

Ramesh Kumar Rana Vs. Romesh and ors.

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Court : Punjab and Haryana

Decided On : Apr-21-1999

Reported in : (1999)122PLR205

Judge : G.S. Singhvi, J.

Acts : Conduct of Election Rules, 1961 - Rules 56(7) and 63(1), 63(2) and 63(3); [Representation of the People Act, 1950](#) - Sections 80, 81, 100 and 101

Appeal No. : Election Petition No. 3 of 1996

Appellant : Ramesh Kumar Rana

Respondent : Romesh and ors.

Advocate for Def. : O.P. Goyal, Sr. Adv. and; Rakesh Gaur, Adv. for Respondent No. 1

Advocate for Pet/Ap. : J.S. Sethi, Sr. Adv.,; I.S. Balhara,; R.P. Rana,;

Judgement :

G.S. Singhvi, J.

1. Petitioner-Ramesh Kumar Rana has through this petition filed under Sections 80 and 81 read with Sections 100 and 101 of the Representative of People Act, 1951 (hereinafter referred to as the Act'), prayed for quashing the election of Ramesh (erroneously typed as Romesh in the petition) son of Sulekh Chand (hereinafter described as 'respondent No. 1') to the Haryana Legislative Assembly from 15, Gharaunda Constituency, Another prayer made by him is for being declared elected in place of respondent No. 1.

2. The petitioner, respondent No. 1 and 33 others, including 9 candidates of different political parties, filed their nomination papers for election to 15, Gharaunda Assembly Constituency. The petitioner filed his nomination as the candidate of Samta Party. Respondent No. 1 was the candidate of Bhartiya Janta Party. Shri Ram Pal (respondent No. 22) filed his papers on Congress (I) ticket. Shri Ram Krishan (respondent No. 18) was Congress Tiwari candidate. Shri Ved Parkash (respondent No. 25) represented Janta Dal. Shri Subhash (respondent No. 31) represented Shiv Sena, Shri Sube Singh (respondent No. 30) was the candidate of Communist Party of Marxist, Shri Kesho Ram (respondent No. 4) represented Bahujan Samajwadi Party and Shri Piru Ram (respondent No. 8) contested election as the candidate of Samajwadi Party. The symbol of the petitioner was 'Mashaal' (Burning Torch) and that of respondent No. 1 was 'Lotus Flower'. The counting of votes commenced on 8.5.1996 and concluded on 9.5.1996. The result of election was announced on 10.5.1996 and respondent No. 1 was declared elected by a narrow margin of 11 votes. The number of votes counted in favour of different candidates are detailed below:-

1. Ramesh Kumar Rana, Petitioner : 20,2192. Romesh, respondent No. 1 the returned candidate : 20,2303. Anguri Devi, respondent No. 2 : 1054. Om Parkash, respondent No. 3 : 4995. Kesho Ram, respondent No. 4,

BSP : 3,6706. Jafra, respondent No. 5 : 1767. Zile Singh, respondent No. 6 : 2068. Nafe Singh, respondent No. 7 : 759. Piru Ram, respondent No. 8 Samajwadi Party : 13410. Prithvi Singh, respondent No. 9 : 4211. Jogi Ram, respondent No. 10 : 7212. Parveen Kumar, respondent No. 11 : 7513. Pravesh Kumar Goyal, respondent No. 12 : 8614. Banarasi, respondent No. 13 : 10915. Balwant Singh, respondent No. 14 : 13916. Bir Singh, respondent No. 15 : 42417. Madan Lal, respondent No. 16 : 7918. Ramesh s/o Bhartu Ram respondent No. 17 : 31719. Ramkrishan (Congress Tiwari) respondent No. 18 : 8,36720. Ram Chandar, respondent No. 19 : 6921. Ram Niwas, respondent No. 20 : 21422. Ram Pal, respondent No. 21 : 8323. Ram Pal Singh, S/o Basant Singh, Congress (I) respondent No. 22 : 11,97324. Rikhi Kesh, respondent No. 23 : 12225. Bikram Singh, respondent No. 24 : 19626. Ved Parkash, respondent No. 25 Janata Dal Candidate : 6,71927. Satnam, respondent No. 26 : 21528. Satish Kumar, respondent No. 27 : 5529. Sajid, respondent No. 28 : 6130. Sukhbir Singh, respondent No. 29 : 3131. Subha Singh, respondent No. 30 (C.P.M. Candidate) : 72032. Subhash Chander, respondent No. 31 (Shiv Sena Candidate) : 3,83333. Surinder Kumar, respondent No. 32 : 4,17034. Suresh Singh, respondent No. 33 : 8235. Surat Singh, respondent No. 34 : 54

3. The petitioner has challenged the election of respondent No. 1 on the following grounds:-

(i) the counting staff was partisan and was favouring respondent No. 1.

(ii) several irregularities were committed in the counting of votes.

(iii) a large number of votes were improperly accepted in favour of respondent No. 1 materially affecting the result of election; and

(iv) the counting was done in violation of the provisions of the Act read with 'The Conduct of Election Rules, 1961' (hereinafter referred to as 'the Rules') and the guide-lines issued by the Election Commission of India for Returning Officers.

4. The afore-mentioned grounds, on which the petitioner challenged the election of respondent No. 1, are borne out from the averments made in paragraphs 10 to 24 of the petition, which are extracted below:

'10. That though Shri Romesh-respondent No. 1 was declared elected by a margin of eleven votes it was only because there was no proper counting of votes. The counting staff deputed on the counting was partisan in favour of respondent No. 1 and many irregularities were committed by them during the course of counting. The result of election was materially affected so far as the Returned Candidate was concerned by resorting to malpractices in the course of counting. The counting was done in utter violation of Election Rules, 1961 (hereinafter referred to as 'the Rules') and the result of election in so far as it concerned the Returned Candidate has been materially affected by the improper acceptance of votes in favour of the respondent No. 1 and by non-compliance of the provisions of the Act and Rules framed thereunder. The material facts are contained hereafter.

11. That the counting started on 8th May, 1996 at 8 a.m. All the contesting candidates appointed their counting agents. There were in all seven tables in one row in the counting space within the Rink-hall for the purposes of counting of votes to the Vidhan Sabha. Each table was manned by a Supervisor and Counting Assistant. The counting space was surrounded by high fence and the Counting Agents were made to sit beyond the fence. The fence was also reinforced by poles and barbed wire. The counting agents had no access to the counting tables and they could only watch the proceedings from a distance. It was impossible to have a proper check on the counting of votes. It all depended on the impartiality and fairness of the counting staff deputed on the tables. Rule 53 of the conduct of election rules casts a duty on the Returning Officer to admit the Counting Agents to the counting hall and further to permit them to watch the counting of votes on each and every table. In the instant case, all the counting agents were made to sit beyond the fence at a distance where it was not feasible to closely watch the counting of votes and serve the interest of the concerned candidate. Even the candidates were not allowed a free access to the counting tables.

12. That from the very start of counting of votes the attitude of the Returning Officer was very partial in favour of respondent No. 1 and against the petitioner. During the very first count the petitioner raised certain objections and pointed out certain irregularities in the counting of votes. It was apparent that the counting officials were partial in favour of respondent No. 1. However, the Returning Officer assured the petitioner that he will look into the matter and see that no injustice is done to the petitioner. It was merely a verbal assurance just to allay the fears of the petitioner but nothing tangible was done. Resultantly, the counting continued in the same manner as before. The petitioner kept on raising the objection about the counting of votes and the malpractices indulged in by the counting staff in favour of respondent No. 1.

13. That the ballots which were liable to be rejected according to the rules were conducted in favour of the returned candidate respondent No. 1. They were not marked by the instrument meant for the purpose. Instead, those ballots were thumb marked and received in favour of the returned candidate. According to the petitioner's estimate, such ballots which were liable to be rejected and wrongly received in favour of respondent No. 1 were more than one hundred.

14. That the matter came to a pass when on Table No. 2 in the fifth round a bundle of ballots numbering 25 which ought to have been counted for the petitioner was put in the kitty of the returned candidates. The deliberate design on the part of the counting staff was detected when it was found that the bundle of said ballot papers was covered by a one ballot paper marked in favour of the returned candidate and the rest ballot papers underneath were ballots cast in favour of the petitioner. The petitioner submitted a written application to the Returning Officer complaining about the malpractices committed by the counting staff on Table No. 2. The Returning Officer went to Table No. 2 and found that the allegation of the petitioner was found to be correct. He took out that one such bundles of ballots and counted the same in favour of the petitioner. The counting officials on Table No. 2 who were responsible for this act were shifted on Table No. 2 to other side of the hall where counting for the parliamentary seat was simultaneously going on. However, in spite of the protest no recount was done for all the five rounds which had already taken place.

15. That after the complaint of the petitioner the counting was suspended at 4.30 a.m. and was resumed only at about 9.00 or 9.30 a.m. on 9.5.1996. During the period, the counting remained suspended the Returning Officer recorded the statements of the counting officials deputed on Table No. 2 and then passed an order whereby two counting officials namely Vijay Chaudhary, Counting Supervisor and Rajvir Singh Ahlawat who were incharge of counting in Table No. 2 were shifted.

16. That other candidates also expressed their dis-satisfaction with the counting process and sent a letter through fax to Mr. Seshan, Chief Election Commission, New Delhi at 7.25 a.m. on 9.5.1996. The letter was signed by Shri Ram Niwas, Chairman, Municipal Committee, Gharaunda, Shri Subhash Sharma, Shiv Sena Candidate, Shri Kesho Ram, BSP Candidate and Sarv Shri Sajid Ali, Parveen Kumar, Suresh Kumar and Balwant Singh independent candidates.

