas affording him a shield of defence, whereas if the election petition besides challenging the validity of the returned candidate claims that some other person has been duly elected, the returned candidate is given an opportunity to recriminate and by way of recrimination he can adopt pleas which can be described as weapons of attack against the validity of the election of the other person.

His argument is that though s. 100(1)(d)(iii) is outside s. 97, it does not mean that in dealing with a claim made by an election petition challenging the validity of his election, a returned candidate can both defend the validity of his election and assail the validity of the votes cast in favour of the petitioner or some other person. It is in the light of these two rival contentions that we must now proceed to decide what the true legal position in the matter is.

It would be convenient if we take a simple case of an election petition where the petitioner makes only one claim and that is that the election of the returned candidate is void. This claim can be made under s. 100. Section 100(1) (a), (b) and (c) refer to three distinct grounds on which the election of the returned candidate can be challenged. We are not concerned with any of these grounds. In dealing with the challenge to the validity of the election of the returned candidate under s. 100(1)(d), it would be noticed that what the election petition has to prove is not only the existence of one or the other of the grounds specified in clauses (i) to (iv) of s. 100(1)(d), but it has also to establish that as a result of the existence of the said ground, the result of the election in so far as it concerns a returned candidate has been materially affected. It is thus obvious that what the Tribunal has to find is whether or not the election in so far as it concerns the returned candidate has been materially affected, and that means that the only point which the Tribunal has to decide is: has the election of the returned candidate been materially affected? And no other enquiry is legitimate or permissible in such a case. This requirement of s. 100(1)(d) necessarily imports limitations on the scope of the enquiry. Confining ourselves to clause (iii) of s. 100(1)(d), what the Tribunal has to consider is whether there has been an improper reception of votes in favour of the returned candidate. It may also enquire whether there has been a refusal or rejection of any vote in regard to any other candidate or whether there has been a reception of any vote which is void and this can only be the reception of a void vote in favour of the returned candidate. In other words, the scope of the enquiry in a case falling under s. 100(1)(d)(iii) is to determine whether any votes have been improperly cast in favour of the returned candidate, or any votes have been improperly refused or rejected in regard to any other candidate. These are the only two matters which would be relevant in deciding whether the election of the returned candidate has been materially affected or not. At this enquiry, the onus is on the petitioner to show that by reason of the infirmities specified in s. 100(1)(d)(iii), the result of the returned candidate's election has been materially affected, and that, incidentally, helps to determine the scope of the enquiry. Therefore, it seems to us that in the case of a petition where the only claim made is that the election of the returned candidate is void, the scope of the enquiry is clearly limited by the requirement of s. 100(1)(d) itself. The enquiry is limited not because the returned candidate has not recriminated under s. 97(1); in fact, s. 97(1) has no application to the case falling under s. 100(1)(d)(iii); the scope of the enquiry is limited for the simple reason that what the clause requires to be considered is whether the election of the returned candidate has been materially affected and nothing else. If the result of the enquiry is in favour of the petitioner who challenges the election of the returned candidate, the Tribunal has to make a declaration to that effect, and that declaration brings to an end the proceedings in the election petition.

There are, however, cases in which the election petition makes a double claim; it claims that the election of the returned candidate is void, and also asks for a declaration that the petitioner himself or some other person has been duly elected. It is in regard to such a composite case that s. 100 as well as s. 101 would apply, and it is in respect of the additional claim for a declaration that some other candidate has been duly elected that s. 97 comes into play. Section 97(1) thus allows the returned candidate to recriminate and raise pleas in support of his case that the other person in whose favour a declaration is claimed by the petition cannot be said to be validly elected, and these would be pleas of attack and it would be open to the returned candidate to take these pleas, because when he recriminates, he really becomes a counter-petitioner challenging the validity of the election of the alternative candidate. The result of s. 97(1) therefore, is that in dealing with a composite election petition, the Tribunal enquires into not only the case made out by the petitioner, but also the counter-claim made by the returned candidate. That being the nature of the proceedings contemplated by s. 97(1), it is not surprising that the returned candidate is required to make his recrimination and serve notice in that behalf in the manner and within the time specified by s. 97(1) proviso and s. 97(2). If the returned candidate does not recriminate as required by s. 97, then he cannot make any attack against the alternative claim made by the petition. In such a case, an enquiry would be held under s. 100 so far as the validity of the returned candidate's election is concerned, and if as a result of the said enquiry a declaration is made that the election of the returned candidate is void, then the Tribunal will proceed to deal with alternative claim, but in doing so, the returned candidate will not be allowed to lead any evidence because he is precluded from raising any pleas against the validity of the claim of the alternative candidate.

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It is true that s. 101(a) requires the Tribunal to find that the petitioner or such other candidate for the declaration of whose election a prayer is made in the election petition has in fact received a majority of the valid votes. It is urged by Mr. Kapoor that the Tribunal cannot make a finding that the alternative candidate has in fact received a majority of the valid votes unless all the votes cast at the election are scrutinised and counted. In our opinion, this contention is not well-founded. We have already noticed that as a result of rule 57, the Election Tribunal will have to assume that every ballot paper which had not been rejected under r. 56 constituted one valid vote and it is on that basis that the finding will have to be made under s. 101(a). Section 97(1) undoubtedly gives an opportunity to the returned candidate to dispute the validity of any of the votes cast in favour of the alternative candidate or to plead for the validity of any vote cast in his favour which has been rejected; but if by his failure to make recrimination within time as required by s. 97 the returned candidate is precluded from raising any such plea at the hearing of the election petition, there would be nothing wrong if the Tribunal proceeds to deal with the dispute under s. 101(a) on the basis that the other votes counted by the returning officer were valid votes and that votes in favour of the returned candidate, if any, which were rejected.

