A JIBONTARA GHATOWAR

v.

SARBANANDA SONOWAL AND ORS.

MAY 9, 2003

B [R.C. LAHOTI AND B.N. AGRAWAL, JJ.]

Election Laws:

Conduct of Election Rules, 1961:

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Rule 63—Recount of votes—Application—Statutory obligation on the returning officer—Held: Is to either allow the application to the extent to which the prayer may be genuine and reasonable or reject to the extent to which it may be found frivolous or unreasonable depending on the facts and D *circumstances of the given case—Such decision is to be in writing giving reasons for the same.*

Rules 38 (1) and 56—Ballot Paper—Rejection on the ground of absence of signature of Presiding Officer and distinguishing mark—Held: Where such defect is caused by mistake or failure on the part of Presiding Officer rejection E *of ballot paper not justified.*

General Elections to the State Legislative Assembly were held. 824 number of votes were rejected and excluded from counting as they did not bear signature of the presiding officer nor were they stamped with any distinguishing mark. Respondent No.1 was declared elected, defeating F **the nearest rival, the appellant. Appellant filed an election petition. It challenged the election of respondent No.1 praying for recount of ballot papers and rescrutiny of the rejected ballot papers. High Court held that the rejection of 824 votes was justified and rejected the petition. During the counting the appellant had filed applications seeking a recount setting** G **out the grounds but it did not receive the attention of the returning officer and remained undisposed of. Hence the present appeal.**

Appellant contended that 824 number of votes could not have been excluded from the counting and serious error was committed at the counting by overlooking the rules.

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Respondent No.1 contended that if this Court feels convinced of Rule 63 having been violated and a case of strong likelihood of the result of the election having been materially affected made out, in that case, the Court may remand the case to the High Court with a direction to the returning officer to record his satisfaction by reference to Rule 38 read with Rule 63 and then his satisfaction being subjected to judicial scrutiny by the High Court whereafter only recount may be carried out.

Allowing the appeal, the Court

HELD:1. Rule 63 of the Conduct of Elections Rules, 1961 spells out a statutory obligation on the returning officer on an application being made under sub-rule (2) to decide the matter. He may allow the application in whole or in part depending on his satisfaction as to the availability of the grounds in support of the prayer for recount and the genuineness and reasonability thereof, which opinion shall, of course, be formed prima facie depending on the facts and circumstances of the given case. Recording of evidence or holding of an enquiry on the application is not required or provided for by the rule. The application may be rejected to the extent to which it appears to him to be frivolous or unreasonable. The expressions 'shall decide the matter', 'may allow the application' and 'if it appears to him' employed in the language of sub-rule (3) cast an obligation on the returning officer to take a decision on the prayer for recount depending on the formation of prima facie opinion in a reasonable manner and as dictated by the facts and circumstances of a given case which would obviously defy definition or formation of any straight jacket formula. In any case, a decision has to be taken. The decision has to be in writing and has to contain the reasons for the decision. In the instant case, there was a clear breach of Rule 63. [161-D, E, F, G]

2.1. It is nobody's case that 824 ballot papers were spurious. The instant case is not a case of booth capturing or rigging. In an election dispute, there are not the candidates alone who are the persons interested. In a democratic set up, as is ours, in an election, the fate of the whole constituency is at stake and every voter and every citizen has, therefore, an interest in that candidate being returned to assembly who has secured the majority of the valid votes. An election dispute cannot be decided on concessions contrary to law. [164-D, E]

2.2. Rules 38(1) and 56 of the Conduct of Elections Rules, 1961 shows that the obligation is cast on the polling officer to stamp with such

A distinguishing mark as the Election Commission may direct and to sign in full on the back of the ballot papers. The candidate has no role to play in the performance of such duty by the polling officer. Absence of mark and the signature renders the ballot paper liable to be rejected. However, still, where the returning officer feels satisfied that such defect has been caused by any mistake or failure on the part of the presiding officer or B polling officer, the ballot paper shall not be rejected merely on the ground of such defect. [163-F, G]