17. That in all 3515 ballots were rejected by the Returning Officer. More than 200 ballots were such which clearly exhibited an intention to vote in favour of the petitioner. Those ballots were such where major portion of the marking was in the column against the symbol of the petitioner and as per Rule 56 it was obligatory on the part of the Returning Officer to find out the intention of the voter. The Returning Officer wrongly rejected those ballot papers, which should have been counted for the petitioner.

18. That there were certain ballot papers which were sent by the counting staff from there respective tables for scrutiny of the Returning Officer. They were such ballot papers which were liable to be rejected according to the rules. However, the Returning Officer instead of rejecting them counted those ballot papers for the returned candidate saying that though thumb mark was put against the symbol of the returned candidate by the elector there was also a mark put by the instrument meant for making the ballot papers. As such, they were to be accepted and counted for the returned candidate. The petitioner raised his objections that those ballot papers could not be accepted but the Returning Officer paid no heed to the plea of the petitioner. In all

there were more than 70 such ballot papers which were wrongly received for the returned candidate, respondent No. 1.

19. That the Returning Officer for Gharaunda Assembly Constituency was Shri Ram Karan Sharma, District Revenue Officer, Karnal. The Assistant Returning Officer was Mahender Singh Tanwar, B.D.O. Gharaunda. Quite a few counting supervisors fixed on different tables for conducting the counting were related to the Returning Officer and belonged to his brotherhood. From the very start of the counting the Returning Officer was biased in favour of the returned candidate. The petitioner raised objections time and again but it had no effect on him. The Returning Officer would not permit the petitioner and other candidates to go to the counting tables for watching the process of counting at various tables. The petitioner complained to the observers about the conduct of the Returning Officer in not permitting the candidate to go to the counting tables. The observers had a word with the Returning Officer and thereafter, the candidates were allowed to go to the counting tables but they were not allowed to stay there for proper checking. Hardly a candidate had gone to the counting tables, he would be asked to move out. The two observers appointed by the Election Commissioner of India were Shri Manoranjan Kumar and Shri Satish Chandra.

20. That the BJP candidate from Karnal for the parliamentary constituency was Shri I.D. Swami a retired I.A.S. Officer of Haryana. The Returning Officer had served under him and was under his influence. Shri Swami played a vital roll in the counting process and ultimately got the result of the election subverted in favour of the returned candidate respondent No. 1 who had actually lost in the counting of the votes.

21. When the counting started on 8th May, 1996 at 8.00 a.m. all the ballot boxes were brought to the counting hall. In the first instance, all the ballot papers were taken out from the boxes and the ballots for Vidhan Sabha and the others for parliamentary segment were separated. After counting the total ballots for the assembly seat it was announced by the Returning Officer that each round for the purposes of counting of votes would be comprising of seven thousand ballots and one thousand ballots will be placed on each table and counting done accordingly. After every round the respective tally of votes of the different candidates would be announced. Surprisingly, for the reason best known to the Returning Officer, this procedure was not adhered to. After first few rounds, the figure of seven thousands votes with one thousand votes on each table was not adhered to. In all, there were 13 rounds but after the eight round, the votes polled by each candidate round wise was not announced and the Returning Officer kept the figures with himself.

22. That inspite of all the irregularities, the petitioner was winning in the counting of votes and the Returning Officer informed the petitioner that he is winning by a margin of 187 votes and that he is filling up the necessary Forms (Forms 20 and 20-A) as required under the conduct of election rules and his result shall be declared officially after a short while. Unfortunately, at that point of time, Mr. I.D. Swami appeared on the scene. He took aside the Returning Officer and talked to him for about 10-15 minutes. Thereafter, the Returning Officer changed his stance and after preparing the forms communicated to the petitioner that he has lost the election by a narrow margin of 11 votes. It was shocking for the petitioner and his supporters.

23. That the petitioner immediately at 9.40 p.m. moved an application demanding recount. The Returning Officer would not take any decision on that application regarding recount. The petitioner complained to the observers about this matter. They advised the Returning Officer to pass an appropriate order for the recount. After dilly dallying for some time he told the petitioner that he is not granting the recount.

24. That the petitioner was informing Shri Chander Shekhar the President of the Samata Party about every development in the counting of votes. The petitioner informed him that he is winning by 187 votes as informed by the Returning Officer. Later on, when it was announced by the Returning Officer that petitioner has lost by 11 votes he again informed Shri Chander Shekhar. Shri Chander Shekhar addressed letters to Shri T.N. Seshan and Shri G.V.G. Krishnamurthi on 9.6.1996 one after, the other asking for their intervention in the matter for doing justice to the petitioner. Again on 11th May, 1996 Shri Chander Shekhar sent another letter to Shri Krishnamurthi Member of Election Commission to do something in this matter of Gharaunda Assembly

Constituency. However, no recount was ordered.'

5. Respondent No. 1 has not only challenged the maintainability of the petition on the ground of lack of material particulars but he has also contested the allegation of irregularities and violation of statutory provisions in the counting of votes by making following assertions in paragraphs 10 to 14 and 16 to 22 of the written statement:-

"10. Contents of para No. 10 of the election petition are admitted to the extent that the answering respondent was declared elected by the margin of 11 votes. However, it is vehemently denied that there was any improper counting of votes. It is denied that the counting staff was partisan. It is also denied that any irregularity was committed by the answering respondent during the course of counting. It is also denied that the result of the election has been materially affected. It is further denied that the answering respondent resorted in the malpractices during the course of counting. It is denied that the counting was done in the violation of any rule as referred to in this paragraph of the petition. It is again denied that the result has been materially affected. It is also denied that there was any improper acceptance of votes in favour of the petitioner or there was non compliance of the provisions of the Act and rules as framed thereunder. The petition is lacking the material facts.

11. Contents of para No. 11 of the Election Petition are not disputed, hence no comments. However, this type of arrangement with regard to the fences, poles, barbed wire was made throughout the areas in which the elections were held and this was done under the guide-lines issued by the Election Commission of India. No one can object to the provisions made for the re-counting. As such the process/procedure made by them were for only one reason and objective that the counting is not affected by any hooligans etc. The petitioner cannot object to the system adopted by the Election Commission of India with regard to the counting of votes.

12. That contents of para No. 12 of the election petition are wrong and incorrect, hence vehemently denied. It is incorrect that the attitude of the returning officer was partial towards the answering respondent. It is incorrect that the petitioner raised any objection and any of the irregularity was pointed out by him. It is denied that the counting officials were partial in favour of the answering respondent. The rest of the averments made in this para of the petition are denied. It is denied that the petitioner raised any objection about the counting of the votes or there was any malpractice being done by the counting staff in favour of the answering respondent.

13. That the contents of para No. 13 of the election petition are wrong and incorrect, hence denied. The petitioner has not given the material evidence and particulars which are required under the law for a trial of the election petition. It is also denied that the ballot were not marked with the instrument. It is also denied that such ballot papers have been wrongly accepted in favour of the answering respondent or they were more than 100 or any other figure. The particulars of such ballot papers have not been given.

14. That contents of para No. 14 of the election petition are wrong and incorrect, hence denied. No such thing occurred at the counting hall. However, the petitioner has attached some documents, true copies of which have not been supplied to the petitioner. It is denied that there was any deliberate design on the part of the counting staff in which it was found that the bundles etc. were marked in favour of other candidates were put in the kitty of the answering respondent. It is denied that the alleged application was ever made before the returning officer, true translated copy of which have been attached in which it has been alleged that both the counting assistants Raghbir and V.K. Chaudhary have stated that they were in the process of completing the result of 5th round and the same was not complete when the application was made and also that they had not seen the marks and had not allotted particular bundle to a particular candidate. In this view of the matter, the application was too premature and it was too pre-mature for the petitioner to think and the returning officer to come to the conclusion that there is something wrong. However, the returning officer also while rejecting the application for recounting has considered their objections very carefully and has found that

there was no substantial irregularity at the time of counting. However, it is correct that these counting officials were shifted to some other tables. It is correct that the recounting of all the five rounds took place. It is denied as suggested by the petitioner that any recounting took place in the 5th round. It is itself in the order of the returning officer that re-checking was done of the 1st, 2nd, 3rd and 4th round of table No. 2.

16. That the contents of para No. 16 of the election petition are denied for want of knowledge. It is denied for want of knowledge that the petitioner sent any fax message to the Chief Election Commissioner, New Delhi levelling allegations. The petitioner be put to strict proof regarding the allegations made in this paragraph.

17. That the contents of para No. 17 are correct to the extent that 3515 ballot papers were rejected by the Returning Officer. However, it is denied that about 200 votes as mentioned in this paragraph accepted in favour of the petitioner or any other ballot papers were wrongly rejected by the returning officer. It is denied that there are any number of votes as such which could be counted in favour of the petitioner.

18. That the contents of para No. 18 are wrong and incorrect, hence denied. It is denied that there were any kind of ballot paper which were liable to be rejected. These valid ballot papers have been counted in favour of the answering respondent. The petitioner may be talking about those ballot papers which could carry the thumb impression of the elector, but the same could be while handling the ballot papers. Even otherwise the petitioner has not given the particulars of such ballot papers. However, the acceptance of such like ballot papers are denied. It is denied that such like ballot papers were accepted and counted in favour of the answering respondent. It is denied that the petitioner raised any objection about such ballot papers and the returning officer did not hear him. It is also denied that there were 70 such ballot papers which are said to have been wrongly received in favour of the answering respondent.

19. That the contents of para No. 19 of the election petition are wrong and incorrect, hence denied. The petitioner is raising hue and cry again and again in this election petition about the facts raised by him at the time of counting. It is obvious that once a person loses an election, in order to prejudice the mind he normally raises such pleadings which have no basis at all as in the present case. That the allegations are vague and cannot be accepted for trial. The allegations are irrelevant. It is denied that the returning officer was ever biased in favour of the answering respondent. The Election Commission of India has fixed up the norms and all the candidates were to abide by the same.