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were invalid. What we have said about the presumed validity of the votes in dealing with a petition under s. 101(a) is equally true in dealing with the matter under s. 100(1)(d)(iii). We are, therefore, satisfied that even in cases to which s. 97 applies, the enquiry necessary while dealing with the dispute under s. 101(a) will not be wider if the returned candidate has failed to recriminate.

If the returned candidate has recriminated and has raised pleas in regard to the votes cast in favour of the alternative candidate or his votes wrongly rejected, then those pleas may have to be tried after a declaration has been made under s. 100 and the matter proceeds to be tried under s. 101(a). In other words, the first part of the enquiry in regard to the validity of the election of the returned candidate must be tried within the narrow limits prescribed by s. 100(1)(d)(iii) and the latter part of the enquiry which is governed by s. 101(a) will have to be tried on a broader basis permitting the returned candidate to lead evidence in support of the pleas which he may have taken by way of recrimination under s. 97(1). If Mr. Kapoor's construction of s. 100(1)(d)(iii) is accepted, it would either make s. 97 otiose and ineffective or make the operation of s. 101 read with s. 97 inconsistent with the operation of s. 100(1)(d)(iii). We are therefore satisfied that the High Court was right in coming to the conclusion that the Tribunal was in error in holding that "it was an authority charged with the duty of investigating the validity of votes for and against the petitioning and returned candidate or for a matter of that any other contesting candidate."

It, however, appears that following its own earlier decision in *Inayatullah Khan's*(1) case the High Court was disposed to take the view that the enquiry under s. 101(a) was wider and that in making its finding under the said provision, it was open to the Tribunal to scrutinise the votes and determine whether in fact, the petitioner or some other person had received a majority of the valid votes. As we have already indicated, this would be the position only if the returned candidate had recriminated; in the absence of recrimination, it would not be open to the Election Tribunal

(1) 15 E.L.R. 219.

to allow the returned candidate to challenge the validity of votes cast in favour of the petitioner or any other candidate in whose favour a declaration is claimed by the election petition or to contend that any of his votes were improperly rejected. We ought to add that the view taken by the Madhya Pradesh High Court in the case of *Inayatullah Khan*(1) in regard to the scope of the enquiry under s. 101 (a) does not correctly represent the true legal position in that behalf. Similarly, the view taken by the Allahabad High Court in *Lakshmi Shankar Yadav* v. *Kunwar Sripal Singh and Ors.*(2), cannot be said to interpret correctly the scope of the enquiry either under s. 100 or s. 101. The conclusion which we have reached in the present appeal is substantially in accord with the observations made by this Court in the case of *Bhim Sen*(3) though it appears that the points in question were not elaborately argued before the Court in that case.

There is another point to which reference must be made. Mr. Garg contended that even if the view taken by the Tribunal about the scope of the enquiry under s. 100(1)(d)(iii) and s. 101 was right, the relief granted by it was not justified by the pleadings of the appellant in the present proceedings. In support of this argument, he referred us to paragraph 4 of the Special Pleas filed by the appellant, and relied on the fact that at the initial stage of the hearing, the Tribunal had framed 18 issues including issue No. 16 which consisted of three parts, *viz.*,—

(a) Whether any votes cast in favour of respondent No. 1 were wrongly rejected specially pertaining to polling station mentioned in para 4 of the written statement under heading special pleas?

(b) Whether many votes were wrongly accepted in favour of the petitioner appertaining to the polling stations mentioned in para 4 of the special pleas in written statement?

(c) What is the effect of the above in the case?

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(1) 15 E.L.R. 219. (2) 22 E.L.R. 47.
(3) 2 E.L.R. 288.

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Later on, when the respondent contended that in the absence of any recrimination by the appellant these issues did not arise on the pleadings, they were struck out, and yet in its judgment, the Tribunal has virtually tried these issues and given relief on grounds which were not included even in his written statement. Since this appeal was admitted mainly on the ground that the appellant wanted this Court to reconsider the observations made by it in the case of *Bhim Sen*(1), we do not propose to rest our decision on this subsidiary point raised by Mr. Garg.

It now remains to refer to two decisions which were cited before us during the course of the arguments. In *Vashist Narain Sharma* v. *Dev Chandra and Ors.*(2), this Court has held that s. 100(1)(c), as it then stood, places a burden on the objector to substantiate the objection that the result of the election has been materially affected by the improper acceptance or rejection of the nomination paper. In that connection, this Court observed that where the margin of votes is greater than the votes secured by the candidate whose nomination paper had been improperly accepted, the result is not only materially not affected but not affected at all; but where it is not possible to anticipate the result, the petitioner must discharge the burden of proving that fact and on his failure to do so, the election must be allowed to stand.

In *Hari Vishnu Kamath* v. *Syed Ahmed Ishaque and others*(3), adverting to the expression "the result of the election" in s. 100(1)(c), this Court stated that unless there is something in the context compelling a different interpretation, the said expression must be construed in the same sense as in section 66, and there it clearly means the result on the basis of the valid votes. Basing himself on this observation, Mr. Kapoor has urged that while the Tribunal decides the question as to whether the election of the returned candidate has been materially affected or not, the validity of the votes falls to be considered, and that inevitably enlarges the scope of the enquiry. We do not think that the observation on which Mr. Kapoor relies was intended to lay down any such proposition. All that the reference to s. 66 denotes is that

(1) 22 E.L.R. 288. (2) [1955] I S.C.R. 509.

(3) [1955] I S.C.R. 1104 at p 1131.

after considering the pleas raised, the Tribunal has to decide whether the election of the returned candidate has been materially affected or not, and that only means that if any votes are shown to have been improperly accepted, or any votes are shown to have been improperly refused or rejected, the Tribunal has to make calculations on the basis of its decisions on those points and nothing more. It is necessary to recall that the votes which have not been rejected by the returning officer under r. 56 have to be treated as valid, unless the contrary is specifically pleaded and proved. Therefore, we do not think that Mr. Kapoor is justified in contending that the observations in *Hari Vishnu Kamath's* case support his plea that the enquiry under s. 100(1)(d)(iii) is wide enough to take in the scrutiny of the validity of all voting papers.

