

Gurjant Singh Vs. Krishan Chander and Others

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Court : Rajasthan

Decided On : Jan-08-2001

Reported in : 2001(2)WLN648

Judge : Dr. B.S. Chauhan, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 2(17), 24(1), 52 and 53 - Order 6, Rules 2, 15 and 16 - Order 7, Rule 11; [Evidence Act, 1872](#) - Sections 17, 21, 76, 77 and 79; Representation of People Act, 1951 - Sections 64, 81(3), 83(1) and 86(1); [Indian Penal Code \(IPC\), 1860](#) - Sections 199; [Indian Contract Act, 1872](#) - Sections 40 and 47; [Administrative Tribunals Act, 1985](#) - Sections 29; [Specific Relief Act, 1963](#) - Sections 22; [Income Tax Act, 1961](#) - Sections 297; Conduct of Election Rules, 1961

Appeal No. : S.B. Election Petition No. 3 of 1999

Appellant : Gurjant Singh

Respondent : Krishan Chander and Others

Advocate for Def. : M.C. Bhoot and; Vinod Bhadu, Advs.

Advocate for Pet/Ap. : L.R. Mehta and; H.S. Sandhu, Advs.

Judgement :

ORDER

Dr. Chauhan, J.

(1) Vide order dated 7.9.2000, fifteen issues were framed in the election petition and three in [he recrimination petilton. Issues No. 3, 4, and 14 in the election petition are issues of law and are being taken first al the instance of Mr. M.C. Bhoot, learned counsel for the returned candidate before proceeding on the issues of facts.

Issue No. 3: Whether verification of documents contained in An-nexures. B,C,F,G,H,I,K,L, M,N and Schedule. I-A are not in accordance with the provisions of Order 6 rule 15 C.P.C. and if so, whether it can be treated as part of the Election Petition:-

(2). Section 83(1) of the Representation of People Act, 1951 (for short, 'the Act') provides as what should be the contents of an election petition. Clause (c) thereof provides that me petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (for short, 'the Code.')-> Sub-section (2) thereof provides that any Schedule or Annexure-to the petition shall also be signed by the petitioner and verified in the same manner as the petilton. Order 6 rule 15 of the Code provides that every pleading shall be verified at the (oot by the party or by any one of the parties pleading or by some other person and proved to the satisfaction of the Court to be acquainted with the facts of the case. Clauses (2) and (3) of the said Section read as under:-

'(2) The person verifying shall satisfy, by reference to the numbered paragraphs of the pleadings, what he verifies of his own knowledge, and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed,'

(3). To verify means: to test the truth or accuracy of or to be proved to be true. Verification means a form of concluding any pleading in which the party makes a solemn declaration that the facts, which are stated in the pleadings or some of them, are true to his personal knowledge, and those which are based on

information and believed by him to be true. A person making the verification has to stand by it and take the responsibility for what he has stated. The object of verification is to fix responsibility for the statement made. (Vide *Devi Prasad vs. Chairman of the Court of Election Tribunal, Gorakhpur & Anr.* (1), and *J.B. Ross & Co. vs. C.R. Scriven & ors.* (2). A false verification is an offence punishable under Section 199 of the Indian Penal Code. Therefore, the responsibility of verification has to be taken seriously. A person making the verification in a'n affidavit will be liable to the penalty attaching to the crime of giving false evidence, if the declaration is found to be false to his knowledge.

(4). Issue is regarding the verification of documents contained in Annexures B,C,F,G,H,I,L and Schedule. 1-A as during the course of arguments, Mr. Bhool gave up the issue regarding Annexures M and N. It is submitted by Mr. Bhool that verification in respect of those annexures and the Schedule is not in accordance with the provisions of O. VI R. 15 of the Code and if so, whether the said documents can be treated a part of the election petition? It is submitted that though verification has been made by the petitioner himself but the manner in which the verification has been made, is not in accordance with law. Person verifying the contents of the document has to specify the number of paragraphs in the pleadings disclosing the source of information and further to state that he believes the information so received to be true in case it is not based on his personal knowledge, for the reason that O.VI R. 2 of the Code requires the division of pleadings into paragraphs and to be numbered consecutively, each allegation being, so far as is convenient, contained in the separate paragraph. In the instant case, Annexures and the said Schedule have not been verified giving reference to the contents and paragraphs thereof and the identity of the person giving information has also not been disclosed and as the requirement of law has not been complied with, the document cannot be treated as a part of the election petition.

(5). On the other hand, Mr. Mchta has submitted that verification is in strict compliance of law. Annexures and Schedules have been mentioned to be the part of the pleadings in the corresponding paragraphs of the election petition. Thus, verification for the same is not even required. And if the said Annexures are not

integral part of the election petition, they have been filed to support the pleas taken in the petition as evidence, which requires no verification.

(6). In *Smt. Sahodrabai Rai vs. Ram Singh Aharwar & Ors.* (3), the Hon'ble Supreme Court considered the case where copy of a pamphlet had been filed as Annexure and the copy of the same had not been attested. The issue involved was whether the said pamphlet formed the part of the election petition? The Apex Court held that even if the petitioner herself had described the pamphlet to be a part of the election petition, it was produced as evidence in support of the averments of the election petition and being so, it could not be treated as a part of the election petition. It had been filed for clarity and to lend force to the averments made in the petition. The Court held as under; -

'The pamphlet, therefore, must be treated as a document and not as a part of the election petition in so far as the averments are concerned. When the election petitioner stated that it was to be treated as part of her election petition, she was merely undertaking that it was not to be thought that she has not produced the document in time. She was insisting upon the documents remaining with the election petition so that they could be available whenever the question of election petition or its contents arose. It would be stretching the words of sub-section (2) of Section 83 too far to think that every document produced as evidence in the election petition becomes a part of the election petition proper. In this particular case we do not think that the pamphlet could be so treated.'