2.3. A defect in the ballot papers in the light of Rule 38(1) read with Rule 56(2)(h) having been detected, the issue had to be decided by the C satisfaction of the returning officer. The concession given by candidates or their election agents submitting to a decision arrived at by the returning officer in accordance with law may come in the way of that candidate turning around and disputing a doubtful position of law taken as resolved and conceded or accepted. In an election dispute, a consensus contrary to law or a failure to discharge statutory obligation cast on an election officer D which has resulted in prejudicing the result of the election, cannot *ipso facto* claim immunity from challenge. [164-E, F]

2.4. In the instant case, the returning officer has clearly failed in discharging his obligation cast by first proviso below clauses (g) and (h) of sub-rule (2) of Rule 56. Therefore, 824 ballot papers should have been E included for the purpose of counting. [164-G]

Arun Kumar Bose v. *Mohd. Furkan Ansari and Ors.*, [1984] 1 SCC 91, relied on.

3. On the averments made in the pleadings and on the material made F available before the Court a clear case for directing a recount was made out. These facts coupled with the fact of breach of statutory duty cast on the returning officer by Rule 63 did make out a case for ordering a recount of ballot papers by the High Court. Certainly the election petitioner was not indulging into a roving inquiry or trying to fish out material. The High G Court has also not held so. Therefore, the High Court did acquire a jurisdiction to permit a recount. Once a recount was ordered the decision of the case would depend on the result of the recount which shall have to be given effect to. Thus, the High Court was not justified in rejecting the prayer for permitting a recount and the judgment of the High Court is set aside. The case is remanded back to the High Court. It shall permit a H recount and then decide the election petition after affording the parties

an opportunity of hearing and in accordance with law. [167-A, B, E, F] A

T.A. Ahammed Kabeer **v.** *A.A. Azeez and Ors.*, **JT [2003] 4 SC 110, relied on.**

Bhabhi **v.** *Sheo Govind,* **[1976] 1 SCC 687;** *Satyanarain Dudhani* **v.** *Uday Kumar Singh,* **[1993] Supp. 2 SCC 82;** *M.R. Gopalakrishnan* **v.** *Thachady Prabhakaran and Ors.*, **[1995] Supp. 2 SCC 101 and** *Bhag Mal* **v.** *Ch. Prabhu Ram and Ors.*, **[1985] 1 SCC 61, referred to.** B

4. The result of the election has been declared. The election petition has already been subjected to trial. Now, it is for the Court to form its own judicial opinion on the issues raised and act in conformity with the findings arrived at. The case cannot now be remanded with a direction to the returning officer to now record his satisfaction with reference to Rule 38 read with Rule 56 and Rule 63. [167-C, D] C

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4033 of 2002. D

From the Judgment and Order dated 31.5.2002 of the Assam High Court at Gauhati in E.P. No. 4 of 2001.

G.L. Sanghi Ms. Meghalee Borthakur, N.G.P R. Luwang, Ms. Krishna Sarma, Ms. Asha G. Nair for M/s. Corporate Law Group for the Appellant. E

S.B. Sanyal, Manish Goswami, Ambar Qamaruddin and Rameshwar Prasad Goyal, for the Respondents.

The Judgment of the Court was delivered by

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R.C. LAHOTI, J. General Elections to the Assam Legislative Assembly were held in the months of April/May, 2001. For no.115, Moran Legislative Assembly Constituency, the appellant, the respondent No.1 and respondent No.2 filed their nomination papers respectively as candidates of the Indian National Congress, Asom Gana Parishad and Nationalist Congress Party. The respondents No.3, 4 and 5 filed their nomination papers as independent G candidates. The appellant's election symbol was 'Hand' while that of respondent No.1 was 'Elephant'. The respondent No.1 was declared elected, defeating the nearest rival, the appellant, by a margin of 850 votes. The final result sheet shows the distribution of votes as under:-

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Total votes polled	67,581
No. of Rejected votes	2,436
Jibontara Ghatowar (App.)	26,927
Sarbananda Sonowal (R-1)	27,777
Hareshwar Changmai (R-2)	1,241
Joy Chandra Nagbanshi (R-3)	7,902
Biren Borah (R-4)	995
Lukua Changmai(R-5)	303

The appellant filed an election petition laying challenge to the election of the respondent No.1 seeking its avoidance and also for declaring herself as duly elected. The success or failure of the election petition depended on the fate of the prayer for recount of ballot papers made in the election petition founded on the following grounds, as summed up by the High Court in its judgment:-

"1. Out of total 2436 votes rejected as many as 834 Nos. of votes in respect of polling station no.11, 25, 60, 66, 76, 92, 102 and 103 were rejected for absence of the signature of the Presiding Officer and 'distinguishing mark' or 'seal' on the ballot papers. According to the petitioner, all these votes were cast in favour of the petitioner who had contested the election as a candidate of the Indian National Congress (I) with the symbol of the above votes were improper.