In *Keshav Laxman Borkar* v. *Dr. Devrao Laxman Anande*(1) this Court has pointed out that the expression "valid votes" has nowhere been defined in the Act, but in the light of the provision of s. 36(8) of the Act read with rule 58, two things are clear, first that the candidates are validly nominated candidates whose nomination papers are accepted by the returning officer after scrutiny, and second that the provision of s. 58 provides that the ballot papers which are not rejected under r. 57 are deemed to be "valid ballot papers" and are to be counted as such.

It appears that the position under the English Law in regard to the recounting of votes in proceedings under election petitions is substantially similar. As Halsbury points out: "where a petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, either party must, six days before that appointed for the trial, deliver to the master, and also at the address, if any, given by the other side, a list of the votes intended to be objected to and of the heads of the objection to each of those votes(2)". It further appears that no evidence may be given against the validity of any vote or under any head not specified in the list, unless by leave of the Court upon such terms

(1) [1960] I S.C.R. 902.

(2) *Halsbury's Laws of England*, p. 306 paras. 553 & 554.

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as to amendment of the list, postponement of the enquiry, and payment of costs as may be ordered. Where no list of the votes, to which it is intended to take objection, has been delivered within the time specified, the Court has no power to extend the time or to allow evidence of the votes objected to or of the objections thereto to be given at the trial. Therefore, it seems clear that in holding an enquiry either under s. 100(1)(d)(iii) or under s. 101, where s. 97 has not been complied with, it is not competent to the Tribunal to order a general recount of the votes preceded by a scrutiny about their validity.

In the result, the appeal fails and is dismissed. We would like to add that though we have accepted the construction of s. 100(1)(d)(iii) and s. 101 for which Mr. Garg contended, no relief can be granted to the respondent, because his application for special leave to appeal against the decision of the High Court has been dismissed since he was unable to make out a sufficient cause for condoning the delay made by him in preferring the said application. In the circumstances of this case, we direct that the parties should bear their own costs.

We ought to mention that when this appeal was argued before us on the 4th December, 1963, we were told that the fresh election which had been ordered to be held in accordance with the decision of the High Court was fixed for the 6th December, 1963; and so, after the case was argued, we announced our decision and intimated to the learned Advocates that our reasons will follow. The present judgment gives the reasons for our decision.

Ayyangar J.

AYYANGAR J.—While I agree that the appeal deserves to be dismissed for reasons which I shall indicate later, I regret my inability to agree with the construction which my learned brethren have placed on s. 100(1)(d)(iii) of the Representation of the People Act which for shortness I shall call the Act, on which in ultimate analysis the question of law arising in the appeal turns.

The facts of the case which have given rise to the proceeding as well as the points involved in the appeal have all been set out in detail in the judgment of Gajendragadkar J. and I consider it unnecessary to repeat them. I shall accordingly state only those facts which are relevant for the purpose of: (1) the construction of s. 100(1)(d) of the Act, and (2) the conclusion I have reached that the appeal should be dismissed.

The appeal arises out of a contested election to the Morena Constituency of the Madhya Pradesh Legislative Assembly. The polling for the election took place on February 21, 1962 and there were as many as seven candidates who participated in that poll. The appeal is, however, concerned only with two of them—Genda Lal and Jabar Singh—the latter being the returned candidate and is the appellant before us. The voting procedure adopted was that set out in rule 39, Conduct of Election Rules, 1961, which I shall hereafter refer to as the Rules, under which the voter makes a mark on the ballot paper on or near the symbol of the contesting candidate to indicate his choice. On the first count of the ballot papers the Returning Officer computed the valid votes obtained by Genda Lal as 5,703 as against 5,671 which had been counted in favour of Jabar Singh. Jabar Singh, however, immediately applied for a recount under rule 63 of the Rules on the ground that the original scrutiny and counting were defective and this, though opposed, was acceded to by the Returning Officer who carried out a recount. I might mention in passing that the Election Tribunal has found discrepancies even in the total of the number of ballot papers in some of the polling stations, the figures of the total number of valid votes in 6 polling stations being different from those found in the result sheet prepared under rule 57(2) in Form 20. The scrutiny and recount disclosed that Genda Lal was found to have polled 5,654 votes as against 5,656 votes counted as having been obtained by Jabar Singh. As a result of this recount Jabar Singh was declared elected, he having obtained 2 votes more than his rival—Genda Lal.

Genda Lal thereupon filed the election petition which has given rise to this appeal in which he sought to have the election of Jabar Singh declared void and also made a claim to the seat. The election was sought to be set aside on various grounds but we are concerned in this appeal

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solely with one of the them *viz.*, the correctness of the scrutiny and counting of votes at the recount *vis-a-vis* the petitioner and the returned candidate. Shortly stated, the allegation in this respect in the election petition was that 49 valid votes cast in favour of the petitioner (who is the respondent before us) were improperly rejected and that 32 votes were improperly accepted in favour of the returned candidate who is the appellant before us. Needless to add these allegations were denied by the returned candidate. Besides the denial, he also pleaded in his written statement that many votes cast in favour of himself had been wrongly rejected in regard to which details were given and that similarly several votes were wrongly accepted in favour of the election-petitioner and in regard to which also details were given and it ended with the prayer that if a proper scrutiny and recount were made of the valid votes received by each, it would be found that he—the returned candidate—had, in fact, obtained a larger number of votes than the election-petitioner and for this reason he submitted that the election petition ought to be dismissed. Though Genda Lal had by his election petition, besides seeking the relief of having the appellant's election declared void, claimed the seat for himself under s. 84 of the Act, none of the respondents to the petition including the appellant had filed any recrimination in conformity with the provisions of s. 97 of the Act against the grant of such further relief and it is the effect of this failure on the rights of the parties that forms the principal point for consideration in the appeal.

