REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOs. 5710-5711 OF 2012

Arikala Narasa Reddy …Appellant

Versus

Venkata Ram Reddy Reddygari & Anr. …Respondents

J U D G M E N T

Dr. B. S. CHAUHAN, J.

1. These appeals have been preferred against the impugned judgment and order dated 20.7.2012, as amended vide order dated 23.7.2012, of the High Court of Judicature of Andhra Pradesh at Hyderabad in Election Petition No.2 of 2009 and Recrimination Petition No.1 of 2009.

2. Facts and circumstances giving rise to these appeals are that:-

A. An election was held on 30.3.2009 for 18-Nizamabad Local Authority Constituency of the Andhra Pradesh Legislative Council

wherein the appellant stood declared as successful candidate and had since then been a Member of Legislative Council (MLC).

B. The respondent no.1, defeated candidate, filed Election Petition No.2 of 2009 on the ground that certain invalid votes had been counted in favour of the appellant and certain valid votes which were cast in favour of the respondent no.1 had wrongly been declared invalid.

C. The election petition was to be decided on the basis of the fact that election for the said post was held on 30.3.2009 wherein out of 706 total votes, 701 votes were cast.

D. The votes were counted on 2.4.2009 and initially both the contesting candidates are said to have got equal number of votes as 336 each while 29 votes were found invalid.

E. On the application of the appellant herein, the Returning Officer allowed re-counting of all the votes wherein the appellant got 336 votes and the respondent no.1 secured 335 votes and 30 votes were found to be invalid and therefore, the appellant was declared to be the successful candidate and elected as MLC by a margin of one vote.

F. The election petition was filed mainly on the ground that 3 votes in question Ex.X-1 to X-3 polled in favour of the respondent no.1 had been wrongly rejected and one vote Ex.Y-13 which had been counted in favour of the appellant ought to have been declared invalid.

G. The High Court issued notice to the appellant regarding the lodgment of the election petition and the appellant not only entered appearance but also filed a Recrimination Petition No.1 of 2009 under Section 97 of the Representation of the People Act, 1951 (hereinafter referred to as the 'Act').

H. The appellant filed the written statement refuting the allegations and averments made in the petition.

I. The respondent no.2, Returning Officer also filed his written statement and it appears that during the pendency of the election petition vide order dated 23.9.2011, the High Court directed the Registrar (Judicial), High Court of Andhra Pradesh to scrutinize and re-count all the ballot papers in the presence of the parties and their counsel as per the rules and regulations, and the instructions and guidelines issued by the Election Commission of India and submit a report within a stipulated period.

J. Aggrieved, the appellant challenged the said order by filing Special Leave Petition (Civil) No.29095 of 2011 and this Court vide an order dated 20.10.2011 set aside the impugned order of the High Court and directed to first determine the question relating to the validity of the 3 disputed votes and, thereafter, to examine the issue of re-counting of all the votes, if required.

K. The High Court, in pursuance of the order of this Court, scrutinized and examined the 3 disputed votes in question in the presence of the parties and their counsel from the bundle of disputed votes, and after identifying them with the assistance of the parties and their counsel, had taken the photocopies thereof. The said photocopies were supplied to the parties and were marked as Ex.X-1, X-2 and X-3.

L. The High Court scrutinized and examined the 3 votes on 24.1.2012 and came to the conclusion that the Returning Officer had wrongly rejected the said 3 votes as invalid and ordered that all the 3 disputed votes to be counted in favour of respondent no.1.

M. Aggrieved, the appellant challenged the said order dated 24.1.2012 by filing Special Leave Petition (C) No.4728 of 2012 and

this Court disposed of the said SLP on 7.2.2012 observing that it was not appropriate to interfere at that stage but the appellant would be at liberty to urge the same point at the time of final hearing. Thus, this Court did not interfere with the same being an interim order.

N. The High Court during the trial of the election petition picked up 17 ballot papers from the bundle of rejected ballot papers as determined by the Returning Officer and marked the same as Ex.Y-1 to Y-17. The High Court also picked up 2 ballot papers from the valid votes of the appellant and marked the same as Ex.R-1 and R-2. Four ballot papers were picked up from the valid votes of respondent no.1 and marked as Ex.P-16 to P-19. After considering all these ballot papers, the High Court vide judgment and order dated 20.7.2012 allowed the election petition holding that certain votes cast in favour of respondent no.1 had wrongly been rejected and the vote which should have been declared as invalid had wrongly been counted in favour of the appellant as valid and thus, the respondent no.1 was declared as successful candidate and elected as MLC. The operation of the aforesaid judgment dated 20.7.2012 was stayed only for a period of 4 weeks to enable the appellant to approach this Court.