20. That the contents of para No. 20 of the election petition are wrong and incorrect, hence denied. It is denied that Shri I.D. Swamy, an retired I.A.S. Officer from Haryana, now Member of Parliament from the Karnal Parliamentary Constituency, had any influence upon the returning officer. He was however, concerned about his own counting which was going on in the same hall as he was a candidate from Karnal Parliamentary Constituency and Gharaunda being the assembly segment of the Karnal Parliamentary Constituency.

21. That the contents of para No. 21 of the election petition are admitted to the extent that the counting started on 8th of May, 1996 at 8.00 a.m. As per the instructions of the Election Commission of India, the ballot papers were taken out from the boxes, then separated and the round of 7,000 votes was announced i.e., 10000 on each table. That the round-wise announcement of respective tally of votes of the different candidates was also made.

22. That the contents of para No. 22 of the election petition are wrong, incorrect and hence denied. There was no irregularity in the counting of votes. It is, denied that the petitioner was winning in the counting and he was ever informed that he won by margin of 187 votes. The answering respondent is the winning candidate and has won by the voice of the people. It is denied that the returning officer took any clue from Shri I.D. Swamy who was present being the counting centre of the parliamentary constituency also for which he was candidate of the Bhartiya Janta Party. It is denied that the returning officer ever changed his stance and told that the petitioner has lost. There is no question of petitioner and has supporters receiving any shock on the victory of the answering respondent. The victory was evident when the counting was going on.

23. That the contents of para No. 23 of the election petition are wrong, incorrect and hence denied. It is denied for want of knowledge if the petitioner made any application at 9.40 p.m. at night.

24. That the contents of para No. 24 of the election petition are wrong, incorrect and hence denied. It is denied that the petitioner was ever winning by 187 votes or he was informed by the returning officer. It is correct that the petitioner lost the election by 11 votes.

6. Respondent No. 1 filed Recrimination Petition No. 1 of 1996 dated 20.8.1996 under Section 97 of the Act and pleaded that if the High Court comes to the conclusion that his election is void, then the election of petitioner-Ramesh Kumar would also be void because of the material irregularities committed at the time of counting and re-counting of votes to his dis-advantage. In paragraph 7, it has been averred as under:-

'7. That in case this Hon'ble High Court comes to the conclusion that the election of the present petitioner and respondent No. 1 in the election petition is void, then the election of the petitioner in the election petition and the respondent in the present petition would be void and liable to be set aside because of the material irregularities committed at the time of counting and re-counting to the dis-advantage of the present petitioner and to the advantage of the respondent No. 1 which has materially affected the result in so far it concerns the election of respondent No. 1 on the following grounds, inter-alia:

(i) That the Returning Officer wrongly allowed the application for the recounting preferred by respondent No. 1. The application was frivolous and was liable to be rejected in toto. However, since the respondent No. 1 was a candidate of Samta Party, he had personal influence over the Returning Officer due to which the undue influence was exercised upon the Returning Officer and the said application was allowed. This has materially affected the result in an illegal manner, (ii) That in round No. 5, at table No. 3, 6 and 7 valid votes belonging to the petitioner have been treated to have invalid votes. These votes clearly carried the mark of the instrument used by the voters. The maximum portion of instrument was on the block of the petitioner, but they have been rejected wrongly. Such like votes are 25 in number. Thus, irregularities were committed at the time of counting which have materially affected the result. If these votes are counted again, then the petitioner would certainly have the benefit of it.

(iii) That similar discrepancies were found at different tables and the petitioner was not at all satisfied with the way the counting was being done by the staff. The votes which were wrongly counted in the name of respondent No. 1 actually belongs to the petitioner. This all happened in a utter confusion and chaos created by the counting agents of respondent No. 1. In round No. 1, the petitioner was leading at a big margin. Suddenly in second round the petitioner's votes were very less. This was basically due to the reason that the votes belonging to the petitioner were either being rejected being invalid votes on the flimsy grounds or being put in the pocket of respondent No. 1. The votes which were considered invalid by the counting staff were not put before the Returning Officer for his verdict despite of the repeated requests made by the counting agent of the petitioner. Thus the irregularities have been committed resulting into materially affecting the result.

(iv) That in all 3515 valid ballot papers have been rejected by the Returning Officer in the total counting out of which about 100 votes are as such which clearly casts the intention of the voters in favour of the petitioner. As submitted before these votes have been made invalid without any ascertainment. These votes are validly casted votes and have been polled in favour of the petitioner if these votes have been accepted in favour of the petitioner, the result would have been different.

(v) As far as the votes polled in favour of respondent No. 1 is concerned about 150 votes which have been wrongly accepted in favour of respondent No. 1 are basically invalid votes. This happened at different rounds and at different tables. These votes were containing the thumb impression on the symbol of respondent No. 1 instead were of the instrument which the voters were supposed to mark. This has resulted into material irregularity and further materially affected the result.

(vi) That out of 19 rejected ballot papers about 9 ballot papers are in favour of the petitioner and the same has been wrongly declared to be invalid votes.

(vii) That out of all the votes shown to have been secured by respondent No. 1, about 50 votes of the petitioner have been counted in favour of respondent No. 1.

(viii) That not only this the votes which have been shown to have been secured by other candidates belonging to various parties have been counted wrongly and have been shown to have been in favour of the other candidates. These votes are about 20 in number.'

7. In the replication filed by him, the petitioner reiterated his plea for invalidation of the election of respondent No. 1 by stating that the counting of votes has not been done properly.

8. On the pleadings of the parties, the following issue were framed:-

(1) Whether the petitioner has disclosed a case for scrutiny and inspection of all the ballot papers marked as well as unmarked in accordance with Rule 93 of the Conduct of Election Rules, 1961, on the allegations contained in paras 7 to 29 of the Election Petition? O.P.P.

(2) Whether the petitioner is entitled to an order of recount, of ballot papers on the following grounds:-

(i) Whether there was discrepancy of 14 ballot papers in form 20 and 20-A as alleged in para 8 of the Election Petition. If so, its effect?

(ii) Whether over 100 votes were received for the returned candidate which were void and ought to have been rejected as alleged in para 13 of the election petition?

(iii) Whether over 200 votes were wrongly rejected by the Returning Officer which ought to have been counted for the petitioner Ramesh Kumar Rana as alleged in para 17 of the election petition?

(iv) Whether over 70 votes were wrongly received for the returned candidate which ought to have been rejected as, alleged in para 18 of the election petition?

(3) Whether the petitioner has in fact secured majority of votes and, therefore, the election of the returned candidate has to be declared as void and petitioner is entitled to be declared as duly elected from Gharaunda Assembly Constituency? OPP

(4) Whether the paras 7 to 10, 12 to 14, 17 to 20, 22, to 24 and 26 of the election petition are liable to be struck off under Order 6 Rule 16 of the CPC? OPP

(5) Whether the election petition lacks the material facts and does not disclose any cause of action, if so, its effect? OPR

(6) Whether the election petition has not been properly verified, if so, its effect? OPR

(7) Whether the true copy of the election petition has not been supplied to the respondent No. 1, if so, its effect? OPR

(8) Relief.

9. By an order dated 24.11.1997, issue No. 4, 5, 6 and 7 were decided against respondent No. 1 and in favour of the petitioner. In view of that order, issues No. 1, 2 and 3 survive for consideration.

10. The petitioner examined himself as P.W.1 and got recorded the statements of Narendra Nath Bhatolia (P.W.2), Balwant Singh (P.W.3), Suresh Singh (P.W.4), Bhagwan Dass Gandhi (P.W.5), Dilawar Singh (P.W.6), Surinder Malik (P.W.7), Baljeet Singh (P.W.8), Naresh Chugh (P.W.9), Parveen Kumar (P.W.10), Pritam Singh

(P.W.11), R.N. Verma (P.W.12), Chander Shekhar (P.W.13) and Ved Parkash (P.W.14). Documents marked as Exs.P.1 to P.22 have also been produced. After closure of evidence of the petitioner, statements of respondent No. 1-Ramesh Kashyap (R.W.2) and his witnesses, namely Bhagwan Dass Gandhi (R.W.1), Ram Pal Kashyap (R.W.3), Rakesh Kumar (R.W.4) and R.K. Sharma (R.W.5) were recorded.

11. Before dealing with the respective contentions, I consider it useful to make reference to the evidence produced by the parties.