2. Total No. of 634 ballot papers concerning polling station No.1, 8, 11, 12 and 28 which were casted in favour of the petitioner were illegally counted in favour of the respondents by placing these ballot papers in the box of the respondents. It is submitted that in some cases the Top and the Bottom ballot papers were in favour of the respondent, whereas the in-between 48 Nos. of ballot papers in the bundle of 50 belonged to the petitioner and the entire bundle was counted in favour of the respondent.

3. The arrangement in the counting hall was far from satisfactory and there was congestion in the area earmarked for the counting agent for the various political parties. It is further alleged that a large no. of unauthorized persons entered into the counting hall and interfered into smooth counting of votes affecting the orderly counting of votes.

4. The petitioner filed two applications for re-counting of the votes but without passing any order, the results were declared in violation of the provisions of the Act." A

It is not necessary to reproduce the pleadings of the parties in this judgment and it would suffice if the relevant issues are reproduced from the record of the High Court which highlight the controversy around which the trial election petition has moved. Issues Nos. 1 to 5 are as under:- B

"1. Whether the allegation contained in para 32 of the E.P. as well as the application for recounting of the votes made to the Returning Officer, made out a case for recounting of votes on the grounds of materially affecting the result of the Election. C

2. Was there any improper rejection of valid votes of the petitioner in course of counting of No.115 Moran LAC in respect of polling station Nos. 1, 11, 25, 60, 64, 66, 76, 92, 102 and 103?

3. Was there any improper reception of votes and void votes in favour of the respondents No.1 in course of counting of votes of 115 Moran LAC in respect of Polling Station No.1, 8, 11, 12, 28 and 64 by way of misplacing ballot papers containing votes cast in favour of the election petition in the compartment meant for respondent No.1 and consequently counting the same in favour of respondent No.1? D E

4. If issue No.4 is decided in favour of the election petitioner whether she is entitled to be declared as elected to No.115 Moran Legislative Assembly Constituency?

5. To what other relief(s) the petitioner is entitled to?" F

Eleven witnesses, including himself were examined by the election petitioner. The respondent No.1 himself appeared in the witness box and examined himself. The Returning Officer Shri B.K Pegu was examined. A few official witnesses were also examined. The High Court found that during the counting the election petitioner had preferred an application (Annexure-3) seeking a recount. An identical copy thereof (Annexure-E) was also moved, the exact time whereof is not known. However, both the applications were moved on 13.5.2001, the day of counting and when the counting was still going on. These applications, Annexure-3 and Annexure-E, were quite brief each containing two sentences only, reading as under:- G H

"Sub.: Application for recounting.

.....

With reference to the subject cited above I hereby want to state that that the counting which has been taken place today is not satisfactory for me.

So I want to request as a candidate of Indian National Congress from Moran Assembly Constituency for recounting of all the ballot Boxes.

Thanking you

Sd/-"

These applications were rejected by the returning officer on the ground that the applications did not set out any ground for directing a recount.

On the same day, the petitioner presented yet another application for recount which reads as under:-

"Dated 13th May, 2001

To

The Returning Officer,
115 Moran L.A.C.

Sub.: Application for re-counting of the above 115 Moran Cons.

Sir,

With reference to the subject mentioned above, I have the honour to request you to grant re-countig in the above Moran 115 LAC for the following reasons below stated.

(1) In Center No.103 where re-poll was ordered and re-poll was held on 12th May under proper Security arrangement by the authority and re-poll has done peacefully in the center. It is found that 435 (approximately) ballot papers were cast in my favour but without the signature of the Presiding Officer and distinguished marks for no fault of mine. The same is the case in Center No. 46 about 150 ballot papers were rejected on the above mentioned ground.

(2) In center No. 30 as per Presiding Officer Diary 697 ballot papers were issued and the same were casted after counting, it was

found to be 721.

(3) Many of the countersigned ballot papers disputed were accepted in favour of opposite party candidate.