Hence, these appeals.

3. Shri B. Adinarayana Rao, learned senior counsel appearing for the appellant has submitted that the election petition has not been decided by the High Court giving strict adherence to the provisions of the Act and the Rules framed for this purpose. It was not permissible for the High Court to go beyond the pleadings of the election petition. The entire controversy could only be in respect of 3 votes as pleaded in the election petition by the respondent no.1 which had been declared invalid and another vote which ought to have been declared invalid but had been counted in favour of the appellant as valid. It was not permissible for the High Court to count all the votes and pick up large number of votes from the bundle of invalid votes, totaling 30, or from the valid votes duly counted in favour of the appellant or the respondent no.1. Counting has to take place strictly in accordance with the rules and there was no occasion for the court to find out the intention of the voters or draw an inference in whose favour the elector wanted to vote. More so, the petition filed by the appellant had not been decided in the correct perspective. Therefore, the appeals deserve to be allowed.

4. Per contra, Shri P.P. Rao, learned senior counsel appearing for the respondents has vehemently opposed the appeals contending that

even if the case is restricted to aforesaid 4 votes, as submitted by learned counsel for the appellant, the result so declared by the High Court is not materially affected. The Returning Officer had committed an error in declaring the 3 valid votes in favour of the respondent no.1 as invalid and miscounted one vote as valid. Thus, in such a fact-situation, the intention of the elector has to be inferred in view of the statutory rules and executive instructions issued by the Election Commission for counting the ballot papers. Therefore, the judgment delivered by the High Court can by no means be termed as perverse and no interference is called for. The appeals lack merit and are liable to be dismissed.

5. We have heard the learned counsel for the parties and perused the record.

6. Section 87 of the Act provides that the election petition is to be tried by the High Court applying the provisions of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') "as nearly as may be" and in accordance with the procedure applicable under CPC and the provisions of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act') shall also be applicable subject to the provisions of the Act.

7. It is a settled legal proposition that the statutory requirements relating to election law have to be strictly adhered to for the reason that an election dispute is a statutory proceeding unknown to the common law and thus, the doctrine of equity, etc. does not apply in such dispute. All the technicalities prescribed/mandated in election law have been provided to safeguard the purity of the election process and courts have a duty to enforce the same with all rigours and not to minimize their operation. A right to be elected is neither a fundamental right nor a common law right, though it may be very fundamental to a democratic set-up of governance. Therefore, answer to every question raised in election dispute is to be solved within the four corners of the statute. The result announced by the Returning Officer leads to formation of a government which requires the stability and continuity as an essential feature in election process and therefore, the counting of ballots is not to be interfered with frequently. More so, secrecy of ballot which is sacrosanct gets exposed if recounting of votes is made easy. The court has to be more careful when the margin between the contesting candidates is very narrow. "Looking for numerical good fortune or windfall of chance discovery of illegal rejection or reception of ballots must be avoided,

as it may tend to a dangerous disorientation which invades the democratic order by providing scope for reopening of declared results". However, a genuine apprehension of mis-count or illegality and other compulsions of justice may require the recourse to a drastic step.

8. Before the court permits the recounting, the following conditions must be satisfied:

(*i*) The court must be satisfied that a *prima facie* case is established;

(*ii*) The material facts and full particulars have been pleaded stating the irregularities in counting of votes;

(*iii*) A roving and fishing inquiry should not be directed by way of an order to re-count the votes;

(*iv*) An opportunity should be given to file objection; and

(*v*) Secrecy of the ballot should be guarded.

9. This Court has consistently held that the court cannot go beyond the pleadings of the parties. The parties have to take proper pleadings and establish by adducing evidence that by a particular irregularity/illegality, the result of the election has been "materially affected". There can be no dispute to the settled legal proposition that "as a rule relief not founded on the pleadings should not be granted".