12. In his statement, P.W.1 Ramesh Kumar has supported the averments made in the election petition. The salient portions of his examination-in-chief and cross examination are extracted below:-

'Examination-in-chief:

All the candidates had appointed their counting agents, Shri Dilawar Singh, Sham Rana, Shri Baljit Singh, Shri Satpal Singh, Shri Subhash Chand, Shri Ramesh Kathuria were my counting agents. In all there were 35 candidates. Each of them had appointed counting agents.....In that Hall, barbed wire had been affixed on the iron angles. On one side of the barbed wire were the counting tables and the counting agents of the candidates were made to stand on the other side. In that very hall, counting of votes for the Parliamentary Constituency of Karnal and Assembly Constituency of Gharaunda was undertaken. On one side, seven counting tables were arranged for counting of votes of Parliamentary Constituency and on the other side, seven counting tables were arranged for the Assembly Constituency.....Due to the barbed fence which was covered by net it was not possible to watch the counting on the other side. Almost all the candidates and their counting agents objected to the counting arrangement and requested the Returning Officer to give them the facilities to watch the counting properly but their request was not heeded.....The Returning Officer Shri Ram Karan Sharma wanted to help the candidate of Bhartiya Janta Party under the influence of Shri Bansi Lal because he was responsible for getting him promoted to the post of Naib Tehsildar. He also acted under the influence of Shri I.D. Swami who was a candidate of Bhartiya Janta Party from Karnal Parliamentary Constituency. Shri Swami is a retired officer of the Indian Administrative Services and Shri Ram Karan Sharma had worked under him while the former was posted as S.D.M., Karnal.....During the 5th round of counting my counting agent told me that some serious irregularity is being done on table No. 2.I do not remember the name of the persons who were doing counting on table No. 2. However, it was Dilawar Singh, who was one of my counting agent who had informed me about the irregularity in the counting on table No. 2. This happened at about 4.00 a.m. on 9.5.1996. My agent told me that in the counted bundles the ballot marked in favour of B.J.P. candidate was put at the top of bundle consisting of the ballots marked in my favour and in this manner the entire bundle was being counted in favour of the candidate of Bhartiya Janta Party. On coming to know of this I made a request for recounting of votes of all the five bundles. The Returning Officer rejected my request. As a mark of protest all the candidates except the respondent No. 1 protested and boycotted the counting, as a result of which the counting remained suspended for 4.1/2 hours. Thereupon, the State observer and Returning Officer Rajiv Arora came on the scene. Shri Arora assured that counting of ballots of all the five rounds may be redone so far as table No. 2 is concerned in view of the allegations of grave irregularities in the counting of votes on that table. They also assured that if any irregularity is detected in the counting of votes on table No. 2 then recount of all the ballots will be got done. The Returning Officer took the ballots of table No. 2 and got them counted on his table. Then it was found that one bundle containing 24 ballots marked in my favour was counted in favour of respondent No. 1 by putting one ballot bearing the mark in his favour at the top of the bundle. Thereafter, all the ballots which had been counted on table No. 2 were recounted and it was found that three ballots marked in my favour were not included in the total ballots counted in my favour. These ballots have been counted in favour of respondent No. 1.....I also requested to change the counting parties for the purpose of a free and unbiased counting because the margin of votes counted in my favour and in favour of respondent No. 1 was very small. The Returning Officer did not accept my request for recounting of all the ballots and said that I may make appropriate application at the end of the counting. My request for the change of staff was also accepted only partially, and the counting party of table No. 2 was shifted from assembly segment to Parliamentary Constituency and members of the counting party

of the parliamentary constituency were shifted to table No. 2.....The counting of ballots continued upto till about 9.15 to 9.40 p.m. on 9.5.1996. My agents informed me that a large number of votes which bore thumb marks and not the mark of the prescribed seal had been counted in favour of respondent No. 1. About 200 ballots which bore mark of seal (major portion against my symbol but a small portion of the seal appeared against the name and symbol of respondent No. 1 which should have been counted in my favour were counted in favour of the respondent No. 1. About 70 ballots which bore the mark of seal as well as thumb impression and which should have been rejected were counted in favour of the respondent No. 1 ... At the end of counting, I was told by the Returning Officer that I have won the election by 187 votes. The counting agents and other candidates were asked to leave the place by saying that I have won the election and the result is going to be announced shortly after completion of the formalities. After some time, the Returning Officer went to the cabin and make a phone call. Thereafter, Shri I.D. Swami, who was candidate of Bhartiya Janta Party from the Parliamentary Constituency of Karnal, came to the counting hall, Shri Swami talked to the Returning Officer for about 2 to 3 minutes in confidence. Thereafter, the Returning Officer declared the respondent No. 1 Shri Ramesh as elected by a margin of 11 votes.

Cross-examination

The statement contained in para 11 of the election petition that there was sitting arrangement for counting agents on the other side of the fence is correct and what I meant by stating that no provision was made for sitting of the counting agents was that no proper arrangement was made for sitting of the counting agents. Whatever, I remembered at the time of filing of the election petition has been incorporated therein. Some points which I could not remember at that time have been stated by me orally yesterday and today.....The figure of 100 ballots which do not bear the mark of seal has been given by me on the basis of information given by my counting agents. They used to tell me orally about the number of ballots counted in favour of the respondent No. 1 though they did not clear the mark of the prescribed seal. I cannot say as to in which the particular round how many such ballots were found and which of the counting agent gave me information of the counting of such ballots in favour of the respondent No. 1. The figure of 200 ballots about, which I have said, were wrongly detected even though they bore mark of the prescribed seal in my favour has been given by me after having seen the ballots which were brought on the table of the Returning Officer for the purpose of recount. I cannot give the round number in which these ballots were found.....These figures have been collected by me from different rounds. I was making a note of the number of ballots which were rejected in different rounds although the same should have been counted in my favour. I cannot give the round number in which 70 ballots were wrongly counted in favour of the respondent No. 1 but I was making a rough note of such ballots found in different rounds. I have not brought that rough note in the Court. That rough note is now not available with me..... I did not give anything in writing to the Returning Officer regarding the arrangements made for counting of the votes. I do not remember the number of votes round-wise wrongfully accepted in favour of the respondent No. 1 and round-wise wrongfully rejected, though they should have been counted in my favour. I cannot give the table-wise account of such votes In the fax messages sent to Shri Chandra Shekhar and Shri T.N. Seshan, the details of the above mentioned irregularities had not been mentioned. I only intimated about the irregularities being committed in the counting of the votes. It was quite natural for Shri I.D. Swami to remain present in the counting hall as he was a candidate for the parliamentary election. Shri Swami left the venue. He was called back by the Returning Officer.'

13. P.W.12-Narendra Nath Butolia, who was working as Section Officer in the Election Commission of India at the relevant time, brought the records and tendered in evidence Ex.P.9 to P.13 and in the cross-examination, he stated that the complaint made by the petitioner was rejected because the Deputy Election Commissioner did not find any force in it.

14. P.W.13-Balwant Singh, who was himself a candidate, has supported the statement of P.W.1-Ramesh that counting was not done properly and one bundle containing one ballot in favour of B.J.P. candidate and the remaining ballots of Samta Party were counted in favour of B.J.P. candidate and the Returning Officer was supporting respondent No. 1. He has also stated that the counting was halted for 4.1/2 hours. The further

statement of this witness is that at the end of counting, the Returning Officer stated that the petitioner was winning by 187 votes but thereafter Shri I.D. Swami, B.J.P. candidate for Karnal Parliamentary Constituency, came and after talking with him, Returning Officer declared respondent No. 1 elected by 11 votes. Some portion of the cross-examination of P.W.3 are extracted below:-

'None of the candidates including myself was allowed to go near the counting tables. I had seen the irregularities committed on counting table No. 2. When the matter was brought to the notice of the Returning Officer.....I cannot say whether the Returning Officer was making entries in Form No. 20 at the end of each round. It is wrong to suggest that the Returning Officer had not told the candidates that Shri Ramesh Kumar Rana was winning by a margin of 187 votes.'

15. Suresh Singh-P.W.4 who was also a candidate in the election, has made similar statement supporting the case of the petitioner. The relevant portions of his statement and cross-examination are extracted below:-

'Examination-in-chief:

In the 5th round of the counting the agent of Samta Party candidate told that there were serious irregularities in the counting. He pointed out that the votes were not being counted properly. This was followed by commotion and it was found that in one bundle of 25 votes, one ballot was of Bhartiya Janta Party candidate and the remaining 24 votes were of Samta Party candidate, but all had been counted in favour of Bhartiya Janta Party candidate. Three more ballots of Samta Party candidate were found to have been counted in favour of Bhartiya Janta Party candidate. The counting remained suspended for about 4.1/2 hours. ... At the end of the counting the Returning Officer said that Samta Party candidate was winning by 187 votes. Shri Ramesh Kashyap congratulated the Samta Party candidate. Thereafter, Shri I.D. Swami, B.J.P. candidate for Karnal Parliamentary Constituency came at the spot. He talked to the Returning Officer. Thereafter, the Returning Officer declared Shri Ramesh Kashyap elected by a majority of 11 votes.

Cross-examination:

We were not allowed to go inside where the counting was taking place, but my election agent was present. I had also gone inside during the counting of 5th round at table No. 2. All the candidates went inside when it was told that irregularity had been committed in the counting of ballots. Then the Returning Officer came and it was found that irregularity had been committed in counting of one bundle. I came back from the counting hall at about 10.00 p.m. on 9.5.1996. By the time I had left the result had been declared.'

16. P.W.6-Dilawar Singh, P.W.7-Surinder Malik, P.W.8-Baljeet Singh, who were counting agents of the petitioner. P.W.9-Naresh Chugh, who was counting agent of another candidate-Shri Sajid Ali, P.W.10 Parveen Kumar, who was election agent of Shri Suresh and P.W.11-Pritam Singh, who was counting agent of Kanwar Ram Pal Singh (Congress-I candidate) have unanimously stated that the counting was conducted on 7 tables and as per counting arrangement, there was barbed wire fencing 'jails' between the counting officers and the counting agents and that sitting arrangement made for counting agents was highly inadequate. They have also stated that in order to see the counting, the agents had to stand up. They are also unanimous in their assertion that in the 5th round of counting, one bundle of 25 ballots was counted in favour of B.J.P. candidate, although only one of the votes was cast in his favour and the remaining were cast in favour of Samta Party candidate. They have supported the statements of other witnesses of the petitioner that the counting remained suspended for 4.1/2 hours and further that initially the petitioner was declared elected by 187 votes but after Shri I.D. Swami came inside the hall, the Returning Officer declared respondent No. 1 elected by 11 votes.

17. P.W.13-Chander Shekhar tendered letters Ex.P.10 to P.12 which were addressed by him to Shri G.V.G. Krishnamurthy, one of the Election Commissioners, and Shri T.N. Seshan, Chief Election Commissioner respectively to bring to their notice the alleged irregularities committed in the declaration of result of the election held for 15, Gharaunda Assembly Constituency.