Therefore, I have great apprehension that justice was not done to me and I strongly urge upon you to order for recounting in the above mentioned 115 Moran Cons. LAC and also I have reason to believe that the with intention the presiding officer was *malafide.*

Thanking you in anticipation.

Received — Jibontara Ghatowar
13.5.2001

Sd/- Illegible — INC Candidate 115 Moran LAC

13.5.2001
P.A. to DC and DEO
Dibrugarh

(Seal)
Deputy Commissioner
Dibrugarh District Dibrugarh.

Verification

I, Smt. Jibontara Ghatowar, wife of Shri Paban Singh Ghatowar, aged about 40 years, resident of ushapur, Moran Town, P.O. Moranhat, in the District of Sibsgar, Assam , election petitioner of the accompanying election petition do hereby solemnly affirm and verify that the Annexure -4 to the election petition is a typed copy of the receipt copy of another application dated 13.5.2001 sumitted by me to the returning officer of No. 115 Moran L.A.C praying for ordering recount of all the ballot papers in respect of No. 115 Moran L.A.C receipt of which was acknowledged by the personal Assistant of Deputy Commissioner, Dibrugarh who is also the Returning Officer of No. 115 Moran L.A.C on 13.5.2001.

And in proof thereof, I sign this verification on this the 25th day of June, 2001 at Guwahati.

(Jibontara Ghatowar)"

A The Deputy Commissioner, Dibrugarh was the appointed returning officer. At the venue of counting he was accompanied by his P.A. The application Annexure P-3 was received by the P.A. and he made an endorsement on the application of having received the same on 13.5.2001, signed the endorsement of presentation in the capacity of P.A. to DC and DEO, Dibrugarh and also affixed the rubber stamp of Deputy Commissioner B thereunder. PA, DC and DEO are abbreviations respectively for Personal Assistant, Deputy Commissioner and District Election Officer. The application Annexure P/3 was also received by the P.A. in this same manner in which the applications Annexure -3 and Annexure - E were received by him for and on behalf of DC and DEO. When the DEO Mr. Pegu appeared in the witness C box he admitted that the application Annexure P-3 was not dealt with by him nor disposed of because it was not brought to his notice by the P.A. Thus it is an undisputed fact that the application for recount, though filed at an appropriate time and setting out the ground for permitting a recount, did not received the attention of the returning officer and remained undisposed of. The reason may be a lack of communication between the DEO and his P.A. D but that is an internal matter of the two. The fact remains that the earlier two applications, similarly received by the P.A., were promptly brought by him the notice of the returning officer and received his attention. There is no reason why the application Annexure P-3 should not have been similarly brought by the P.A. promptly to the notice of the DEO and why it should not E have received his attention and been disposed of.

Rule 63 of the Conduct of Elections Rules, 1961 reads as under:-

63. *Re-count of votes.*- (1) After the completion of the counting, the returning officer shall record in the result sheet in Form 20 the total number of votes polled by each candidate and announce the same. F

(2) After such announcement has been made, a candidate or, in his absence, his election agent or any of his counting agents may apply in writing to the returning officer to re-count the votes eihter wholly or in part stating the ground on which he demands such re-count. G

(3) On such an application being made the returning officer shall decide the matter and may allow the application in whole in part or may reject it in toto if it appears to him to be frivolous or unreasonable.

(4) Every decision of the returning officer under sub-rule (3) H shall be in writing and contain the reasons therefor.

(5) If the returning officer decides under sub-rule(3) to allow a re-count of the votes either wholly or in part, he shall- A

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

(b) amend the result sheet in Form 20 to the extent necessary after such re-count; and B

(c) announce the amendments so made by him.