The Election Tribunal who inquired into the petition framed the necessary issues arising out of these pleadings. Issue 6(a) dealt with the allegation in the petition that 49 valid votes cast in favour of Genda Lal had been improperly rejected. After examining the evidence adduced and considering the validity of those votes in regard to which a dispute was raised, the Election Tribunal recorded the finding that not 49 but only 10 votes of Genda Lal had been improperly rejected. In regard to the question of the improper acceptance of 32 votes cast in favour of Jabar Singh which was covered by issue 6(b), the Tribunal found, again after going through the evidence in respect of the particular votes in dispute, that not 32 but only 4 had been improperly accepted. The result of these findings on issues 6(a) and 6(b) was that the total number of valid votes polled by Genda Lal became 5,664 as against 5,652 polled by Jabar Singh. The Tribunal consequently held that the election of Jabar Singh who had obtained a minority of votes compared to Genda Lal must be declared void under s. 100(1)(d)(iii).

So far we are on non-controversial ground except this that on this state of the voting Genda Lal claimed that he was entitled to the further relief that he be declared elected having obtained the majority of lawful votes satisfying the requirement of s. 101(a). The Election Tribunal refused him that relief for reasons which it is unnecessary to set out or discuss and that decision having been affirmed by the High Court in appeal and the special leave prayed for to appeal from that decision of the High Court having been dismissed by us, the possibility of the disallowance of this additional relief does not require to be further noticed.

The question about the scope of s. 100(1)(d)(iii) and its relative place in the scheme of ss. 97, 100 and 101 of the Act arises out of the plea made by Jabar Singh that without reference to the irregularities in the counting of the 49 and the 32 votes alleged by Genda Lal and which he had denied, and which were the subject-matter of issues 6(a) and 6(b) to which I have already adverted, there were other irregularities in the scrutiny and counting which, if examined, would establish that after every error was eliminated, he himself had obtained a majority of lawful votes. The question of law that was debated before us was whether on the scheme of the Representation of the People Act, 1951, Jabar Singh was entitled to make such a plea and claim to adduce proof in support thereof in order to sustain his election without filing a recrimination under s. 97 of the Act. My learned brethren have held that he could not and it is on that point that I do not find it possible to agree with them.

The correct answer to this question would depend, it is common ground, on a proper construction of s. 100(1)(d)(iii) read in conjunction with s. 101(a), and this I shall first consider. I shall next deal with the place and function of s. 97 in this context and its bearing on the interpretation of the provisions on which the decision of this appeal turns.

Though there have been a few decisions bearing upon the question of law I have indicated, and they have all been referred to by Gajendragadkar J. it is common ground that there is no binding decision of this Court touching the matter, though some observations in *Bhim Sen* v. *Gopali and Ors.*(1) would appear to favour the construction which my learned brethren have adopted. As, however, the appeal was placed before this Bench for the consideration of this question and we have proceeded on the basis that the matter is *res integra* I do not propose to refer to any of these decisions but shall proceed merely to interpret the provisions without advertence to the authorities to which our attention was invited during the course of the arguments.

Section 100(1)(d) reads:

"100. *Grounds for declaring election to be void*—(1) Subject to the provisions of sub-section (2) if the Tribunal is of opinion—

. . . .

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(i) by the improper acceptance of any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the Tribunal

(1) 22 E.L.R. 288.

shall declare the election of the returned candidate to be void."

The short question arising for consideration in this appeal may be stated thus: In the context of the provisions contained in s. 100(1)(d) which permits an election of a returned candidate to be set aside only on proof of the "result" *viz.*, the election of the returned candidate having been "materially affected" by the improprieties or illegalities referred to in the four clauses numbered (i) to (iv) what is the import of the words "by the improper reception, refusal or rejection of any vote or the reception of any vote which is void". For our present purposes I might omit the reference to the latter part of this provision relating to "the reception of a vote which is void" and concentrate on the earlier part.

It is manifest that the jurisdiction of the Tribunal to declare an election void arises only when it is of opinion that "the result of the election has been materially affected" by the defects or improprieties set out in cls. (i) to (iv), so that if notwithstanding that impropriety or illegality of the types set out in the four clauses, the result of the election is not materially affected, the returned candidate is entitled to retain his seat. With this preliminary observation I shall proceed to consider the import of the relevant words "materially affected by the improper reception, refusal or rejection of any vote" first in a case where there is no complication arising from the petition claiming the seat in addition to the relief of having the election of the returned candidate declared void. The argument strenuously pressed before us by Mr. Garg—learned counsel for the respondent was, that the Tribunal in considering whether the result of an election had been materially affected, was confined to the consideration of any impropriety alleged as regards the reception of the votes of the returned candidate as well as improprieties alleged by the petitioner in the refusal or rejection of votes stated to have been cast in favour of the petitioner and the denials of these charges or allegations by the returned candidate. His further submission was that the returned candidate could not sustain his seat by showing a similar improper reception of votes in favour of the

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petitioner or an improper refusal or rejection of his own votes. In other words, the argument was that the Tribunal dealing with a petition under s. 100(1)(d) had jurisdiction to proceed only on the allegations made in the petition and that even where a case had been established for a scrutiny, and a recount is ordered, it would be so confined and that its jurisdiction would not extend to cases of complaints by the returned candidate. It is this argument that I feel unable to accept.