(7). Thus, the submission made by Mr. Mehta that if a document has been filed as an evidence in support of the averments made in the election petition, it is not even necessary to verify the same. Further, Mr. Mehta has placed reliance upon a Full Bench judgment of the Allahabad High Court in *Rajit Ram & ors. vs. Kateshkar Nath & ors.* (4), wherein a plaint had been verified in the form 'the contents of the petition or plaint are true to the best of my knowledge and belief.' The objection was raised whether such a verification could be treated to be in accordance with law as the verification did not make any reference to the particular paragraph of the plaint or part of the pleadings, nor it was disclosed which part of it was based on personal knowledge or which was based on documents. The Full Bench held

that the verification was not free from ambiguity but there was substantial compliance of the requirement of law. Moreso, even if verification of the plaint is discovered to be defective by the Court of first instance, the Court should ask the party to amend it. In case it is noticed by the first appellate Court, it must ignore it and once the trial has commenced with the settlement of issues, the defect, if it is a defect, need not be taken note of. The Court observed as under:-

'Although the verification in the present case is not in strict compliance of the Code, it substantially complies with it, and after the trial had commenced with the settlement of issues, the defect, if it was a defect, need not have been taken note of.....For the purpose of answering the remaining questions, we will assume that verification is defective and not in compliance of Section 52 of the Code and that it omitted to indicate which matters were true to the knowledge of the plaintiff and which matters, if any, were stated on information believed to be true. Now, under Section 53, the Court of first instance, only acting under the orders of the Appellate Court, could not return the plaint to be amended after the settlement of issues; but if the plaint requires amendment and the fact was only discovered after issues had been settled, the Court could, under Section 53(c), amend the plaint or cause it to be amended at any time before the judgment....It would be difficult to imagine any case in which a defective verification of a plaint could affect the merits of the case or jurisdiction of the Court; so that practically, in our opinion, on a mere question of defect of verification, it is not necessary for an Appellate Court to pay any attention or take any steps to rectify a defect in the verification of the document.'

(8). Similarly, a Constitution Bench of the Hon'ble Supreme Court, in *Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore & Anr.* (5), considered the case wherein in verification of the Election Petition, it had not been stated that the advice and information received was believed by him to be true. The Court held as under:-

'It seems clear to us that reading the relevant sections in part VI of the Act, it is impossible to accept the contention that a defect in verification, which is to be made in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleadings as required by Clause (c) of Sub-section CD of Section

83, is fatal to the maintainability of the petition.'

(9). The same view has been reiterated in *F.A. Sapa & ors. vs. Singora & ors.* (6), wherein the Hon'ble Supreme Court considered the case of amendment of material particulars and observed that it should be granted by the Court liberally in the facts and circumstances of the case if the Court comes to the conclusion that it would be unjust and prejudicial to the opposite party to allow the same, however, such prejudice must be distinct from mere inconvenience. So far as defect in the verification is concerned, the Court held that mere defect in the verification of the election petition is not fatal to the maintainability of the election petition and it cannot be thrown out solely on that ground, rather it should be cured. The Hon'ble Apex Court remanded the cases to the High Court for issuing appropriate directions to cure the defect in verification within a stipulated period and only in case the same is not cured, consequential order be passed in accordance with law.

(10). In *H.D. Revanna vs. G. Puttaswamy Gowda & ors.* (7), the Hon'ble Supreme Court held that the defect in verification of the election petition or the affidavit accompanying the election petition, is curable and not fatal.

(11). In *V. Narayanaswamy vs. C.P.-. Thirunavukkarasu* (8), the Hon'ble Supreme Court held that in case the election petition is based on corrupt practice, the existence of material facts, material particulars, correct verification and affidavit are relevant and important and in absence thereof, the Court has jurisdiction to dismiss the petition. 'The High Court has, undoubtedly, the power to permit amendment of the petition for supply of better material particulars and also to require amendment of the verification and filing of the required affidavit but there is no duty cast on the High Court to direct suo moto the furnishing of better particulars and requiring amendment of the petition for the purpose of verification and filing a proper affidavit. In a matter of this kind, the primary responsibility for furnishing full particulars of the alleged corrupt practices and to filing of petition in full compliance of the provisions of law is on the petitioner.' However, there is a distinction as such a requirement is only for the petition based on corrupt practice.

(12). Want of verification, or defect therein cannot make the pleading void and a suit cannot be dismissed on that ground for the reason that this is a matter of procedure only. (Vide All India Reporter Ltd., Bombay vs. Ramachandra Dhondo Datar (9), Karam Singh vs. Ram Rachpal Singh (10), and Purshottam Umedbhai and Co. vs. M/s. Manilal and Sons (II). The defect in verification has always been treated as a mere irregularity and curable by amendment at any stage of the proceedings. (Vide Nand Kishore vs. Bhag Kuer (12), and Gauri Kumari vs. Commissioner of Income Tax (13).

(13). A Constitution Bench of the Hon'ble Supreme Court, in Deenabandhu Sahu vs. Jadumoni Mangaraj & ors. (14), over-ruled the objection that election petition with defective verification could not be accepted. In the said case, the Election Tribunal had directed the petitioner to cure the defect in verification by a particular date and the argument had been that the Tribunal ought to have dismissed the petition on the ground of defective verification.