(6) After the total number of votes polled by each candidate has been announced under sub-rule (1) or sub-rule (5), the returning officer shall complete and sign the result sheet in Form 20 and no application C for recount shall be entertained thereafter:

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

The rule clearly spells out a statutory obligation on the returning officer on an application being made under sub-rule (2) to decide the matter. He may allow the application in whole or in part depending on his satisfaction as to the availability of the grounds in support of the prayer for recount and the genuineness and reasonability thereof, which opinion shall, of course, be E formed prime facie depending on the facts and circumstances of the given case. Recording of evidence or holding of an enquiry on the application is not required or provided for by the rule. The application may be rejected to the extent to which it appears to him to be frivolous or unreasonable. The expressions 'shall decide the matter', 'may allow the application' and 'if it F appears to him' employed in the language of sub-rule (3) cast an obligation on the returning officer to take a decision on the prayer for recount depending on the formation of prima facie opinion in a reasonable manner and as dictated by the facts and circumstances of a given case which would obviously defy definition or formation of any straightjacket formula. The application may be genuine and reasonable. It may be rejected to the extent to which it may be G found frivolous or unreasonable. In any case, a decision has to be taken. The decision has to be in writing and has to contain the reasons for the decision. There was a clear breach of Rule 63 in the present case.

In addition, the learned senior counsel for the appellant has invited our attention to the statement made in para 33 of the written statement replying H

A to the averments made in para 32 of the election petition. The respondent states that in the application filed before the DEO the only objection raised was in respect of rejection of votes in polling station nos. 103,46 and 30 only. It is alleged that in polling station no.103 approximately 435 ballot papers bearing votes cast in favour of the petitioner were rejected but from the result sheet (Annexure - 1) it is clear that total number of rejected ballot B papers were only 433. Similarly in polling station no.46 it is alleged that 150 ballot papers were rejected: but from the perusal of the result sheet (Annexure - 1) the total number of rejected ballot papers in the polling station no.46 were only 64. Particulars of this rejection of 150 ballot papers as alleged by the Election Petitioner were not specifically pleaded.

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The stand taken in the counter affidavit supports the plea of the appellant, at least partially, that there was a good number of ballot papers rejected though not invalid.

Vide para 33 of the election petition, the petitioner has specifically D averred-

> "33. That a recount and rescrutiny of the rejected ballot papers and the ballot papers counted in favour of the Respondent No.1 will show that the Petitioner had in fact polled 28,474 (26,927+903+644) valid votes while the Respondent No.1 had in fact polled not more than E 27,133 (27,777-644) votes out of which 200 more ballot papers polled in Polling Station No.30 should have been rejected. Hence, on the aforesaid statements of material facts, it is pre-eminently a fit case where your Lordships would be pleased to order recount and scrutiny of the rejected ballot papers and ballot papers counted in favour of F the Respondent No. 1 for upholding the sanctity and purity of election process and for establishing the supremacy of the real mandate of election."

During the course of hearing before the High Court, it was not disputed that 824 number of votes were rejected by reference to Rule 56(2) and excluded G from counting for the reason that they did not bear the signature of the presiding officer, nor were they stamped with any distinguishing mark. It seems that at the time of counting there was orally a consensus arrived at that the votes having no seal or signature shall be rejected as invalid straightway. The High Court formed an opinion that such rejection of 824 votes was justified. The submission of the learned senior counsel for the appellant is H that the votes could not have been excluded from the counting and a serious

error has been committed at the counting by overlooking of the rules. A

Sub-rule (1) of rule 38 and relevant part of Rule 56 provide as under;-

"*38. Issue of ballot papers to electors.*- (1) Every ballot papers before it is issued to an elector, and the counterfoil attached thereto shall be stamped on the back with such distinguishing mark as the Election B Commission may direct, and every ballot paper, before it is issued, shall be signed in full on its back by the presiding officer.

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56. Counting of votes.- (1) The ballot papers taken out of each ballot box shall be arranged in convenient bundles and scrutinized. C

(2) The returning officer shall reject a ballot paper-

XXX XXX XXX XXX

(h) if it does not bear both the mark and the signature which it should have borne under the provisions of sub-rule (1) of rule 38: D

Provided that where the returning officer is satisfied that any such defect as is mentioned in clause (g) or clause (h) has been caused by any mistake or failure on the part of a presiding officer or polling officer, the ballot paper shall not be rejected merely on the ground of such defect: E

Provided further that a ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote-shall be for a particular candidate clearly appears from the way the paper is marked." F

A bare reading of the rules shows that the obligation is cast on the polling officer to stamp with such distinguishing mark as the Election Commission may direct and to sign in full on the back of the ballot papers. The candidate has no role to play in the performance of such duty by the G polling officer. Absence of mark and the signature renders the ballot paper liable to be rejected. However, still, where the returning officer feels satisfied that such defect has been caused by any mistake or failure on the part of the presiding officer or polling officer the ballot paper shall not be rejected merely on the ground of such defect. An analysis of this rule and the legal implication thereof may not detain us any longer inasmuch as we find these H