Thus, a decision of the case should not be based on grounds outside the pleadings of the parties. In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts. (**Vide: Ram Sewak Yadav v. Hussain Kamil Kidwai & Ors.,** AIR 1964 SC 1249; **Bhabhi v. Sheo Govind & Ors.,** AIR 1975 SC 2117; and **M. Chinnasamy v. K.C. Palanisamy & Ors.,** (2004) 6 SCC 341).

10. There may be an exceptional case where the parties proceed to trial fully knowing the rival case and lead all the evidence not only in support of their contentions, but in refutation of the case set up by the other side. Only in such circumstances, absence of an issue may not be fatal and a party may not be permitted to submit that there has been a mis-trial and the proceedings stood vitiated. (Vide: **Kalyan Singh Chouhan v. C.P. Joshi**, AIR 2011 SC 1127).

11. The secrecy of a ballot is to be preserved in view of the statutory provision contained in Section 94 of the Act. Secrecy of ballot has always been treated as sacrosanct and indispensable adjunct of free and fair election. Such principle of secrecy is based on public policy aimed to ensure that voter may vote without fear or favour and is free from any apprehension of its disclosure against his will.

In the case of **S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra & Ors.**, AIR 1980 SC 1362, a Constitution Bench of this Court considered the aspect of secrecy of vote and held that such policy is for the benefit of the voters to enable them to cast their vote freely. However, where a benefit, even though based on public policy, is granted to a person, it is open for that person and no one else

to wave of such benefit. The very concept of privilege inheres a right to wave it. (See also: **Kuldip Nayar v. Union of India & Ors**., AIR 2006 SC 3127; and **People's Union for Civil Liberties & Anr. v. Union of India & Anr.**, (2013) 10 SCC 1).

12. We find some force in the contention of Shri P.P. Rao, learned senior counsel appearing for the respondent No.1 that though secrecy of ballot is an inherent principle in conducting elections, however, the said principle has diminished to some extent in view of the rule of whip as prescribed in Tenth Schedule to the Constitution of India.

13. The issue of marking and writing on ballot papers is governed by the Conduct of Elections Rules, 1961 (hereinafter referred to as `Rules'). Rule 73(2) of the Rules reads as under:

> "73. **Scrutiny and opening of ballot boxes and the packets of postal ballot papers:**
>
> (1) xx xx xx
>
> (2) A ballot paper shall be invalid on which-
>
> (a) the figure '1' is not marked; or
>
> (b) the figure '1' is set opposite the name of more than one candidate or is so placed as to render it doubtful to which candidate it is intended to apply; or

(c) the figure '1' and some other figures are set opposite the name of the same candidate; or

(d) there is any mark or writing by which the elector can be identified.

xx xx xx"

14. In **Dr. Anup Singh v. Shri Abdul Ghani & Anr.**, AIR 1965 SC 815, a Constitution Bench of this Court considered the provisions of Rule 73(2)(d) which provides that a ballot paper shall be invalid if "there is any mark or writing by which the elector can be identified". The Court observed as under:

"10…Thus there are three possible interpretations of the words "by which the elector can be identified" appearing in Rule 73(2)(d), namely (i) any mark or writing which might possibly lead to the identification of the elector, (ii) such mark or writing as can reasonably and probably lead to the identification of the elector, and (iii) the mark or writing should be connected by evidence aliened with an elector and it should be shown that the elector is actually identified by such mark or writing.

11. ....When the legislature provided that the mark or writing should be such that the elector can be identified thereby it was not providing for a mere possibility of identification. On this construction almost every additional mark or writing would fall within the mischief of the provision. If that was the intention the words would have been different,....

12. We are further of opinion that the third construction on which the appellant relies also cannot be accepted. If the intention of the legislature was that only such votes should be invalidated in which the elector was actually

identified because of the mark or writing, the legislature would not have used the words "the mark or writing by which the elector can be identified". These words in our opinion do not mean that there must be an actual identification of the elector by the mark or writing before the vote can be invalidated. If such was the intention of the legislature clause (d) would have read something like "any mark or writing which identifies the elector". But the words used are "any mark or writing by which the elector can be identified", and these words in our opinion mean something more than a mere possibility of identification but do not require actual proof of identification before the vote can be invalidated, though by such proof, when offered, the disability would be attracted."