(14). In Sangram Singh vs. Election Tribunal, Kotah (15), the Hon'ble Supreme Court dealt with the provisions of the Code applicable in trial of election petition and made the following observations:-

'Now Code of Procedure must be regarded as such. As 'procedure', something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalty; not a thing designed to trip people up. Too taking a consideration of sections that leaves no room for reasonable elasticity of interpolation, the Tribunal be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it.'

(15). Placing reliance upon the said judgment in Sangram Singh (supra), the Hon'ble Supreme Court, in Ghanshyam Das vs. Dominion of India & ors. (16), held that when substantial justice and technicalities are pitted against each other, the cause of substantial justice should not be defeated on technicalities for the reason that 'our laws of procedure are based on the principle that as far as possible, no proceeding in a Court of law should be allowed to be defeated on some technicality.'

(16). The Constitution Bench of the Hon'ble Supreme Court, in *Bhikaji Keshao Joshi & Anr. vs. Brijlal Nandlal Biyani & ors.* (17), after considering various provisions and earlier judgments, held that so far as verification is concerned, substantial compliance is necessary for the reason that the elections should not be set-aside merely as an abuse for the purpose of maligning the successful candidate by levelling vague, false and irresponsible charges against him. However, the petition cannot be dismissed in the early stage and the Tribunal should ask for furnishing the better particulars and only in case of non-compliance of such order, it could strike out of such of the charges which remain vague and can call upon the petitioner to substantiate the allegations in respect of those which are, reasonably specified.

(17). Another relevant plea which requires consideration at this stage is whether it is necessary to disclose the source of information while verifying a document in case it is based on information received by him.

(18). In *Prabhu Narayan vs. A.K. Srivastava* (18), and *K.M Mani vs. P.J. Antony & ors.* (19), the Hon'ble Supreme Court explained the distinction from its earlier judgment in *Virendra Kumar Saklecha vs. Jagjiwan* (20), observing that source of information had to be disclosed in verification as per the mandatory requirement of Madhya Pradesh High Court Rules regarding election matters and unless there is an analogous provision in the Rules, it is not at all required to disclose the source of information. In *Rivers Steam Navigation Co. vs. Khatia* (21), the Calcutta High Court categorically held that names of the persons from whom information is received may or may not be disclosed.

(19). Thus, disclosing the source of information is not necessary unless the High Court Rules in this regard require it mandatorily. I find no force in the submission of Mr. Bhoot that verification is not in accordance with law for the reason that petitioner did not disclose the source of information as it is not at all required in law so far as Schedule I-A and Annexures in question are concerned.

(20). The instant requires consideration in the light of the aforesaid legal propositions.

(21). Verification of the said Schedule reads that 'the contents of Schedule I-A' are believed by me to be true on the basis of the information conveyed by my counting agents to me after declaration of the result on the basis of the notes prepared by them during the counting.' Schedule 1-A has been filed in reference to the contents of para No. 22 of the election petition and if the contents of para 22 have been verified correctly in the election petition, the defect, if any at all, does not warrant any notice at all. Contents of the Schedule have not been incorporated in para 22 of the petition to make pleadings compendious. Petitioner himself has disclosed, verifying the contents of Schedule I-A that the figures mentioned therein were based on the basis of the notes prepared by his counting agents during counting and he believed that information to be true. The 'agent' referred to in the verification, is not to be understood in the sense of law of agency under the Contract Act. Section 40 of the Act, 1951 provides for appointment of the election agents; Section 46 for appointment of polling agents and Section 47 for appointment of counting agents. The Schedule contains a tabular statement of mixing of the votes illegally and has been prepared on the basis of information furnished by his counting agents appointed under Section 47 of the Act, 1951 and has been referred to in the body of the petition. Thus, I find no fault in verification made to Schedule.1-A.

(22). Annexure-B is a certified photo slat copy of the Election Index Card. The verification of the same has been made stating that it is a certified copy of its original received from the Returning Officer, Sangaria. According to Mr. Bhoot, the verification is not in accordance with law as it does not verify the contents of the election index card, nor does it show that the contents thereof are believed to be true. Therefore, Annexure-B cannot be treated as a part of the election petition. There is no force in this contention. Annexure-B, being the certified copy of a public document, as it would be explained at a later stage, does not require any other mode of verification.

(23). So far as Annexure C is concerned, it contains photo copies of diaries of the Polling Officers. Contents of the documents have not been stated to be true from pages 32 to SO. In addition to objection as in respect of Annexure-B, Mr. Bhool submitted that Annexure-C contains a large number of photo slat copies of diaries

of different Polling Officers and have been placed together and verified collectively, which is not permissible in law. However, he could not point out any statutory bar putting identical documents together and verifying the same collectively. Even otherwise, in view of the above, if the defect in verification is curable and Mr. Mehla is willing to cure the defect, it does not affect the merit of the case and requires correct verification.

(24). Annexure F is a certified copy of the detailed track of assembly constituencies with details for all candidates and the verification thereof is also alleged to be defective as each page is a separate document giving details round-wise, therefore, they could not have been verified together, nor contents thereof have been verified nor it is submitted that he believed it to be true. However, being certified copies of the public documents, they have to be treated alike Annexures B and C and it does not require a different treatment at all.

(25). Annexure G runs from pages 77 to 101. Petitioner has verified it saying that Annexure-G is the notes prepared by his counting agents during the counting and is believed to be true. According to Mr. Bhoot, they are the documents prepared by different persons and cannot be verified together and each page, being a separate document, should have been verified separately. In para 22 of the election petition, reference of Annexure G has been given and it forms part of the Election Petition. Therefore, substantial compliance of law has been made and if there is any defect to the extent that each page, being a different document, should have been verified separately, is curable and Mr. Mehta has already expressed his willingness to do the needful, thus, it will not affect the merit of the case and requires correct verification.