A rules having been dealt with in *Arun Kumar Bose* v. *Mohd. Furkan Ansari and Ors.*, [1984] 1 SCC 91, wherein this Court found that the absence of signature and distinguishing mark on 74 ballot papers was attributable to failure on the part of the presiding officer. Having found so, the Court held-

> "It was the obligation of the Presiding Officer to put his signature on
> B the ballot papers before they were issued to the voter. Every voter has the right to vote and in the democratic set up prevailing in the country no person entitled to share the franchise can be denied the privilege. Nor can the candidate be made to suffer. Keeping this position in view, we are of the definite view that the present case is one of
> C failure on the part of the Presiding Officer to put his signature on those ballot papers so as to satisfy the requirement of law. The proviso once it is applicable, has also a mandate that the ballot paper is not to be rejected. We, therefore, hold that the ballot papers were not liable to be rejected as the proviso applied and the High Court, in our opinion, came to the correct conclusion in counting these ballot papers
> D and giving credit thereof to the respondent no.1."

It is pertinent to note that it is nobody's case that 824 ballot papers were spurious. The present one is not case of booth capturing or rigging. In an election dispute, they are not the candidates alone who are the persons interested. In a democratic set up, as is ours, in an election, the fate of the
E whole constituency is at stake and every voter and every citizen has, therefore, an interest in that candidate being returned to assembly who has secured the majority of the valid votes. An election dispute cannot be decided on concessions contrary to law. A defect in the ballot papers in the light of Rule 38(1) read with Rule 56(2)(h) having been detected, the issue had to be
F decided by the satisfaction of the returning officer. The concession given by candidates or their election agents submitting to a decision arrived at by the returning officer in accordance with law may come in the way of that candidate turning around and disputing a doubtful position of law taken as resolved and conceded or accepted. In an election dispute, a consensus contrary to law or a failure to discharge statutory obligation cast on an election officer which
G has resulted in prejudicing the result of the election, cannot *ipso facto* claim immunity from challenge. In the present case the returning officer has clearly failed in discharging his obligation cast by first proviso below clauses (g) and (h) of sub-rule (2) of Rule 56. Disagreeing with the High Court, therefore, we hold that these 824 ballot papers should have been included for the
H purpose of counting.

It is, therefore clear that so far as 824 votes are concerned it is a case of rejection of ballot papers contrary to the provisions contained in the rules and to the law declared by this Court in case of *Arun Kumar Bose* (supra). From the other material available on record a case for rejection of other ballot papers was also made out. The averments made in the counter affidavit itself show that the number of rejected ballot papers was 497 out of which 433 ballot papers were in favour of the election petitioner. These facts coupled with the fact of breach of statutory duty cast on the returning officer by Rule 63 did make out a case for ordering a recount of ballot papers by the High Court.

The High Court in its judgment has referred to the decisions of this *Court in Bhabhi* v. *Sheo Govind,* [1976] 1 SCC 687, *Satyanarain Dudhani* v. *Uday Kumar Singh,* [1993] Supp. 2 SCC 82 and *M.R. Gopalakrishnan* v. *Thachady Prabhkaran and Ors.,* [1995] Supp. 2 SCC 101 to read the law that the secrecy of ballot papers cannot be permitted to be tinkered with lightly; that an order for recount is not to be granted as a matter of course; and that the secrecy of ballot papers has to be maintained. In other words a recount has to be ordered only when on the basis of material facts pleaded in the petition and supported by the contemporaneous evidence a case for recount is made out. A similar view has been taken in a host of other decisions. It is not necessary to burden this judgment by cataloguing all the decisions relevant to the point. Suffice it to refer to a recent decision of this Court in *T.A. Ahammmed Kabeer* v. *A.A. Azeez and Ors.*, JT (2003) 4 SC 110. This Court noted the observation made earlier in *Bhag Mal* v. *Ch. Prabhu Ram and Ors.*, [1985] 1 SCC 61 that the Constitution and connected laws aim at ensuring true democracy functioning in the country and the will of the people to prevail. That can be achieved by allowing the one to represent the constituency who has obtained the majority of valid votes by proper and due process of law. It would really be a mockery of the procedure of law in a situation where it is demonstrated duly in the Court that a person who obtained four votes less than the other next candidate should be declared elected in preference to the others and allowed to represent the constituency.