18. R.W.1-Bhagwan Dass Gandhi, who was working as Election Tehsildar, Karnal at the relevant time, tendered Ex.R.W.1/1 to Ex.R.W.1/11 (round-wise counting certificates), Ex.R.W.1/12 to Ex. R.W.1/160 (original Form 16 Part I) and Ex.R.W.1/161 to Ex. R.W.1/312 (Form, 16 Part II number 152), and Ex.R.W.1/313 which is said to be the video cassette film on which the counting of votes was picturised.

19. Respondent No. 1-Ramesh Kashyap supported the statement made in the written statement. The relevant portions of his statement are extracted below:-

'The counting had taken place on 8.5.1996 at Abhimanyu Shakting Hall, Karnal. Shri Ram Karan Sharma, DRO, was the Returning Officer, The counting started at 8.00 a.m. The ballots were taken out of the boxes and mixed up. Thereafter, bundles of 25 votes were prepared. This process continued till the evening of 8.5.1996. There were 7 counting tables. On all counting tables, the agents of the candidates were present. The counting was completed in 13 rounds. At the end of each round the Returning Officer used to declare the number of valid votes secured by each candidate. Ex.R.W.1/1 to Ex.R.W.1/11 bear the signatures of some of the candidates. Of these, R.W.1/2, R.W.1/4 to R.W.1/10 bear my signatures. I used to sign these forms on the asking of the staff against my own name. Shri Ramesh Rana when asked to sign these forms used to say that he would sign if he is declared elected.....On one occasion, Shri Ramesh Rana had complained to the Returning Officer regarding the irregularity in the counting. He stated that there were irregularities in the counting on table No. 2 in fifth round. After considering the complaint of Shri Ramesh Rana, the Returning Officer summoned all the ballots from table No. 2 and changed the staff. The Returning Officer got the ballots of all the five rounds of table No. 2 re-counted. After fifth round none of the candidates complained against the counting on table No. 2. There was no complaint by any candidate in respect of counting of ballots on other tables during the entire counting. The counting was completed at about 9.00 to 9.15 p.m. on 9.5.1996. In the initial rounds of counting, I was leading but in the later rounds, I trailed vis-a-vis Shri Ramesh Rana. After 8th round, my votes became more. At the end of 13th rounds of counting, I was leading by 11 votes.....The counting of votes of Parliamentary Election finished about 2 hours prior to the completion of counting of votes in respect of Assembly Constituency. Shri I.D. Swami was present in the counting hall when the counting of Parliamentary Election was over. He was also present when the counting of votes completed in respect of Assembly Constituency. Shri I.D. Swami came out of the hall with me. Shri I.D. Swami did not talk to the Returning Officer.....As per the sitting arrangement, there was a fence (jali) between the counting tables and the agents of the candidates. No body had complained that the counting of votes was not visible across the 'jali'. The candidates were sitting near the table of the Returning Officer. A video cassette was prepared by the people of the Election Office ... It is correct that there was some disturbance in the counting hall at about 4.30 to 5.00 a.m. This was due to the alleged irregularity in the counting of votes on table No. 2. It is wrong to suggest that the disturbance in the counting hall was continuing right from the beginning. (The witness was read over the para 7(3) of the Recrimination Petition. He further stated that whatever has been said today in the Court is correct). It is correct that during the course of counting on table No. 2 one bundle was having one vote of mine and the remaining votes of Samta Party candidate but this was detected during the course of counting. But no final statement regarding the total votes counted had been prepared and all the votes were taken on the table of Returning Officer on the complaint of Shri Ramesh Rana. It is wrong to say that the disputed bundle was put in my bundles. It is correct that the Returning Officer passed an order for recounting of votes of all the five rounds of table No. 2.....It is correct that Shri I.D. Swami was a member of the All India Service before he had contested the election to the Parliament and that he had retired as Deputy Commissioner, I do not know whether the Returning Officer was a one time subordinate of Shri I.D. Swami. After the declaration of the result of the counting of votes of Parliamentary election, the candidates and their counting agents left the hall. However, Shri I.D. Swami stayed back because he is a leader of Bhartiya Janta Party to which I belong. It is correct that Shri I.D. Swami was not my counting agent and I had not authorised him to remain present in the counting hall on my behalf. However, his presence in the hall was justified because he is a leader of our party and was a candidate in the Parliamentary election of which Gharaunda constituency is one of the segments.....Forms 20 and 20-A were prepared in the presence of all the candidates including myself. The cuttings and over-writings in these forms may have been made by the

staff. I have no knowledge of them. It is correct that total votes counted were 87136. I do not remember whether the total number of votes polled was 87150. I cannot say why only 11 forms 21-A containing round-wise counting of votes were counted in 13 rounds. It is wrong to suggest that Shri Ramesh Rana refused to sign on the ground that the counting was not done properly. In fact, he had said that he would sign the forms only if he is declared winner. I cannot say whether Shri Ramesh Rana had signed forms showing the counting of votes in first two rounds. It is wrong to suggest that Shri I.D. Swami had left the counting hall after the declaration of the result of Parliamentary constituency and he was called hack. It is totally wrong to say that the Returning Officer had told Shri Ramesh Rana that he had won the election by 187 votes.'

20. During cross-examination, R.W.2-Ramesh Kashyap was confronted with the contents of paragraphs 7(ii) to 7(vii) of the Recrimination Petition. After reading out the contents of these paragraphs, he stated that whatever he was stating in the Court is correct.

21. R.W.3-Ram Pal Kashyap who was counting agent of respondent No,1 on table No. 2, admitted that in the 5th round of counting an objection was raised by the counting agent of Samta Party candidate that his ballots were being mixed up with those of the candidate of Bhartiya Janata Party. He also admitted that the ballots of 5th round of table No. 2 were re-counted and thereafter the counting remained suspended for 2 to 3 hours and then there was no objection of any type.

22. R.W.4-Rakesh Kumar is also counting agent of respondent No. 1. He was deputed on table No. 5. In cross-examination, this witness has admitted that the counting remained suspended for some time but expressed his ignorance about other events including the raising of objection regarding the irregularities in the counting of votes.

23. The last witness of respondent No. 5 is R.W.5-R.K. Sharma, who was the Returning Officer. The following are the relevant extracts of his examination-in-chief and cross-examination:

'Examination-in-chief:

On 9.5.1996, Shri Ramesh Rana made a complaint at about 4.00 a.m. regarding the irregularities in the counting of ballots. The complaint was made in writing. I have seen the complaint which is marked as Ex.P.16, This was given to me by Shri Ramesh Rana. After receiving the complaint, I summoned the ballots of table No. 2 on my table. At that time, counting of table No. 2 was going on. I got the ballots of table No. 2 counted in my presence. During that counting, it was revealed that one bundle of votes which contained 24 votes of Shri Ramssh Rana and one vote was of Shri Ramesh Kashyap, was counted for Shri Ramesh Kashyap. At that time the final counting had not been done. I got the counting turned to the satisfaction of Shri Rana and also changed the counting staff of table No. 2. On the oral request of Shri Ramesh Rana I also got the ballots of four rounds counted At the end of each round the number of votes polled by various candidates were written on the black board. I also used to get the signatures of all the candidates on Form No. 16 at the end of each round. Exs.R.W.1/1 to R.W.1/11 are those forms. Shri Ramesh Rana signed only R.W.1/1 but did not sign the other forms by saying that I will put my signatures if I, win the election else I will file the election petition.....The doubtful votes used to be sent on my table. I used to take a decision in respect of each doubted ballot after showing the same to the candidates. At the end of counting result sheet was prepared showing the total number of votes polled by the candidates. This was shown to the candidates and only thereafter Shri Ramesh Rana submitted the application Ex.P.20, Ex.P.15 is the final result sheet.

Cross-Examination

It is not correct to say that counting of votes of Assembly Constituency remained suspended for four to four and half hours. Only in respect of table No. 2 the votes of 5th round were counted in my presence.....The candidates of Parliamentary Election left the counting hall after the counting was over. After this the witness stated that Shri I.D. Swami remained sitting in the counting hall. It is correct that I had worked as Naib Tehsildar in the year 1980-81 under Shri I.D. Swami.....On receiving the complaint I summoned all the ballots