15. Similarly, in **Era Sezhiyan v. T.R. Balu & Ors.**, AIR 1990 SC 838, this Court after considering Rule 73(2) of the Rules held as under:

"14…Sub-rule (2) of rule 73 of the Election Rules set out earlier that a ballot paper shall be invalid on which there is any figure marked otherwise than with the article supplied for the purpose. Rule 73 is directly applicable to the case of the election in question and as aforesaid it prescribes that if on the ballot paper there is any figure marked otherwise than with the article supplied for the purpose, the ballot paper shall be invalid. Assuming that the voter in this case had expressed his intention clearly by marking the figure I in green ink, ***he did so in violation of the express provisions of the Rules which have a statutory force and hence no effect can be given to that intention.****"* (Emphasis added)

While considering the case, this Court placed reliance upon its earlier judgment in **Hari Vishnu Kamath v. Syed Ahmad Ishaque & Ors.,** AIR 1955 SC 233.

16. In **Km. Shradha Devi v. Krishna Chandra Pant & Ors.**, AIR 1982 SC 1569, this Court considered the provisions of Rule 73(2)(d) of the Rules and held as under:

> *"A ballot paper shall be invalid on which there is any mark or writing by which the elector can be identified. Section 94 of the Act ensures secrecy of ballot and it cannot be infringed because no witness or other person shall be required to state for whom he has voted at an election. Section 94 was interpreted by this Court in* ***Raghubir Singh Gill*** *(supra), to confer a privilege upon the voter not to be compelled to disclose how and for whom he voted. To ensure free and fair election which is pivotal for setting up a parliamentary democracy, this vital principle was enacted in Section 94 to ensure that a voter would be able to vote uninhibited by any fear or any undesirable consequence of disclosure of how he voted. As a corollary it is provided that if there is any mark or writing on the ballot paper which enables the elector to be identified, the ballot paper would be rejected as invalid. But the mark or writing must be such as would unerringly lead to the identity of the voter."*

17. If all the judgments referred to hereinabove in respect of interpreting the provisions of Rule 73(2)(d) are conjointly considered, we are of the opinion that there must be some casual connection between the mark and the identity of the voter and such writing or

marking itself must reasonably give indication of the voter's identity. As to whether such marking or writing in a particular case would disclose the identity of the voter, would depend on the nature of writing or marking on the ballot involved in each case. Therefore, such marking or writing must be such as to draw an inference about the identity of the voter. To that extent, with all humility at our command, we have to say that word "unerringly" used by this Court in **Km. Shradha Devi** (supra) is not in consonance with the law laid down by the Constitution Bench of this Court in **Dr. Anup Singh** (supra).

18. This brings us to the next question involved herein as to whether election petition and recrimination petition have to be tried simultaneously.

In a composite election petition wherein the petitioner claims not only that the election of the returned candidate is void but also that the petitioner or some other person be declared to have been duly elected, Section 97 of the Act comes into play and allows the returned candidate to recriminate and raise counter-pleas in support of his case, **"but the pleas of the returned candidate under Section 97 have to be tried after a declaration has been made under Section 100 of**

the Act." The first part of the enquiry is in regard to the validity of the election of the returned candidate which is to be tried within the narrow limits prescribed by Section 100 (1) (d) (iii) while the latter part of the enquiry governed by Section 101 (a) will have to be tried on a broader basis permitting the returned candidate to lead evidence in support of the pleas taken by him in his recrimination petition. If the returned candidate does not recriminate as required by Section 97, then he cannot make any attack against the alternative claim made by the election petitioner. In such a case an enquiry would be held under Section 100 so far as the validity of the returned candidate's election is concerned, and if as a result of the said enquiry, declaration is made that the election of the returned candidate is void, then the Tribunal will proceed to deal with the alternative claim, but in doing so, the returned candidate will not be allowed to lead any evidence because he is precluded from raising any pleas against the validity of the claim of the alternative candidate. (Vide: **Jabar Singh v. Genda Lal,** AIR 1964 SC 1200; **Ram Autar Singh Bhadauria v. Ram Gopal Singh & Ors.,** AIR 1975 SC 2182; and **Bhag Mal v. Ch. Parbhu Ram & Ors.**, AIR 1985 SC 150).