(26). Annexure H has been referred to in para 26 of the petition, wherein petitioner has submitted that there has been a very thin margin of votes of the petitioner and the returned candidate, thus, the election agent Mr. Resham Singh hurriedly filed an application for recounting of votes and the certified copy thereof has been filed as Annexure H. Being a certified copy of the application filed by the petitioner himself, the verification does not suffer from any defect and it will fall within the category of Annexure C, already dealt with.

(27). Annexure 1 contains copies of the FAX messages sent by the petitioner to various authorities, including the Chief Election Commissioner, New Delhi, alongwith its confirmation reports and it has been verified as 'believed to be true.' Though substantial compliance of law is there, but contents of Annexure-I have not been verified. As it does not affect the merit of the case and Mr. Mehta is willing to cure the defect, it is desirable to give petitioner an opportunity to verify correctly.

(28). Annexure J is a certified copy of the order rejecting the application for recounting and it has been verified being the certified copy of the original document issued by the Returning Officer. The copy, being certified copy of the order, falls within the category of the Annexure C and no further discussion is required on that court.

(29). Annexure K is the certified copy of the order of refusal to grant the certified copy of Form XVI by the Returning Officer vide order dated 21.1.99, Being a certified copy of the order, it also falls in the category of Annexure C and requires to be treated in the same way.

(30). Annexure L is a sample copy of the ballot paper printed for canvassing purpose and it has been verified stating as 'it is a printed copy of the ballot paper which has been got printed for canvassing purposes and is believed by me to be true.' Mr. Bhool has submitted that petitioner did not disclose whether it is true to his personal knowledge or on the basis of the document. Mr. Mehta submitted that-even if it is a defect in verification, he is willing to cure it and, this, it is desirable to give an opportunity to the petitioner to cure the defect in verification.

(31). In view of the above, the election petitioner is given two weeks' time to verify the documents contained in Annexures-C, F and G separately treating each page of them a separate document. Verification of Annexure-1 may be made correctly making reference to its contents and he is further directed to disclose the basis of information and verify correctly Annexure-L. The proper amendment may be done within the period of two weeks from today.

(32). ISSUE NO. 4-Whether the documents contained in Annexures-B, C, F, G and Schedule 1-A, II, III and IV are admissible:-

The provisions of Section 74 onwards of the Evidence Act deal with admissibility of public documents. Section 79 provides for presumption of genuineness of the documents filed as certified copies thereof. In the instant case, Annexures 8, C and F are the certified copies issued by the Competent Authorities and, therefore, presumption of their genuineness is there under Section 79 of the Evidence Act.

(33). Undoubtedly, Chapter IV of the Evidence Act provides for mainly adducing the primary evidence and in case it is not available, the secondary evidence can be filed. As Annexures B, C and F are the certified copies of their respective originals, the question is: Whether presumption of their genuineness is there or not. The objection taken by Mr. Bhoot is that Annx. 1 are the photo copies of diaries of the Polling Officers which are not authenticated official documents. The actual account of votes was contained in Form No. XVI, which was prepared by the respective Polling Officer of the Polling Stations after the election and a copy of the same was given to the polling agents of all the candidates. Polled and lender votes were counted on the basis of Form XVI and it was the only authenticated proforma. The Presiding Officers' diaries are not an authenticated account of votes and, therefore, the same are inadmissible.

(34). In reply, Mr. Mehta has submitted that as petitioner had applied for certified copy of Form XVI but the same could not be issued as it had been placed in the ballot boxes alongwith the votes, the same are admissible being secondary evidence. Moreover, according to the Instructions contained in the Hand Book for Returning Officers for Election to House of People and State Legislative Assemblies, each Officer is directed to maintain a diary in which he is required to draw all proceedings in the polling station. The Proforma of Diary, to be maintained by the Presiding Officer, is given in Form XXVI of the said Hand Book. Therefore, the same has to be held to be authenticated official document. According to Mr. Mehta, this is not the stage to plead inadmissibility of documents and at the most, the returned candidate can file an application under O. VI R. 16 of the Code for striking out of pleadings which he feels are unnecessary, scandalous, frivolous or vexatious or may tend to prejudice, embarrass or delay the fair trial of the petition, or which is otherwise an abuse of the process of Court. But so far as the Schedules are concerned, they are integral parts of the petition and cannot be struck off for

the reason that they contain the material facts and particulars and may couch the cause of action for the election petition and annexures can either be treated as part of the election petition or may be considered as evidence in support of the contentions raised in the election petition.

(35). In *Sahodrabai Rai* (supra), the Hon'ble Supreme Court categorically held that in Section 83(2) and Section 81(3) of the Act, 1951, legislature has used the term 'election petition'. As there is no reference to any document accompanying the election petition, therefore, reference under Sub-section (2) of Section 83 is not to be made to a document which is produced as evidence in support of the averments made in the election petition. Section 83(2) has 'reference not to a document which is produced as evidence of the averments of the election petition but to averments of the election petition which are put-in not in the election petition but in the accompanying schedule or annexure.' The Court further explained that for example, the details of the corrupt practices therein, may be set out separately in the schedule and which may, in many cases, be so done even after amendment of the present law. Similarly, the details of averments too compendious for being included in the election petition, may be set out in the schedule or annexure to the election petition.