of table No. 2 in respect of round No. 5 to my table and counted them in the presence of candidates including Shri Ramesh Rana. It is correct to say that one of the bundle had one vote of Shri Ramesh Kashyap at the top and the remaining 24 votes were of Shri Ramesh Rana.....It is correct to say that there was a lot of noise in the counting hall during 5th round of counting and the observer had also come. The Deputy Commissioner had also come in the counting hall. It is not correct to say that the candidates had demanded recount of the ballots of all the tables. Only Shri Ramesh Rana requested for recount of the ballots and I got the ballots of B.J.P. candidates. I got the ballots of all the candidates counted in respect of table No. 2. This I had done after the Deputy Commissioner and the observer told me to do so. It is not correct to say that during the recount, it was found that three ballots which should have been counted in favour of Shri Ramesh Rana had been counted in favour of Shri Ramesh Kashyap. Three votes of B.J.P. candidate which were liable to be rejected but were earlier counted for the B.J.P. candidate. Similarly, one rejected vote was found from the bundle of Shri Ramesh Rana. From the second round of the counting, one ballot which was wrongly counted in favour of B.J.P. candidate but which was meant for congress candidate was counted in favour of congress candidate. One ballot of B.J.P. candidate was found rejected. Similarly, one ballot of Shri Ramesh Rana was found as rejected ballot.....It is correct that Form 16 was prepared only in respect of 11 rounds. The forms in respect of two rounds was not filled because of the tense situation in the counting hall. One Shri Mohinder Singh Lather who was a candidate from Shahabad Assembly Constituency had entered the counting hall and out of his fear the counting party left their tables. This was the reason for not filling the form 16 in respect of 2 rounds. Then the Deputy Commissioner came in the counting hall and asked Shri Mohinder Singh to leave the counting hall.....It is correct that the result of election was compiled without the form 16 of round No. 12 and 13. The witness then said that I had compiled the result on the basis of results received from all the counting tables.....It is correct that I did not make random checking of the 5% valid votes. This was due to the rush of work because I was Returning Officer for the Assembly as well as for the Parliamentary Election. I did not make any test check of 5% ballots.....It is wrong to say that I had permitted the candidates for going to the tables. I had only restrained them from touching the ballots papers. Shri Ramesh Kashyap did not make any complaint about the mode of counting of votes. It is not correct to say that there was a lot of noise in the counting hall during the entire period of counting. Only in round No. 5 there was some noise.....The witness was shown page No. 1 of Form 20-A. He agreed in the presence of the learned counsel Shri Sethi that it contains some cuttings and over-writings. It is correct to say that on page 2 there are over-writings at 1.2 places. On other pages also, there are some cuttings and over-writings. It is correct that there is a difference of 14 votes between the figures total votes entered in Form 20-A and the votes which were originally counted plus the postal ballots. In the initial counting there was 87087 votes and 63 votes were received by post (postal ballot papers), which comes to 87150 and the total votes counted were 87136. The form 20-A has been filled by the members of the staff who were deputed for preparing the result.....I did not ask Shri I.D. Swami to leave the counting hall after the counting of votes of the Parliamentary Constituency had finished because he was a candidate from the Parliamentary Constituency from Karnal. Shri I.D. Swami could remain in the counting hall because the counting of ballots of the Assembly and the Parliamentary Constituencies, was taking place simultaneously. I know who can remain the counting hall and Shri I.D. Swami remained in the hall because the result of the counting of votes of Parliamentary Constituency had not been sent to the returning officer (Deputy Commissioner). It is wrong to suggest that Shri I.D. Swami had any influence on me.....It is wrong to say that I had told to Shri Ramesh Rana that he was winning and I had asked the counting agents to leave the hall. Mr. Mohinder Singh Lathur consulted Shri Ramesh Rana about the declaration of result but till then the result had not been compiled. The result was compiled after Shri Mohinder Singh had come in the counting hall. It was at 9.30 p.m. It is correct that the counting was concluded before 9 p.m. and the counting work on all the tables had finished and the counting staff was with me. The counting staff had come out of the counting hall due to the terror of Shri Mohinder Singh but the staff engaged in the compiling of the result was present. It is wrong to say that I declared Shri Ramesh Rana elected and after all had left the counting hall. I manipulated the result to declare Shri Ramesh Kashyap as elected.'

24. At this stage, it will also be useful to refer to the documentary evidence produced by the parties. Ex.P. 17 is

the order dated 9.5.1996 passed by the Returning Officer on the application Ex.P.16 submitted by the petitioner to him with the request that there were serious irregularities in the counting of votes on table No. 2. On receipt of the complaint, the Returning Officer recorded the statements of V.K. Chaudhary and Rajbir Singh, two counting assistants (Ex.P.18 and Ex.P.19), and then he passed order for re-count of the ballots of all the five rounds. Ex.P.20 is the application submitted by the petitioner for re-count of the ballots after the completion of the counting. Ex.P.21 is the order passed by the Returning Officer on that application. Ex.P. 15 is Form 20 containing the statement of votes found in ballot boxes and the votes counted in favour of various candidates. Ex.P.6 is the copy of the result sheet. Ex.P.P.7 is the copy of Recrimination Petition filed by respondent No. 1 Exs.P.8 and P.9 are the photostat copies of Fax message sent to the Election Commissioner. Exe.P.8/1, P.8/2 and P.91 are the receipts of fax messages. Ex.P.10 to Ex.P.12 are the copies of the letters written by Shri Chander Shekhar to the Chief Election Commissioner and the Election Commissioner bringing to their notice the irregularities allegedly committed in the counting of votes. Ex.P.13 is the report of the observers. Ex.P.14 is the decision taken by the Deputy Election Commissioner on the complaints sent in the Form of fax messages.

25. Shri M.J.S. Sethi, Senior Advocate, for the petitioner extensively referred to the pleadings and the evidence and argued that the prayer of the petitioner for inspection and re-count of the votes should be granted because grave irregularities were committed during the counting of votes. Learned counsel laid emphasis on the fact that one bundle of 25 votes which consisted of 24 votes polled in favour of the petitioner were counted in favour of respondent No. 1 and the Returning Officer (R.W.5) passed the order of count of the fifth round of counting in respect of table No. 2 only after the intervention of the Election Supervisor and the Deputy Commissioner, Karnal. He pointedly drew my attention to the following irregularities:

(a) The Returning Officer did not make arrangements of counting in a manner which could enable the counting agents a clear view of the counting process. He pointed out that due to the barbed fencing and jalis, the counting agents could not avail the opportunity available to them under Rule 56(3) of the Rules,

(b) The Returning Officer did not adhere to the instructions issued by the Election Commission about the preparation of check memo by checking 5% of the valid votes and requirement of maintaining accounts of votes in Form 16 and Form 20.

(c) The Returning Officer compiled the result of counting and declared respondent No. 1 as elected without ensuring that Form 16 is filled up in respect of all the rounds. He made particular reference to the admission made by the Returning Officer that Form 16 in respect of rounds No. 12 and 13 was not at all filled.

(d) There have been cuttings and over-writings on all pages of Form 20 in which entries regarding the votes have been done,

(e) The Returning Officer did not inform the Election Commission of India about the suspension of counting for 4 to 4-1/2 hours, about the change of counting assistants of table No. 2, about the presence of Shri I.D. Swami in the counting hall even after two hours of the completion of counting of votes of parliamentary constituency, about the alleged entry of Mahinder Singh Lather in the counting hall and about non-preparation of Form 16 for round Nos.12 and 13.

26. Learned counsel submitted that these irregularities and violation of the statutory rules are sufficient to constitute a prima facie case for inspection and re-count of ballots. Shri Sethi also referred to the discrepancy of 14 votes (87,136 polled and 87,150 recorded in Form 20-A) and submitted that failure of the Returning Officer to explain this discrepancy should also be treated as a valid ground for inspection and re-count of the votes keeping in view the fact that respondent No. 1 has been declared elected by a narrow margin of 11 votes. Learned counsel assailed the order passed by the Returning Officer on the application filed by the petitioner under Rule 63(2) by arguing that the reason assigned by him is wholly untenable. Shri Sethi argued that as the Returning Officer has not held the application to be frivolous or unreasonable, he did not have the jurisdiction to reject the same in the face of the fact that the counting had remained suspended for 4 to 4-1/2

hours and the re-counting done in pursuance of the order Ex.P.17 passed by him revealed that one bundle of 25 votes was counted in favour of respondent No. 1, though it contained 24 votes polled in favour of the petitioner, one invalid vote was counted in favour of the respondent No. 1 and the other in favour of the petitioner and also that three votes polled in favour of the petitioner and one polled in favour of Congress candidate were counted as the votes of respondent No. 1.

27. Learned counsel relied on *Swami Rameshwaranand v. Madhu Ram and Anr.*, 40 E.L.R. 281; *Nathu Ram Mirdha v. Gordhan Soni and Anr.*, 38 E.L.R. 16; *Arun Kumar Bose v. Mohd. Furkan Ansari and Ors.*, A.I.R. 1983 S.C. 1311; *K. Shradha Devi v. Krishna Chandra Pant and Ors.*, A.I.R. 1982 S.C. 1569; *Sehti Roop Lal v. Malti Thapar Mrs. and Ors.*, (1994)2 S.C.C. 579; and *S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra and Ors.*, A.I.R. 1980 S.C. 1362. Learned counsel further submitted that the facts pleaded by the petitioner are sufficient to order of inspection of the votes and their re-count.

28. Shri Satya Pal Jain, Senior Advocate appearing for respondent No. 1 pleaded for dismissal of the petition by arguing that the petitioner has failed to plead material facts justifying an order of re-count. He submitted that the bald allegations made in the petition about the commission of irregularities in the counting of votes and the discrepancy of 14 votes cannot be made ground for granting the inspection of the ballots because the petitioner has failed to plead and prove that 14 votes were polled in his favour and if counted, they would have changed the result of election. Shri Jain laid considerable emphasis on the fact that the complaint Ex.P.16 made by the petitioner related to table No. 2 only and after the passing of order Ex.P.17, no further complaint was made by the petitioner or any other candidate about any irregularity in the counting of votes till the filing of application for re-count at the end of counting. Shri Jain submitted that even in the letters sent by Shri Chandra Shekhar to the Election Commissioner/The Chief Election Commissioner, there is no reference to the irregularities committed on any other table except table No. 2. Shri Jain submitted that the evidence produced by the petitioner is not sufficient to prima facie prove any irregularity in the counting of votes. He submitted that the rough notes allegedly prepared by the petitioner on the basis of information given by his counting agents have not been produced. The counting agents of the petitioner and other candidates, who were deputed on table No. 2 have not been produced. Shri Subhash Sharma, scribe of the application sent to the Chief Election Commissioner, has also not been produced. Learned counsel submitted that the allegation made in paragraph 12, 13, 14 and 15 of the election petition cannot be treated to have been proved because the same are vague and no evidence has been produced to substantiate the same. He placed reliance on Ex.P.13 i.e., the report of the general observer which was sent to the Election Commission and submitted that in view of this report, the theory propounded by the counsel for the petitioner regarding the irregularities in the counting should be rejected. Shri Jain then argued that the petitioner's plea regarding improper rejection of ballot papers made in para 17(3) of the petition should not be accepted because no details have been furnished regarding the number of ballots, the round, the table and the time regarding improper rejection have been given and it has not been proved that any request was made to the Returning Officer under Rule 56(3) for grant of permission to inspect the ballots. Shri Jain supported the rejection of the application submitted by the petitioner under Rule 63(2) by arguing that the application did not contain any ground for re-count. He submitted that mere dissatisfaction of the petitioner with the result of election cannot be a ground for ordering re-count and even though that order does not in so many words say that the application is frivolous and unreasonable, on merits the order cannot be described as contrary to Rule 63(3) of the Rules. Shri Jain also justified the presence of Shri I.D. Swami in the counting hall by pointing out that as a candidate of the B.J.P. he had the right to remain in the hall till the declaration of the result of the counting for Parliamentary Constituency. Shri Jain relied on the following judgments:-

(i) *S. Baldev Singh v. Teja Singh Swatantra (Dead)*, A.I.R. 1975 S.C. 693;

(ii) *Shri Satyanarain Dudhani v. Uday Kumar Singh*, A.I.R. 1993 S.C. 367;

(iii) *Mahant Ram Parkash Dass v. Ramesh Chander*, A.I.R. 1998 P&H; 146; and

(iv) Ram Avtar Singh Bhadauria v. Ram Gopal Singh, A.I.R. 1975 S.C. 2182.