When an election petition is filed complaining of the improper reception or rejection of votes and praying for a scrutiny of the ballot papers for the purpose of determining whether the votes have been properly counted by the Returning Officer, the Tribunal would doubtless have to be satisfied that a case is made out for scrutiny and a re-count, for it is settled law that the petitioner is not as a matter of right entitled to have such a scrutiny and recount merely because he prays for such a relief, but has to allege, make out and prove the specific grounds to establish that the scrutiny or counting was improper and that the return was in consequence erroneous. If one reaches that stage and the Tribunal is satisfied that a case for scrutiny and re-count is made out it would mean that the Returning Officer had not discharged his duties properly in the matter of the scrutiny of the ballot papers and their counting. If in such circumstances the respondent (the returned candidate) also makes allegations of the same type regarding the scrutiny and the counting I consider it would be unjust to deprive him of the opportunity of proving his allegations and thus maintain his seat, unless of course, the statutory provision clearly precludes him from doing so. In saying this I am not suggesting that the respondent need make no averment in his pleadings making definite allegations regarding the particular votes regarding which he desires scrutiny and which he says have been wrongly counted either for or against him. Let us take a case where the allegation of the petitioner is that there has been a miscount *i.e.,* a wrong counting of the votes of the returned candidate and nothing more. Let us suppose that A has been declared elected as having secured, say 200 votes as against B who has secured 190. If B in his election petition says that

A's votes have been wrongly counted as 200, whereas, in fact, if they were recounted they would only be 180 and the Tribunal on a recount finds the allegation in the petition made out and that the returned candidate had obtained only 180 votes the acceptance of Mr. Garg's argument would mean that the election of A would have to be set aside notwithstanding that there has been a similar mistake in the counting of B's votes and if these were properly counted they might not amount to more than 170. Mr. Garg submitted that though if B claimed the seat there would have to be a recount of the votes of both the candidates and this also, only in the event of a recrimination being filed under s. 97, still if no seat was claimed the election of the returned candidate would be set aside and that the latter had no means whereby he could maintain his election notwithstanding that as a fact he had obtained a majority of lawful votes.

It is urged that this result flowed from the opening words of s. 100(1)(d) which speaks of "the result of the election" being materially affected "so far as it concerns a returned candidate". I do not find it possible to agree with the construction or reasoning on which the submission is based. There is, no doubt, that an election petition is primarily concerned with the validity of the election of the returned candidate. It cannot also be disputed that the election of the returned candidate cannot be declared void, unless, confining oneself to the impropriety or illegality involved in the reception or refusal of votes, the returned candidate is proved to have obtained a minority of votes, for otherwise whatever be the impropriety or its degree or extensiveness, the result of the election would not be materially affected. It is common ground and beyond controversy that the election petitioner is not restricted as regards the manner or details of the improper reception or refusal of votes which he could allege and prove which would achieve that result. If so much is conceded and is common ground, I do not see any force in the contention that the returned candidate is confined merely to disproving what is alleged to dislodge him from his seat and is forbidden from proving that votes which under the law had to

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be counted in his favour, have been wrongly omitted to be so counted. The words in cl. (iii) do not impose any such restriction, for they speak of the "improper reception or refusal of *any* vote", and as the inquiry under s. 100(1)(d) is for ascertaining whether the result of the election has been materially affected which in the context of cl. (iii) obviously means "the returned candidate has been proved not to have obtained, in fact, a majority of valid votes", there appears to me no scope for the argument pressed before us by Mr. Garg.

On an analysis of the situation the position would appear to be this. Let us for instance assume that the voting procedure adopted in an election was that prescribed in rule 59 *i.e.,* by placing the ballot papers in the ballot boxes set apart for the different contesting candidates. The returning officer counts the valid votes cast in the several boxes and declares A elected as having secured 200 votes as against B whose votes are counted as 198. If B files a petition and alleges that the counting was irregular, that the totals of the ballot papers in the result sheet are not properly computed, and that as a matter of fact A's papers, if counted, would be 196, Mr. Garg's submission is that though the discrepancy disclosed in the totals is considerable, A cannot prove that there has been a miscounting of B's votes also, and that though if properly counted his total is only 190, still A's election should be set aside. It is said that the position would be different and the anomaly would be overcome in cases where the election petitioner, besides claiming a declaration that the election of the returned cadidate is void, also seeks a further declaration that he should be declared duly elected and the returned candidate files a recrimination against such a prayer and challenges the right to have the further declaration. This, however, obviously furnishes no answer for more than one reason. It is the submission of Mr. Garg, and that is the whole basis upon which the construction which he desires us to adopt of s. 100(1)(d)(iii) turns, that the question raised by the recrimination arises only after the election of the returned candidate is declared void. Therefore we would have the anomalous situation wherein the election of the returned candiate is declared void by reason of his not obtaining the majority of valid votes so far as the decision under s. 100(1)(d) is concerned and then after the matter set out in the claim to the seat and the recrimination is inquired into and decided the election tribunal holds that the returned candidate had a majority of lawful votes but that this affected only the right of the defeated candidate to claim the seat. In my judgment the provisions of s. 100 read with s. 101 do not contemplate this position of a candidate's election being set aside because he did not get a majority of lawful votes but in the same proceedings and as part of the same inquiry he being held to have obtained a majority of lawful votes. A construction of s. 100(1)(d) which would lead to this result must, in my opinion, be rejected as unsound.

The apart, there is the further circumstance arising from the fact that according to Mr. Garg the enquiry in respect of a recrimination and its defence is identical with what he says is the scope of a petition and its defence. This, of course, is logical, but it suffers from the same anomaly which I have pointed out as resulting from the acceptance of the primary argument regarding the construction of s. 100(1)(d)(iii). Applying what I have shown already regarding a case where there was no claim to a seat in an election petition in which the election of a returned candidate has to be declared void, notwithstanding that he had, in fact, obtained a majority of valid votes, because he is precluded from proving this fact, similarly in cases where a seat is claimed, the petitioner so claiming would have to be declared elected, notwithstanding that as a fact he has not obtained the majority of lawful votes, but that the returned candidate has obtained such a majority, because the latter is precluded from proving it. If one took a case where there were more candidates than two, the anomaly I have indicated would be seen clearly. If B files a petition against A the returned candidate claiming the seat and impleads as he must C & D who are the other contestants, no proof could be led by A to show that some of his own votes have been counted for C or D, though B would be entitled to prove that some of C's or D's votes have been wrongly counted as cast in favour of A. In such a case

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it is obvious that B gains no advantage by recriminating, because recrimination under s. 97 could only be against A and not against the other contesting candidates impleaded as respondents. The result, therefore, would be that though, in fact, A has obtained the majority of lawful votes, B, the petitioner, will be declared elected—recrimination or no recrimination. I cannot accept the position that either s. 100(1)(d)(iii) or s. 101(a) contemplate this result which is at once so unjust and anomalous and appears to me to contradict the basic principles underlying election law *viz.*, (1) that apart from disqualification, corrupt practices etc., the election of a candidate who obtains the majority of valid votes shall not be set aside. and (2) no candidates shall be declared duly elected who has not obtained the majority of valid votes.