(36). Similarly, in *U.S. Sasidhatan vs. K. Karunakaran & Ann* (22), the Hon'ble Supreme Court observed as under:-

'Material facts or particulars relating to any corrupt practice may be contained in a document and the election petitioner, without pleading the material facts or particulars of corrupt practice, may refer to the documents. When such a reference is made in the election petition, the copy of [the document must be supplied in as much as by making a reference to the document and without its contents in the election petition, the document becomes incorporated in the election petition by reference. In other words, it forms an integral part of the election petition....When a document forms an integral part of the election petition and a copy of such document is not furnished to the respondents alongwith the copy of the election petition, the copy of the election petition will not be a true copy within the meaning of Section 81(3), as such the Court has to dismiss the election petition under

Section 86(1) for non-compliance of Section 81(3). On the other hand, if the contents of the document in question are pleaded in the election petition, the document does not form an integral part of the election petition. In such a case, a copy of the document need not be served on the respondents and that will not be treated non-compliance of the provisions of Section 81 (3). The document may be relied upon as an evidence in the proceedings!

(37). In *Ashwani Kumar Sharma vs. Yaduvansh Singh & ors.* (23), facts involved had been similar to the present case. The Election Petition was based on the information furnished by the agents of the election petitioner after declaration of the result. The Hon'ble Supreme Court categorically held that non-compliance of the instructions contained in the Hand Book for the Polling/Returning Officers also give rise to the cause of action for presenting the election petition. Moreso, Section 74 of the Evidence Act makes the public documents admissible, which include the documents or records of the public officers legislative, judicial and executive. In *Las Baba vs. Government of Mysore* (24), the Government Officers deputed in education department were held to be the 'executive officers' within the meaning of said provisions of the Evidence Act. In *Aina Bachan vs. State of U.P.* (25), certified copies from the electoral roll and nomination register had been held to be public documents requiring no proof. In *Neladhar Mahapatra vs. Seva Dibya* (26), the electoral roll was held to be a public document requiring no proof. In *Chand Sultana vs. Khurshid* (27), an application for maintenance before the Salarjung Estate Committee, Hyderabad was held to be public document by Andhra Pradesh High Court on the ground that the committee was a public institute. Even the outdoor ticket and discharge certificate issued by a public hospital had been held to be public document. (Vide *Raman Bala vs. Kanai* (28)).

(38). Section 2(17) of the Code defines the 'public officer' elaboratively, Sub-clause (h) thereof reads as under: -

'Every officer in the service or pay of the Government or remunerated by fee or commission for performance of the public duty.'

(39). This Clause defines the 'public officer' in a very wide sense. In the instant case, the Returning Officer, who was admittedly the Sub-Divisional Officer was a

public officer and for the purpose of election, he was working on deputation with the Election Commission, but that circumstance would not change his status and even on deputation, he continued to be public officer.

(40). In *Shilekha Vidyarthi vs. State of U.P.* X29), the Hon'ble Supreme Court has observed as under:-

'Every holder of a public office, by virtue of the acts on behalf of the State or public body, is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to exercise for a public good and promoting the public interest.... Thus, every holder of a public office is a trustee, whose highest duty is to the people of the country and, therefore, every act of the holder of the public office, irrespective of the label classifying that act is in discharge of public duty meant ultimately for public good.'

(41). In *Commissioner of Wakfs, Bengal vs. Shahebzada Mohammed Jahangir Shah* (30), the Commissioner of Wakfs, functioning in relation to the public endowment, was held to perform public duty and, therefore, a 'public officer' within the meaning of Section 2(17)(h) of the Code.

(42). In *Vishnu Wasudeo Joshi vs. T.L.H. Smith Pearse* (31), an officer of the Indian Education Service working on deputation with a private college as a Principal, was held to be a 'public officer' within the meaning of Section 2(17)(h) of the Code, observing that even on deputation, he did not cease to be in the service of the Crown.

(43). The word 'service' in Section 2(17)(h) of the Code has been interpreted as something more than being merely subject to the orders of the Government or control of the Government. 'Service' means 'to perform function; do what is required for.' In *Coal Mines Provident Fund Commissioner vs. Ramesh Chandra Jha* (32), the Hon'ble Supreme Court held that Sub Clause (h) of Section 2(17) of the Code is very wide and the Commissioner of coal mines was a public officer performing the public duty and while acting in the capacity of Provident Fund Commissioner, he did not cease to be an officer in the service of the Government.

(44). In Election Commission of India through Secretary vs. Ashok Kumar & ors. (33), the Hon'ble Supreme Court explained the powers of superintendence of the Election Commission as under;-

'Article 324 of the Constitution contemplates constitution of the Election Commission, in which shall vest the superintendence, direction and control of the preparation of the electoral rolls for, and . conduct of, all elections to Parliament and to the Legislature of every State and of election to the Office of President and Vice President held under the Constitution. The words "superintendence, direction and control' have a wide connotation so as to include therein such powers which though not specifically provided but are necessarily be exercised for effectively accomplishing the task of holding the elections to their completion.'

(45). In view of the above, there can be no doubt that the annexures-B, C & F are admissible being certified copies of record of public officer, i.e. the Returning Officer and I find no force in the submission made by Mr. Bhoot that the said documents had not been prepared under any statute, for the simple reason that all the aforesaid documents had been prepared under the Instructions contained in the Hand Book for Reluming/Polling and the issue has fully been dealt with by the Hon'ble Supreme Court in Ashwani Kumar Sharma (supra). Thus, I have no hesitation to hold that Annexures B, C and F are the public documents duly prepared as per the Instructions contained in the Hand Book'for Returning Officers and being the certified copies of documents prepared by the public officer, they are admissible under Section 77 of the Evidence Act and presumption of genuineness thereof is also there under Section 79 of the Evidence Act. Annexure B, being the Election Index Card, has been prepared under the said Instructions contained in Chapter XVIII, Miscellaneous Paragraph 4, and is in the form prescribed in Annexure 51 thereof. Annexure C, which are the diaries of the Polling Officers, have also been prepared as per the Instruction Para 29.1, Chapter XIII of the said Instructions and as per the proforma contained in Annexure 27. Annexure F is the detailed track for assembly constituency with details of candidates etc. and it has been prepared as-per Chapter XIV-B, para 11 and as per the annex'ure contained in Form No. 46 of the said Instructions. Thus, they are held to be public documents and admissible, in evidence.