29. In order to appreciate the respective contentions in a correct perspective, it will be useful to refer to the relevant statutory provisions i.e., Sections 97, 100(1) and 101 of the Act and Rules 56(3), (4) and (7) and 63(1), (2) and (3) of the Rules, which are reproduced below:-

'Section 97 of the Act.

97. Recrimination when seat claimed.- (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 High Court) 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(1) of the Act.

100. Grounds for declaring election to be void.- (1) Subject to the provisions of sub-section (2) if [the High Court] 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 for the Government of Union Territories Act, 1963 (20 of 1963);
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 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 or 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 of this Act or of any rules or orders made under this Act,

[the High Court] shall declare the election of the returned candidate to be void.'

'Section 101 of the Act.

101. Grounds for which a candidate other than the returned candidate may be declared to have been elected.- 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 High Court] 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 High Court] shall, after declaring the election of the returning candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected.'

'Rule 56(3), (4) and (7) of the Rules.

56. [Counting of Votes].

(3) Before rejecting any ballot paper under sub-rule (2), the returning officer shall allow each counting agent present a reasonable opportunity to inspect the ballot paper but shall not allow him to handle it or any other ballot paper.

(4) The returning officer shall endorse on every ballot paper which he rejects the word 'Rejected' and the grounds of rejection in abbreviated form either in his own hand or by means of a rubber stamp and shall initial such endorsement.

(7) After the counting of all ballot papers contained in all the ballot boxes used at a polling station has been completed,-

(a) the counting supervisor shall fill in and sign Part-II Result of Counting, in Form 16, which shall also be signed by the returning officer; and

(b) the returning officer shall make the entries in a result sheet in Form 20 and announces the particulars.'

'Rule 63(1), (2) and 93) of the Rules.

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.

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

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

30. An analysis of the provisions extracted above, show that the election of a returned candidate can be set aside on any of the grounds specified in Section 100 of the Act, one of which is that the result of the election has been materially affected by the improper reception, refusal or rejection of any vote or the reception of any vote which is void or by any non-compliance with the provisions of the Constitution or of the Act or any rules or orders made under the Act. The scope of enquiry in a petition filed for setting aside the election (simplicitor) on the grounds specified in Section 100(1)(d)(iii) and (iv) is limited to the determination of issue whether any vote has been improperly received in favour of the returned candidate or any vote has been improperly refused or rejected in regard to any other candidate or there has been non-compliance of the provisions of the Constitution or the Act or the Rules or orders made under the Act and any one of these factors has materially affected the election of the returned candidate. However, in a composite election petition wherein the petitioner claims that the election of the returned candidate is void and also asks for a declaration that he or some other persons has been duly elected, the returned candidate can recriminate and raise counter pleas in support of his case that the other person in whose favour a declaration is claimed in the petition cannot be said to be validly declared. For raising this plea, the returned candidate has to serve a notice under Section 97(1). Then the Court is required to enquire into not only the case made out by the petitioner but also the counter claim made by the returned candidate.

31. Rule 56(3) casts a mandatory duty on the returning officer to give a reasonable opportunity of inspection to the counting agents before rejecting any ballot paper under Rule 56(2). On each rejected ballot paper, he has to record the word 'Rejected' and the ground of rejection in abbreviated form. Rule 56(7) lays down that after the counting of all ballot papers contained in ballot boxes used at a polling station has been completed, the Counting Supervisor shall fill in and sign Part-II-Result of Counting in Form-16. The same is also required to be signed by the Returning Officer who is further required to make entries in a result sheet in Form-20 and announce the particulars. Rule 63, which deals with re-count of votes, enjoins a duty on the Returning Officer to record in the result sheet in Form-20 the total number of votes polled by each candidate and announce the same. After this, a candidate can apply in writing to the Returning Officer to re-count the votes either wholly or in part by stating the grounds on which he demands such re-count. In the absence of candidate, his election agent or any of his counting agents can also make such application. Sub-rule (3) of Rule 63 requires adjudication of such application by the Returning Officer who may allow the application in whole or in part or may reject it in toto if he finds it to be frivolous or unreasonable. Rule 63(4) imposes a duty on the Returning Officer to render his decision under Rule 63(3) in writing and record reasons therefore. Sub-rule (5) of Rule 63 lays down the procedure for re-count and sub-rule (6) thereof provides that no application for re-count shall be entertained after the total number of votes polled by each candidate has been announced under sub-rule (1) or sub-rule(5). This is subject to the condition that before any step is taken under sub-rule (6), the candidate and election agents have been given a reasonable opportunity to exercise the right conferred by sub-rule(1).

32. In *Ram Sewak Yadav v. Hussain Kamil Kidwai and Ors.*, A.I.R. 1964 S.C. 1249, a Constitution Bench of the Supreme Court dealt with the issue relating to power of the Tribunal or the Court to grant inspection and held as under: -

'An order for inspection may not be granted as a matter of course; having regard to the insistence upon the secrecy of the ballot papers, the Court would be justified in granting an order for inspection provided two conditions are fulfilled;

(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and

(ii) the Tribunal is prima facie satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary.

But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts. To establish a case so. pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection.'

33. In *Dr. Jagjit Singh v. Giani Kartar Singh and Ors.*, A.I.R. 1966 S.C. 773, their Lordships held as under:-

'Section 92 of the Act which defines the powers of the Tribunal, in terms, confers on it by Clause (a), the powers which are vested in a Court under the Code of Civil Procedure when trying a suit, inter alia, in respect of discovery and inspection. Therefore, in a proper case, the Tribunal can order the inspection of the ballot boxes and may proceed to examine the objections raised by the parties in relation to the improper acceptance or rejection of the voting papers. But in exercising this power, the Tribunal has to bear in mind certain important considerations. Section 83(1)(a) of the Act requires that an election petition shall contain a concise statement of the material facts on which the petitioner relies; and in every case, where a prayer is made by a petition for the inspection of the ballot boxes, the Tribunal must enquire whether the application made by the petitioner in that behalf contains a concise statement of the material facts on which he relies. Vague or general allegations that valid votes were improperly rejected, or invalid votes were improperly

accepted, would not serve the purpose which Section 83(1)(a) has in mind. An application made for the inspection of ballot boxes must give material facts which would enable the Tribunal to consider whether in the interests of justice, the ballot boxes should be inspected or not. In dealing with this question, the importance of the secrecy of the ballot papers cannot be ignored, and it is always to be borne in mind that the statutory rules framed under the Act are intended to provide adequate safeguard for the examination of the validity or invalidity of votes and for their proper counting. It may be that in some cases the ends of justice would make it necessary for the Tribunal to allow a party to inspect the ballot boxes and consider his objections about the improper acceptance or improper rejection of votes tendered by voters at any given election; but in considering the requirements of justice, care must be taken to see that election petitioners do not get a chance to make a roving or fishing enquiry in the ballot boxes so as to justify their claim that the returned void. No hard and fast rule can be laid down in this matter; for, attempt to lay down such a rule would be inexpedient and unreasonable.'

34. the case of Swami Rameshwaranand V. Madho Ram and Ors. (supra) is quite similar to the case in hand. In that case, one of the allegations made in the petition was that the ballot papers which constituted valid votes in favour of the petitioner were intentionally placed inside the bundle of 50 votes of respondent No. 1. Their Lordships of the Supreme court referred to the proposition laid down in Ram Sewak's case (supra) and Dr. Jagjit Singh's case (supra) and then granted the request for partial re-count by making the following observations:-

'In our view the discovery of 49 votes out of a bundle of 50 in the Khalsa Jurasi segment if correct would go to show that there had been very serious irregularities in the matter of counting of votes polled at that station. The irregularity alleged is of such a grave nature that in the interests of justice we feel that it is a matter which calls for scrutiny. We are also not unmindful of the irregularities alleged in the recrimination petition of the respondent. On a consideration of all the circumstances of this case, we order that the ballot papers of the said constituency be inspected, and whether or not we should order a re-count of ballot papers of other polling stations will depend on the result of this scrutiny.'

35. In Raghbir Singh Gill v. Gurcharan Singh Tohra (supra), their Lordships of the Supreme court observed that secrecy of ballot cannot be used to suppress a wrong coming to light and to protect a fraud on the election process or even to defend a crime, i.e., forgery of ballot papers and that principle of secrecy of ballot will have to yield to the larger principle of free and fair elections.