I would add that the entire argument proceeds on a misconception of the procedure involved in a scrutiny. I will take the case where the voting takes place, as in the case of the election before us, in accordance with the provisions of rule 39. Then conformably to Rule 57(3) all the ballot papers which have been held to be valid in each polling station are bundled up and sealed by the Returning Officer, and similarly all the rejected ones of each station are made into another bundle. At the scrutiny by the Tribunal these two sets of bundles are examined to find out whether the votes cast in favour of each of the contesting candidates have been properly counted or not. How this can be done compartmentally, as those cast for A or B or C separately as is suggested by Mr. Garg, I am unable to follow. If the votes cast in favour of each candidate were made into separate bundles, then at least, there might be scope for an argument that the bundle of A or B shall not be opened up, but when all the voting papers have to be scrutinised in order to find out (a) whether the returned candidate has really been proved to have received a minority of valid votes and (b) whether the candidate claiming the seat has obtained a majority of valid votes, this cannot obviously be done without an examination of the ballot papers to which objection is taken and which are contained in the two types of bundles into which these are made up under rule 57(3).

Support was sought by Mr. Garg for the construction that he sought to press upon us by reference to the provisions in the other sub-clauses of s. 100(1)(d). His point was that if the returned candidate could not put forward the objections contained in those clauses the returned candidate could not likewise allege improprieties in the reception of the votes of any other candidate including the petitioner. I am wholly unimpressed by this argument which does not take into account both the nature of the objections in these other clauses as well as their bearing on the question whether the election of the returned candidate has been materially affected, which is the prime question for consideration in the provision and which furnishes the key to the interpretation of the sub-clause now under consideration. Let me take each of the cases provided by the other sub-clauses. Sub-cl. (i) deals with the improper acceptance of a nomination. It is obvious that allegations and proof by the returned candidate regarding the improper acceptance of a nomination cannot serve to sustain his election. *A fortiori* so, clause (ii) which reads

> "(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or"

could have no meaning in the present context nor cl. (iv) unless the non-compliance has a bearing on the reception of votes in which case it would be wholly covered by cl. (iii). In the case of cls. (i), (ii) and (iv) it is obvious, having regard to the very nature of the provisions, that the returned candidate can do no more than prove (a) that there was no such impropriety or illegality as is alleged, and (b) that even if there was, the same had not affected the result of his election; in other words, that the impropriety or illegality, if any, was inconsequential so far as his election was concerned. But this would not be the position in regard to the improper reception or rejection of votes. There we have two factors: (1) the impropriety of the reception or rejection, and (2) whether as a result of such improper reception or rejection the result was materially affected. In the case contemplated by cl. (iii) the question whether the result was materially affected or not could not, when

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the facts are ascertained, be a matter of doubt or dispute but would be one merely of arithmetical calculation and comparison. No doubt, s. 100 of the Act casts on the election petitioner the onus of establishing to the satisfaction of the Tribunal that "the result of the election was materially affected" by the impropriety etc., and taking the case of cl. (iii) in hand, of improper reception or rejection of particular votes, but from this it does not follow that the returned candidate is powerless to establish to the satisfaction of the Tribunal that notwithstanding the improper reception or rejection of the particular votes alleged by the petitioner his election has not been materially affected. The argument of Mr. Garg, if accepted, would mean that the returned candidate can merely combat the case alleged against him and is disabled from establishing positively that the result of the election has not been materially affected. If the key words of the provision on the fulfilment of which alone the Tribunal is invested with jurisdiction to set aside an election are taken to be the words "The *result* of the election *has been materially affected.*" I do not consider that it is possible to contend that it is beyond the power of the returned candidate to establish this fact which he might do in any manner he likes. He might do this by establishing that though a few votes were wrongly counted as in his favour, still a larger number of his own votes were counted in favour of the petitioner or that votes which ought to have been counted as cast for him, have been improperly counted as cast in favour of defeated candidates other than the petitioner. Without such a scrutiny it would manifestly not be possible to determine whether the election of the returned candidate has been materially affected or not. Nor do I see anything in the language of cl. (iii) which precludes the returned candidate from establishing this. This clause employs the words "improper reception, refusal or rejection of any vote", to confine oneself to its first part. No doubt, when a petitioner complains of a rejection, he obviously means an improper rejection of votes in his own favour and when he speaks of an improper reception he means also obviously an improper reception of votes in favour of the returned candidate. But from this it does not follow that there might not be an improper reception of votes in favour of the election petitioner or of another candidate or of an improper rejection of votes of the returned candidate. As the clause does not speak of the person in whose favour or as against whom the improper reception or rejection has taken place, its content and significance have to be ascertained from the purpose for which the provision is intended *viz.*, to determine from a counting of the voting papers after a scrutiny whether the election of the returned candidate has been materially affected. For instance, let me take a case within s. 100(1)(d)(i) where there has been an improper acceptance of any nomination. The question arises as to whether the election of the returned candidate has been materially affected by that improper acceptance. Obviously, a nomination which is alleged to have been improperly accepted and which is the subject of the charge under s. 100(1)(d)(i) is not the acceptance of the nomination either of the election petitioner where he has been one of the candidates or of the returned candidate but only of one of the other defeated candidates. If after inquiry the nomination is found to have been improperly accepted and the Tribunal proceeds to inquire as to its effect on the election, I take it, it would necessarily have to consider the votes received by that candidate. If this is not to be done it would either mean that in every case of an improper acceptance of a nomination the election is to be declared void or that in no case can such a declaration be made. Now, if the votes cast in favour of that candidate whose nomination was improperly accepted have to be counted, necessarily there has to be a scrutiny and the Tribunal would have to inquire and ascertain the number of valid votes cast for that candidate in order to determine whether the improper reception of votes in favour of that candidate has materially affected the result of the election *i.e.*, has resulted in the election of the returned candidate. In that context the scrutiny of the improper reception of the votes in favour of such candidate would obviously have to take place and that could be done only by virtue of the provision in s. 100 (1)(d) (iii). This would at least show that the expression of "any vote" in the clause has to be read as meaning 'any vote cast in the election with which the petition is concerned' and not 'any vote cast in favour of the returned