This Court further held in *T.A. Ahammmed Kabeer* (supra) -"the last before an Election Judge is ticklish. It is often urged and also held that the success of a winning candidate should not be lightly set aside and the secrecy of ballot must be zealously guarded. On account of a rigid following of these principles the election courts are inclined to lean in favour of the returned candidate and place the onus of proof on the person challenging the result of

A the election, insisting on strict compliance with the rules of pleadings and excluding such evidence from consideration as is in divergence with the pleadings. However, what has so developed as a rule of practice should not be unduly stretched; for the purity of the election process needs to be preserved unpolluted so as to achieve the predominant goal of democracy that only he should represent the constituency who has been chosen by the majority of the B electors. This is the purpose and object of the election law.

"Though the inspection of ballot papers is to be allowed sparingly and the Court may refuse the prayer of the defeated candidate for inspection if, in the garb of seeking inspection, he was indulging into a roving enquiry in order to fish out materials to set aside the election, C or the allegations made in support of such prayer were vague or too generalized to deserve any cognizance. Nevertheless, the power to direct inspection of ballot papers is there and ought to be exercised if, based on precise allegations of material facts, also substantiated, a case for permitting inspection is made out as is necessary to D determine the issue arising for decision in the case and in the interest of Justice". It was also held, "it is true that a recount is not be ordered merely for the asking or merely because the Court is inclined to hold a recount. In order to protect the secrecy of ballots the Court would permit a recount only upon a clear case in that regard having been made out. To permit or not to permit a recount is a question involving E jurisdiction of the Court. Once a recount has been allowed the Court cannot shut its eyes to the result of recount on the ground that the result of recount as found is at variance with the pleadings. Once the Court has permitted recount within the well-settled parameters of exercising jurisdiction in this regard, it is the result of the recount F which has to be given effect to."

"So also once the Court exercises its jurisdiction to enter into the question of improper reception, refusal or rejection of any vote, or the reception of any vote which is void by reference to the election result of the returned candidate under Section 100(1)(d)(iii), as also G as to the result of the election of any other candidate by reference by to Section 97 of the Act and enters into scrutiny of the votes polled, followed by recount, consistently with its findings on the validity or invalidity of the votes, it cannot refuse to give effect to the result of its findings as to the validity or invalidity of the votes for the purpose of finding out the true result of the recount though the actual finding H

as to the validity or otherwise of the votes by reference to number may be at variance with the pleadings. In short, the pleadings and proof in the matter of recount have relevance for the purpose of determining the question of jurisdiction to permit or not to permit recount. Once the jurisdiction to order recount is found to have been rightly exercised, thereafter it is the truth as revealed by the result of recounting that has to be given effect to". A B

The law so laid down clinches the issue. On the averments made in the pleadings and on the material made available before the Court in the present case a clear case for directing a recount was made out. Certainly the election petitioner was not indulging into a roving inquiry or trying to fish out material. The High Court has also not held so. Therefore, the High Court did acquire a jurisdiction to permit a recount. Once a recount was ordered the decision of the case would depend on the result of the recount which shall have to be given effect to. C

Shri. Sanyal, the learned senior counsel for the respondent no.1, submitted that if this Court feels convinced of Rule 63 having been violated and a case of strong likelihood of the result of the election having been materially affected made out, in that case, the Court may remand the case to the High Court with a direction to the returning officer to record his satisfaction by reference to Rules 38 read with 56 and Rule 63 and then his satisfaction being subjected to judicial scrutiny by the High Court whereafter only recount may be carried out. We do not find any authority or reasoning to support such a proposition. The result of the election has been declared. The election petition has already been subjected to trial. Now, it is for the Court to form its own judicial opinion on the issues raised and act in conformity with the finding arrived at. D E F

For the foregoing reasons we are of the opinion that the High Court was not justified in rejection the prayer for permitting a recount. The judgment of the High Court is set aside. The case is remanded back to the High Court. The High Court shall permit a recount and then decide the election petition after affording the parties an opportunity of hearing and in accordance with law. The costs shall abide the result.

N.J. Appeal allowed.