(46). So far as Annexure-G is concerned, it collectively furnishes details of notes received by each candidate round-wise and table-wise. This annexure collectively contains notes prepared by the counting agents of the election petitioner, who had been appointed to watch the counting. Mr. Bhoot has submitted that in view of the provisions of Chapter-11 of the Evidence Act and on consideration of the classification of relevant facts under the same, the relevancy of the statements about the facts is to be proved only under Sections 17 to 39 of the Evidence Act and Section 21 makes admissions relevant and proveable. Therefore, unless the documents contained in Annexure-G fall within the ambit of provisions of Section 21, the petitioner cannot be permitted to place reliance thereon or to say that the documents are admissible. Mr. Bhool placed reliance upon the judgment of the Orissa High Court in Akshay Kumar Behera vs. Purnhana Chandra Behera & ors. (34), wherein the Division Bench has held as under:-

'An admission, as defined under Section 17 of the Evidence Act includes both self-serving statement as well as self harming admission. The admissions are substantive evidence and if a party is permitted to prove the statement made by himself and in favour of his own case. It would encourage him to fabricate the evidence in his own favour. It would be extremely unsafe to allow the parties to settle their claims by their own self-serving testimony. It is precisely for this reason that Section 21 provides that admissions are relevant and may be proved as against the person who makes them or his representative in interest but they cannot be proved on behalf of the person who makes them or by his representative in interest except in three cases mentioned in the Section....Under Section 17, an admission is a statement which suggests any inference as to any fact in issue or relevant fact.'

(47). The principle enunciated in Illustration-A, under Section 21, must be kept in mind while considering the admissibility of a document prepared by the party who wants to prove it.

(48). The document which is self-supporting and prepared by the agents of the election petitioner during the course of their duty as the election agents, cannot be held to be admissible under the Evidence Act, though the same can be held

admission against them. It does not fall within the exception given under Section 21 of the Evidence Act and Annexure-G, if held to be not admissible, the election petition will be limited to the counting of 5th round only. Mr. Bhoot has submitted that though it may be a case of solutory transaction, it was in respect of full proceedings of counting of ballots and as it supports the election petitioner himself, it cannot be held to be admissible.

(49). Mr. Mehta has contended that even by stretch of imagination it cannot be said that it is not admissible under Section 18 of the Evidence Act for the reason that those counting agents cannot be held to be the 'Karta' of the family or the power of attorney-holder or as an agent in law of Agency in Contract Act, for the simple reason that in the instant case, the principle of estoppel etc. cannot be applied as the said agents had never been a party to any lis or proceedings. They had merely been appointed to have an eye on counting though their appointments had been made under the Statutory provisions. Mr. Mehla has contended that the case is not to be examined within the meaning of Section 18 of the Evidence Act for the reason that counting agents had not been party to any lis or proceedings. In the instant case, the question of privity of contract did not arise.

(50). The word 'proceeding' contained in Section 18 of the Evidence Act means 'the form and manner of conducting judicial business before a court or judicial officer.' (Black's Law Dictionary, p. 1368). 'Proceeding' means a prescribed course of action for enforcement of a legal right. (Vide Smt. Sircar vs. Bisweswar Lal Sharma (35). In Babu A. vs. Bhaskar Shetly (36), it has been held that 'proceeding' therein means an action; a measure taken in Court; proceeding taken in the action preceding the final judgment or order. It also means during pendency of action including all types of interlocutory orders. 'Proceeding' is a term of wide amplitude, which means a prescribed course of action for enforcing or protecting the legal right and embracing the requisite steps to be taken, whether procedural or substantive. It also means the form in which relief is sought before Courts of law or before other body or authority determining rights and liabilities and in which actions are brought and defended and the manner of conducting them and the mode of deciding them. All the happenings or events before the Court, tribunal or any other authority, to whom jurisdiction is conferred by law to dispose of contentious

matters are understood by the term 'proceeding'. (Vide Workmen of Ball Singh Bhagwan Singh vs. Management (37) and K.L. Lingan vs. Joint Commercial Tax Officer (38).

(51). In Ram Chandra Aggarwal vs. State of U.P. & ors. (39), the Hon'ble Supreme Court interpreted the word 'proceeding' contained in Section 24(l)(b) of the Code and held that it means something going on in a Court in relation to the adjudication of a dispute other than a suit or an appeal.

(52). In P.L. Kantha Rao vs. State of Andhra Pradesh (-10), the Hon'ble Supreme Court held that the term 'proceeding' in Section 29 of the [Administrative Tribunals Act, 1985](#) was a very wide term to mean a prescribed course of action to enforce a legal right as it indicates the prescribed mode in which the judicial business is to be conducted.

(53). The word 'proceeding' in Section 22 of the Specific Relief Act has been held to be a very comprehensive term, meaning (hereby a prescribed course of action for enforcement of a legal right and inclusive of execution proceedings also. (Vide Babilal vs. Hazari Lal Kishori Lal (41). Similar view has been reiterated while explaining the meaning of 'proceeding' in Sub-section (2) of Section 297 of the Income Tax Act, by the Hon'ble Supreme Court in Kalawali Devi Harlalka vs. The Commissioner of Income Tax, West Bengal & ors. (42).