36. In S. Baldev Singh v. Teja Singh Swatantra (Dead) and Ors. (supra), the following proposition has been laid down:

'The Courts frowns upon frivolous and unreasonable refusals of recount by Returning Officers who forget the mandate of Rule 63 that allowance of recount is not the exception and refusal is restricted to cases where the demand itself is 'frivolous' or 'unreasonable'. Where the margin of difference is minimal, the claim for a fresh count cannot be summarily brushed aside the futile or trumpery. If, a uniform view, founded in legal error, has led to wrong rejection of votes, rectification by a recount on the spot, when a demand was made, would have been reasonable. If formal defects had been misconstrued as substantial infirmities, or vice versa, resulting in wrongful reception or rejection, the sooner it was set right the better, especially when a plea for a second inspection had been made on the spot. Many practical circumstances or legal misconceptions might honestly affect the legal or arithmetical accuracy of the result and prestige or fatigue should not inhibit, a fresh, may be partial, check. Of course, baseless or concocted claims for recount or fabricated grounds for inspection or specious complaints of mistakes in counting when the gap is huge arc obvious cases of frivolous and unreasonable demands for recount.'

37. in N. Narayanan v. S. Semmalai and Ors. (supra), the proposition of Saw has been summarised in the following words:-

'The relief of recounting cannot be accepted merely on the possibility of there being an error. It is well settled

that such allegations must not only be clearly made but also proved by cogent evidence. The fact that the margin of votes by which the successful candidate was declared elected was very narrow, though undoubtedly an important factor to be considered, would not by itself vitiate the counting of votes or justify recounting by the Court.

The Court would be justified in ordering a recount of the ballot papers only where:

- (1) The election petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded;
- (2) On the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting; and
- (3) The Court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties.'

38. In *Nathu Ram Mirdhan v. Gordhan Soni*, (1968)38 Election Reports 16, it was inter alia observed that 'a party is not entitled at the trial of an election petition to claim recount as a matter of course. He must establish a prima facie case that there has been improper reception, refusal or rejection of votes or reception of void votes, before an order for recount is made by the Court.'

39. In *Chanda Singh v. Ch. Shiv Ram Verma*, A.I.R. 1975 S.C. 403, it was said that 'if the counting of the ballots are interfered with by too frequent and flippant recounts by Courts a new threat to the certainty to the poll system is introduced through the judicial instruments. Moreover, the secrecy of the ballot which is sacrosanct becomes exposed to deleterious prying if recount of votes is made easy. The best surmise, if it be nothing more than surmise, cannot and should not induce the judgment to break open the ballot boxes.' Even where 'the difference is microscopic, the stage is set for a recount given some plea point of clear suspicion or legal lacuna militating against the regularity, accuracy, impartiality or objectivity bearing on the original counting.'

40. Again in *Baldev Singh v. Teja Singh Swatantra*, A.I.R. 1975 S.C. 693, the High Court had rejected the request for re-count of votes. Approving the view taken by the High Court, their Lordships were pleased to observe that 'had there been any manipulation by the counting staff, the matter would have been immediately taken to the notice of the Returning Officer and reference to it would have been made in the two applications to the Returning Officer for recount or at least in the application to the Election Commission for inspection made on March 17, 1971. Their silence really silences the grievance.' (Pr.11). While acknowledging in para 18 that 'mis-givings about the process must be erased at the earliest', their Lordships considered it apt to add that 'judicial power to direct inspection and recount is undoubted but will be exercised sparingly.'

41. The proposition which emerge from these precedents are:

- (a) An order of inspection and re-count of votes cannot be claimed and granted as a matter of course.
- (b) The election petition in which prayer for inspection and re-count is made must contain an adequate statement of the material facts on which allegations of irregularity or illegality in the counting are based and on the basis of evidence produced before it, the Court must feel satisfied that the allegations of irregularity or illegality in counting have been prima facie established justifying an order of re-count.
- (c) The narrow margin of votes by which the successful candidate was declared elected is an important factor to be considered and if other evidence available shows that any irregularity or illegality has been committed in the counting of votes, the Court may grant an order of re-count.

42. The case of the petitioner may now be examined keeping in view the aforesaid propositions of law. A careful analysis of evidence and pleadings of the parties show that:

- (i) The counting of votes polled for 15, Gharaunda Assembly Constituency was done at Ring Hall, Karnal. The

arrangement made in the counting hall prevented the counting agents of the candidates from having a clear view of the counting process because barbed wire fencing with jalis was put up between the counting tables and the sitting arrangement made for the counting agents and in this situation, it was very difficult if not impossible for the counting agents to take down the numbers of the disputed votes.

(ii) During the course of counting, objections were raised by the petitioner and his counting agents as well as other candidates about the irregularities in the counting as a result of which counting remained suspended for about 4 to 4 1/2 hours in the early morning of 9.5.1996. The petitioner also filed a written complaint for re-count of the votes counted on table No. 2. This application was allowed by the Returning Officer, Shri R.K. Sharma, after the intervention of the Election Supervisor and the Deputy Commissioner, Karnal.

(iii) As a result of re-count of the votes of five rounds at table No. 5, it was found that one bundle of votes containing 25 ballots was counted in favour of respondent No. 1, even though out of the 25 votes, 24 were polled in favour of the petitioner. It was also found that three votes of the election-petitioner and one vote of the Congress candidate were also counted in favour of respondent No. 1. One invalid vote was wrongly counted in favour of the petitioner and one in favour of respondent No. 1.

(iv) After these irregularities were detected, the Returning Officer changed two Counting Assistants of table No. 2.

(v) At the end of counting, the petitioner submitted written application under Rule 63(2), which was rejected by the Returning Officer without recording a finding that the application is frivolous or unreasonable.

(vi) The counting of votes for Parliamentary Constituency, which was taken upon simultaneously with the counting of votes of 15, Gharaunda Assembly Constituency, was finished about 2 hours prior to the counting of votes of the Assembly Constituency but the candidate of Bhartiya Janta Party for the Parliamentary Constituency, Shri I.D. Swami, a retired officer of the Indian Administrative Services under whom the Returning Officer had served in District Karnal, stayed in the counting hall and was present at the time of final declaration of result, although there was no occasion for him to stay back in the counting hall.

(vii) The Returning Officer finalised the result of election and declared it even though Part-II of Form 16 in respect of round Nos.12 and 13 were not prepared. The explanation given by the Returning Officer for declaration of the result even without preparation of Form-16 for round Nos.12 and 13 is that Mahender Singh Lather, who was a candidate for Shahabad Assembly Constituency had entered the counting hall and due to his fear the counting supervisors did not prepare Form-16 for 12th and 13th rounds.

(viii) The Returning Officer did not make random checking of the 5% valid votes, as required by the guide-lines issued by the Election Commission of India. He has tried to explain his failure to test check 5% ballots by stating that there was rush of work.

(ix) The entries made in Form-20 are full of cuttings and over-writings and the same have not been signed or initialed by the Returning Officer and no explanation has been offered by him for not doing so.

(x) The Returning Officer not only violated the guide-lines issued by the Election Commission regarding arrangement for counting of votes and test check of valid votes but he also failed to inform the Election Commission that counting supervisors had not filled up Part-II-Result of Counting in Form-16 and he had not made entries in the result sheet in Form-20 in respect of round Nos.12 and 13. He also did not inform the Election Commission about the alleged unauthorised entry of Mahender Singh Lather in the counting hall.

(xi) In the Recrimination Petition filed by him, respondent No. 1 has also made assertion regarding commission of irregularities in the counting of votes.

43. On the basis of decision on issues No. 4 to 7 and the above discussion, it is held that the petitioner has not only pleaded material facts which may justify an order of inspection and re-count but has also adduced

cogent evidence to prima facie establish that serious irregularities were committed in the counting of votes. The fact that as many as 27 votes polled in favour of the petitioner were counted in favour of respondent No. 1 and one vote of Congress candidate was also counted in his favour, the fact that the Returning Officer declared respondent No. 1 elected without complying with the mandatory provisions of Rule 56(7) of the Rules, the fact that he did not comply with the guide-lines issued by the Election Commission regarding counting arrangements, test, check of valid votes, non-preparation of Part-II of Form-16 with regard to 12th and 13th rounds of counting as well as the arbitrary rejection of application filed by the petitioner under Rule 63(2) are sufficient to prove that the election of the returned candidate has been materially affected by irregularities and illegalities committed in the counting of votes and the declaration of result. The failure of the petitioner to provide the number of ballots with reference to other allegations of irregularities or the minor discrepancies in the oral statements of the petitioner and his witnesses about the total period during which the counting remained suspended or the number of votes which are alleged to have been wrongly counted in favour of respondent No. 1 are not sufficient to refuse an order of re-count.

44. For the reasons mentioned above, I accept the petitioner's prayer for inspection and re-count of the votes polled for 15, Gharaunda Assembly Constituency and direct that:

(i) The re-count of ballots be done in the High Court premises under the supervision and control of District Judge (Vigilance), Punjab.

(ii) The District Magistrate, Karnal is directed to send the sealed packets of ballots per messenger.

(iii) Shri A.K. Takkar, Amarjit Singh, Bhoop Singh and Ms. Jai Shree Thakur, Advocates are appointed as tellers. They are to be paid Rs. 5,000/- each. The remuneration of tellers will be paid by the either party in equal measure and it will be condition precedent for counting of the votes.

(iv) Only the parties and their counsel will remain present at the re-counting.

45. Copy of this order be given to Shri Nirmal Singh, District Judge (Vigilance), Punjab for taking immediate action to get the sealed packets of the ballots from the Deputy Commissioner, Karnal and fixing the date for re-counting with due intimation to the tellers and counsel for the parties.

46. The case be listed before the Court for further orders on 1.4.1999 alongwith the report of District Judge (Vigilance), Punjab.

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