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candidate', to take the illustration merely of the improper reception of a vote.

The construction which I have placed on s. 100(1)(d) (iii) would harmonise the provision contained in the opening words of s. 100(1)(d) and s. 101(a). I cannot reasonably conceive of the law providing (unless of course the language employed leaves me no alternative) for the setting aside of an election of the returned candidate because the Tribunal finds that he did not receive the highest number of valid votes cast at the election; but that after this stage is over and the Tribunal proceeds to consider whether the claim to the seat is made out or not its reaching the finding that such a petitioner is not entitled to that relief because on further scrutiny, the returned candidate had, in fact, secured the highest number of votes. Mr. Garg, no doubt, contemplated this anomaly with equanimity suggesting that it was due not to any anomaly at all but a situation arising merely from the application of different tests or being the result of inquiries directed to different ends at different stages of the petition. It is this that I am unable to reconcile myself to. The language used in s. 101(a) is, no doubt, "in fact received the majority of the valid votes". I do not, however, consider that the use of the words 'in fact' involves scrutiny of a type different from that which the Tribunal conducts for ascertaining whether by reason of the improper reception or rejection of votes the election of a returned candidate has been materially affected so as to justify its being set aside. The inquiries are identical. If every vote which has been improperly received is eliminated and every vote which has been improperly refused or rejected is added you get the totality of the valid votes cast in favour of a candidate. That is precisely the inquiry which is prescribed to be conducted under s. 100(1)(d) read with cl. (iii). The words 'in fact' used in s. 101(a) to my mind do not add any new element as regards either the scrutiny or the counting. If so, on the construction which I have endeavoured to explain, when once it is ascertained that the returned candidate has obtained a majority of valid votes there is no question of his election having to be set aside. But it might be shown that he had not obtained the majority of valid votes. In other words, by the scrutiny that has taken place in order to test the validity of his election the Tribunal might have arrived at a conclusion that he had not received the majority of valid votes. Immediately that stage is reached and that conclusion is arrived at the Tribunal proceeds to declare the election void. If there is no claim to a seat there is nothing more to be done, with the result that it stops with declaring the election void in which event there would be a re-election. If, however, the seat is claimed by a defeated candidate or on his behalf there has to be a further inquiry which the Tribunal is called upon to conduct. For the purpose of declaring the election void the Tribunal would have arrived at the figures of the valid votes cast in favour of the several candidates. It might be that the petitioner who made the claim to the seat or the person on whose behalf that is made might not have obtained the highest number of valid votes in which case, of course, a claim to the seat would be rejected. It is this situation which is indicated by s. 101(a). It provides that there cannot be a declaration in favour of the claimant to a seat merely because the election of the returned candidate has been declared void but he must in addition have secured the majority of the lawful votes cast. A question might arise as to how this total is to be ascertained. It is obvious that for this purpose the Tribunal ought to scrutinise not merely the ballot papers of the claimant and the returned candidate but also of the other candidates. Thus, for instance, taking the case only of the petitioner who is a claimant, among the votes counted in his favour might be some which were really votes cast in favour of a defeated candidate and similarly votes properly cast for him might have been improperly counted as the votes of the other defeated candidates. Undoubtedly the irregularities would have to be pleaded, but I am now concerned with whether even if pleaded, the Tribunal would on a proper interpretation of ss. 100 and 101 have jurisdiction to entertain the pleas and embark on such a scrutiny. Proceeding then on the footing that the necessary averments have been made in the pleadings filed there would have to be a scrutiny of the ballot papers before it can be ascertained whether or not the person who or on whose behalf the seat is claimed has obtain-

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ed a majority of valid votes in order to sustain the claim to the seat. After this stage is passed and the Tribunal has reached the conclusion that the claimant has, in fact, received the majority of valid votes that the Tribunal embarks on the further inquiry as to whether there are any reasons why he should not be declared elected. And it is at this stage that the provisions of s. 97 in regard to recrimination come into play. If no recrimination is filed then on the terms of s. 101(a) the claimant would be immediately declared elected but if there is a recrimination then s. 101(b) is attracted and the Tribunal would have to inquire whether if the claimant were a returned candidate there are circumstances in which his election could be declared void. This would indicate that the recrimination is concerned with a stage which emerges after the scrutiny is completed and assumes that the scrutiny has resulted in the claimant being found to have obtained the majority of valid votes. This construction would harmonise the provisions of ss. 97,100(1) (d) and 101 and would lead to a rational result.