(54). In Silaram Motilal Kalal vs. Santanu Prasad Jaishankar Bhatl (13), the Hon'ble Supreme Court held that 'admission of documents means admission of facts contained in the documents...strictly speaking, no provision of law makes the admission admissible against a person other than the person making them, unless such person can be said to be bound by the admission.'

(55). In Mahendra Manilal Nanawati vs. Sushila Mahendra Nanawati (44), the Hon'ble Apex Court considered the case of pregnancy before marriage, wherein the decree of nullity of marriage was sought on the ground of fraud. The Court considered the letters written by the respondent-wife and held that 'the statement of the respondent-wife in her letters can be used, against her as her admissions, but cannot be used in her favour accepting them to be me correct statement.'

(56). In *Biswanath Prasad & ors. vs. Dwarka Prasad & ors.* (45), the Hon'ble Supreme Court held that a statement can be used against its author to contradict the contents thereof but not in his favour. The Hon'ble Supreme Court placed reliance upon its earlier judgment in *Bharat Singh vs. Mst. Bhagirathi* (46), wherein the Court observed as under:-

'Admissions are substantive evidence by themselves, in view of Sections 17 and 21 of the Indian Evidence Act, though they are not conclusive proof of the matters admitted. We are of opinion that admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not, and whether that party, when appearing as witness, was confronted with this statement, it made a statement contrary to those admissions. The purpose of contradicting the witness under Section 145 of the Evidence Act is very much different from the purpose of proving the admission. Admission is substantive evidence of the fact admitted while a previous statement used to contradict the witness does not become substantive evidence and merely serve the purpose of throwing doubt on the veracity of the witness. What weight is to be attached to an admission made by a party, is a matter different from its use and admissible evidence.'

(57). In *M/s. Central Coalfields Ltd. vs. M/s. Mining Construction & Multi-contract (P) Ltd.* (47), the Hon'ble Supreme Court held that a statement made or a document prepared would amount to an 'admission against its maker who would, therefore, be bound by it unless he could explain it away satisfactorily.'

(58). In the instant case, Annexure-G is said to have been prepared by the counting agents of the election petitioner. As it is self-serving, it can be used only against the election petitioner or to contradict the author thereof if he is examined in the Court, but it cannot be held to be admissible as such under the provisions of Sections 18 and 21 of the Evidence Act and the petitioner is at liberty to prove the same in accordance with law.

(59). Schedule I-A has been described in para 22 of the election petition and the table has been prepared showing the mixing of votes. All the schedules disclose material facts, without which petition could not be entertained. They have been

referred to in paragraphs 22, 24 and 25 of the election petition. They form an integral part of the election petition and contain the extended averments being tabulated statement of mixing up of votes etc.

(60). In para 23 of the election petition, reference has been given to the Instructions given in para 9, issued by the Chief Election Commissioner of India for test check of the votes and the schedules make a reference thereto, Para-N of the said Instructions clearly provides that the Reluming Officer should satisfy himself that the number of ballot papers have been correctly sorted out and do not contain any ballot paper which ought to be rejected or ought to be placed in the bundles of valid ballot papers of other candidate. To insure it, he must make a test check of the bundles of valid ballot papers and to ensure further accuracy in the counting of votes. 5% of total number of bundles of valid ballot papers of different contesting candidates shall be counted by him. He would make selection of the said 5% in such a manner that it contains bundles pertaining to different contest candidates. '

(61). Schedules II, III & IV as such are not admissible although the same contain material facts and forming an integral part of the election petition. The said schedules have been prepared on the basis of information furnished by his counting agents. Contents thereof have to be proved by the election petitioner as the contents of Annexure-G.

Issue No. 14:

(62). Mr. Bhoot has raised the issue that the pleas which have not been taken before the Returning Officer for recounting cannot be taken before this Court. In support of this contention, Mr. Bhoot has placed reliance upon the order of this Court rejecting his application under Order 7 Rule 11 of the Code, wherein an observation had been made that in case the pleas had not been taken before the Returning Officer and taken herein, it may be a case of after-thought and if the election petition is based only on such new pleas, the application under O. VII R. 11 of the Code may be allowed.

(63). It is settled legal proposition that proceedings before the Election Tribunal are original in nature and the Tribunal is not sitting in appeal against the order passed

by the Returning Officer and all the grounds taken in the petition are liable to be entertained by the Election Tribunal. In *N.T. Veluswami Thevar vs. G. Raja Nainar & ors.* (48), the Hon'ble Supreme Court observed as under:-

'It is a sound rule of construction that procedural enactment should be construed liberally and in such manner as to render the enforcement of the substantive right effective. Reading Section 100(l)(c) in the context of the whole enactment, we think that an enquiry before the Tribunal must embrace all the matters as to qualification and disqualification mentioned in Section 36(2) and that it cannot be limited to the particular ground of disqualification which was taken before the Returning Officer....The enquiry which a Returning Officer has to make under Section 36 is summary in character....Such being the nature of the enquiry, the right which is given to an authority under Section 100(l)(c) and Section 100(l)(d)(i) to challenge the propriety of an order of rejection or acceptance of a nomination paper, would become illusory if the Tribunal is to base its decision only on the material placed before the Returning Officer.'

(64). Similarly, in *J.H. Patel vs. Subhan Khan* (49), the Court observed that election petition, being original proceedings and not appellate proceeding, the High Court's jurisdiction cannot be confined to the grounds on which the Returning Officer rejected the nomination. However, the High Court must examine the bonafide of the election petitioner as he should not be permitted to challenge the election of the returned candidate in a mischievous manner, i.e. on concocted grounds etc.

(65). In *Birad Mal Singhvi vs. Anand Purohit* (50), the Apex Court rejected the contention that High Court cannot entertain fresh or additional grounds, i.e. grounds other than taken before the Returning Officer. The Court observed as under:-

'In the election, it is open to an election petitioner to place cogent evidence before the High Court.....Enquiry during scrutiny is summary in nature....Therefore, it is open to a party to place fresh or additional material before the High Court to show that the Returning Officer's order rejecting the nomination paper was improper. It should be borne in mind that the proceedings in election petition are not in the

nature of appeal against the order of the Returning Officer. It is an original proceeding.'

(66). Similar view has been reiterated by this Court, after placing reliance on some of the aforesaid judgments, in *Smt. Shanti Devi vs. Election Tribunal cum District Judge, Bikaner & ors.* (51).

(67). In *Ashwani Kumar Sharma (supra)*, the Hon'ble Apex Court held that election petition can be filed on the ground that 'counting was unfair, improper or not in accordance with law.' The grounds may also be that 'the Returning Officer did not comply with rule 56 of the Conduct of Election Rules, 1961 (for short, 'the Rules, 1961') and the instructions contained in the Hand Book for Returning Officers.'

(68). Therefore, in view of the above, it is crystal clear that proceedings before the Election Tribunal are original in nature and election petitioner can produce all cogent material and take additional grounds which have not been taken before the Returning Officer at the time of filing the application for recounting under rule 63 of the Conduct of Election Rules, 1961. Section 64 of the Act, 1951 provides for a mode of counting of votes. Section 100 of the Act specifies the grounds on which the election of the returned candidate can be declared void, it includes that if the result of the election petition, in so far as the returned candidate is concerned, has been materially affected by improper reception, refusal or rejection of any vote or reception of any vote which is void, or by any non-compliance with the provisions of the Constitution or of the Act 1951, or any rule or order made under the Act, 1951. Thus, the Act, 1951 itself provides that election petition shall lie only on the aforesaid grounds. In case the counting has been done in flagrant violation of the provisions of the Act or the Rules but the election petitioner came to know only after declaration of the result and he could not file the application for recounting under rule 63 of the Rules, 1961, the question does arise whether his election petition cannot be entertained for recounting. Take an example that 'A' has lost the election by a margin of fifty votes. He did not apply for recounting of votes before the Returning Officer at all. After declaration of the result, he possessed the knowledge of material fact that his forty valid votes had been mixed up and placed in the bundles of the returned candidate by the Counting Assistant and the same

had materially affected the result of the election of the returned candidate, can his petition be not entertained for recounting merely on the ground that he did not file an application for recounting at all. Taking such a view is not permissible even by stretch of imagination. However, the Court has to exercise its power in circumspection and the election petitioner may be asked to furnish the explanation as why he did not raise the objection before the Returning Officer. The Court has also to be careful that the election petitioner should not be permitted to play the mischief knowingly and abuse the process of the Court or the new grounds taken in the election petition should not be concocted/manufactured after the declaration of the result. (Vide Nathu Ram Mirdha vs. Gordhan Soni & Anr. (52).

(69). It is settled proposition of law that a pure question of law, which does not require any investigation of fact, can be raised first time at any forum or stage. An issue which requires investigation of facts, cannot be allowed to be agitated. (Vide A.M. Allison vs. State of Assam (53); St. Arunchallai Pillai vs. Southern Roadways Ltd. (54); Cantonment, Ambala vs. Pyare Lal (55); State of U.P. vs. Dr. Anupam Gupta (56); Bhanwar Lal vs. T.K.A. Abdul Karim (57); Ratan Lal Sharma vs. Managing Committee (58); Rajeshwari Amma vs. Joseph (59); Commissioner of Income Tax vs. U.P. Forest Corporation (60); P.R. Deshpande vs. Maruti Balaram Haibalti (61); State of Punjab vs. R.N. Bhatnagar (62); Oil & Natural Gas Commission vs. M.C. Chelland Engineers S.A., (63); Rajasthan Agriculture University vs. Ram Krishna Vyas (64); Warner Hindustan Ltd. vs. Collector of Central Excise (65); Atlas Export Industries vs. Kotak & Co. (66); Ram Kumar Agrawal vs. Thawar Das (67); Kali Prasad & ors. vs. Deputy Director Consolidation & ors., (68); S. Saktival vs. M. Venugopal Pillai & ors. (69); and Badrinath vs. Govt. of Tamil Nadu (70).

(70). In Ramesh Chandra Sharma vs. UdhamSingh Kamal & ors. (71); the Hon'ble Supreme Court held that a plea, for which no foundation has been laid before the trial Court or Tribunal, cannot be entertained in writ jurisdiction.

(71). But this proposition is not applicable in the instant case as these proceedings are original in nature and this Court is not functioning as an appellate/writ court.

(72). I find no force in the submissions made by Mr. Bhoot that all the cases referred to above were in respect of rejection or acceptance of the nomination paper and the Hon'ble Court had held that only new material can be furnished before the Election Tribunal and not new plea. In view of the peculiar facts of this case wherein petitioner has specifically stated that he was informed subsequently about the illegality of acceptance and rejection of votes. The submission made by Mr. Bhoot that the case should be limited only to the extent of re-counting of votes only of 5th round, is not sustainable and this issue is decided against the respondent No. 1

(72). The legal issues are decided accordingly. List the case on 24.1.2001 for compliance of this order.

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