This brings me to a submission based upon rule 57(1) to which reference was made by Mr. Garg. He referred us to the words of that rule reading:

> "Every ballot paper which is not rejected under Rule 56 shall be counted as one valid vote"

as throwing some light on the construction of s. 100(1)(d) (iii) and as favouring the intrepretation which he invited us to put upon the provision. I consider that the rule has no bearing at all upon the point now in controversy. Rule 57 occurs in Part V of the Rules beginning with rule 50 which is headed 'Counting of votes in Parliamentary and Assembly Constituencies.' Rule 55 prescribes the scrutiny at the time of the opening of the ballot boxes and rule 56 with the scrutiny and rejection of ballot-papers. This last rule lays down which shall be deemed to be a valid vote on a ballot paper and which is not and directs the Returning Officer to follow these directions and make the counting. And it is in that context that we have rule 57 and the provision in sub-r. (1). It obviously means only that so far as the Returning Officer is concerned and for the purpose of enabling him to declare the result the ballot papers which are not rejected are to be deemed as valid. It is manifest that if that validity held good even at the stage of the election petition and for the conduct of the inquiry before the Tribunal, that could really be no scrutiny of the ballot papers and s. 100(1)(d)(iii) would become meaningless. The meaning of rule 57(1) is only this that ballot papers not rejected shall be deemed to be valid so far as the Returning Officer is concerned and even as regards himself it is subject to the provision in rule 63 under which a recount may be demanded and granted. His decision has, of course, *prima facie* validity at the stage of the inquiry by the Election Tribunal because the impropriety of his acceptance or refusal has to be pleaded and proved by the party objecting to this scrutiny and it is only if the Tribunal finds the impropriety established, that the vote would be differently treated or counted. It appears to me to be clear therefore that rule 57 does not bear upon the construction of s. 100(1)(d)(iii) or of s. 101(a) for which purpose reliance was placed upon it.

The next question that arises is the result of the construction which I have endeavoured to explain of the relevant provisions of the Act and now I shall set out a few further findings of the Election Tribunal which bear upon the point next to be considered. The Election Tribunal found after a scrutiny of the voting papers to which objection had been made by the petitioner—Genda Lal—and on a recount that it resulted in Genda Lal having obtained 5,664 votes as against 5,652 obtained by the returned candidate—Jabar Singh which meant that the election of Jabar Singh should be declared void. The Tribunal then proceeded to investigate the allegations made by Jabar Singh as regards the improper reception of votes in favour of Genda Lal and the improper rejection of votes in his own favour and after considering the ballot papers of the several polling stations, it arrived at the result that Genda Lal had been improperly credited with 10 votes and that Jabar Singh had been improperly denied the benefit of 12 votes cast in his favour. If this position could be sustained the result would be that Genda Lal had obtained 5,654 votes as against 5,664 votes polled by Jabar Singh which would mean that the election of Jabar Singh could not be declared void, for "the result of the election had not been materially affected." It was this

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that was strenuously urged before us by Mr. Kapoor—learned counsel for the appellant Jabar Singh. Both the Tribunal as well as the High Court on appeal therefrom have held that because Jabar Singh had not recriminated this deduction of 10 votes in favour of Genda Lal and the addition of 12 votes in favour of Jabar Singh could not be made and consequently denied to the appellant the benefit of this finding. In view of what I have stated earlier as to the proper construction of ss. (100)(1)(d)(iii) and 101(a) the absence of recrimination could not lead to this result and if this finding could be sustained I would have allowed the appeal. But this finding of the Tribunal has proceeded partly without any pleading to support it. When an objection is taken to the improper reception or refusal of a vote the facts upon which such impropriety has occurred have to be set out and the other party has to be given an opportunity to meet the case. Though there might be no express requirement of the Act or any rule made thereunder, I consider that it is implicit in the pleadings required to be filed under ss. 81 to 83 of the Act read with the frame of s. 100 that a party who alleges an impropriety or error in the scrutiny by the Returning Officer, and needless to add this would apply to every allegation of impropriety or illegality by whosoever committed, must specify with particularity the grounds of attack on the action of the Returning Officer in regard to the scrutiny of the ballot paper or the counting. In the present case it is admitted that though in his written statement, the appellant Jabar Singh challenged the propriety of the reception of certain votes in favour of Genda Lal and the improper rejection of some of his own votes, he did not specify all of these in regard to which impropriety has been found by the Tribunal. The Tribunal has, as I have already stated, found that 10 ballot papers whose numbers have been specified ought not to have been counted in favour of Genda Lal. But of these, it is now admitted, that in regard to 6 of them no plea had been made in the written statement, with the result that only 4 votes could be taken into account as having been wrongly counted, bearing in mind the pleading in the case. Similarly, as regards the rejection of Jabar Singh's votes the Tirbunal, as stated eariler, has found that 12 votes ought to have been counted in his favour. Of these, however, the written statement contained allegations only as regards 6 and not as regards the rest. This would mean that the Tribunal had no jurisdiction to find that more than 6 votes had been improperly rejected in his case. If the votes regarding which no plea of impropriety had been raised by Jabar Singh were eliminated, it would follow that as a result of the final scrutiny Genda Lal had obtained properly 5,660 valid votes as against 5,658 polled by Jabar Singh. The result of the election, therefore, was materially affected by the improper reception or refusal of votes and therefore I consider that the election of Jabar Singh was properly set aside and that is why I concur in the order that the appeal should be dismissed.

Appeal dismissed.

SAIT NAGJEE PURUSHOTHAM AND CO.

v.

COMMISSIONER OF INCOME-TAX, MADRAS

1963
December, 20

(A. K. SARKAR, M. HIDAYATULLAH AND J. C. SHAH JJ.)

Income Tax Act (11 *of* 1922), *s.* 25(3) and (4)—*Firm carrying on business in* 1918—*Disintegration into two firms—If discontinuance of business.*

By s. 25(4) of the Income-tax Act, "Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939....carrying on any business, profession or vocation in which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession."

A firm bearing the same name as the appellant firm, had been carrying on business from before 1918 and had paid tax on that business under the Income-tax Act, 1918. The firm did three kinds of businesses, namely, (a) in piece-goods, yarn as general merchants,