19. The instant case requires to be considered in light of the above settled legal propositions.

In the instant case, as explained hereinabove, there were 706 total votes, out of which 701 votes were polled. At the time of initial counting on 2.4.2009, both the candidates got equal votes as 336 and 29 votes were found invalid. On the request of the appellant, the Returning Officer permitted recounting of the votes and the appellant got 336 votes while the respondent no.1 got 335 votes and 30 votes were found to be invalid. In the election petition, the only grounds had been that 3 votes i.e. Ex.X-1 to X-3 polled in favour of respondent no.1 which had wrongly been rejected and one vote Ex.Y-13 which had been counted in favour of the appellant ought to have been declared invalid.

20. In view of the pleadings in the election petition, the case should have been restricted only to these four votes and even if the recrimination petition is taken into account, there could have been no occasion for the High Court to direct recounting of all the votes and in case certain discrepancies were found out in recounting of votes by the Registrar of the High Court as per the direction of the High Court, it was not permissible for the High Court to take into consideration all

such discrepancies and decide the election petition or recrimination petition on the basis thereof. The course adopted by the High Court is impermissible and cannot be taken note of being in contravention with statutory requirements. Therefore, the case has to be restricted only to the four votes in the election petition and the allegations made in the recrimination petition ignoring altogether what had been found out in the recounting of votes as under no circumstance the recounting of votes at that stage was permissible.

21. We have been taken through the judgment of the High Court as well as the record of the election petition including photocopies of the ballot papers in question.

22. Prayer of the election petition reads as under:

a) To declare the election of respondent no.1 to the Legislative Council 18-Nizamabad Local Authority Constituency, Nizamabad held on 30.3.2009 as illegal and void;

b) To direct recounting and scrutiny of the ballot papers and validate three votes cast in favour of the petitioner;

c) To declare one vote cast in favour of the respondent no.1 as invalid;

d) To set aside the election of the first respondent as the member of the Legislative Council from 18-Nizamabad Local Authority Constituency;

e) To declare the petitioner as elected to the Legislative Council of the State of Andhra Pradesh from 18-Nizamabad Local Authority Constituency in the election held on 30.3.2009;

f) To award costs of the petition.

23. The particulars as per the election petition in respect of the aforesaid facts had been as under:

a) one vote was polled in favour of the petitioner by marking figure '1', but the same was doubted as it looked like '7' and was kept under doubtful votes.

b) One vote which was polled in favour of the petitioner by marking figure '1' was doubted on the ground that it looked like 'dot'.

c) One vote which was polled in favour of the petitioner by marking figure '1' was treated as doubtful vote on the ground that the name of the petitioner, the contesting candidate was written on the ballot paper.

24. On the basis of the pleadings, the following issues were framed:

1. Whether the petitioner has got a *prima facie* case to an order of scrutiny and recounting of ballot papers as prayed for in the election petition?

2. Whether three (3) votes polled in favour of the petitioner as set out in paras 10 and 11 of the election petition are improperly refused or rejected?

3. Whether one (1) vote improperly received and counted in favour of the returned candidate as set out in para 10 of the election petition?

4. Whether the election of the returned candidate has been materially affected by improper refusal or rejection of three (3) votes polled in favour of the election petitioner and improper reception of one (1) vote in favour of returned candidate as stated in paras 10 and 11 of the election petition?

5. Whether the election of the respondent/returned candidate has to be declared as void?

6. To what relief?

25. It is a settled legal proposition that the instructions contained in the handbook for Returning Officer are issued by the Election Commission in exercise of its statutory functions and are therefore, binding on the Returning Officers. Such a view stands fortified by various judgments of this Court in **Ram Sukh v. Dinesh Aggarwal**, AIR 2010 SC 1227; and **Uttamrao Shivdas Jankar v. Ranjitsinh Vijaysinh Mohite Patil,** AIR 2009 SC 2975. Instruction 16 of the Handbook deals with cases as to when the ballot is not to be rejected. The Returning Officers are bound by the Rules and such instructions in counting the ballot as has been done in this case.

26. The High Court had examined the votes in dispute and came to the following findings:

> "Coming to Ex.X-1, the figure '1' is clearly marked by the voter in the panel meant for the petitioner in the ballot paper. Though, it was not in the space which is actually meant for marking figure '1', since it is in the panel (space) provided for the petitioner, it has to be treated as valid. This was also, however, objected to by the first respondent that it looks like '7' and not '1'. But, it would clearly appear that the voter marked the figure '1' and there is a small extension towards left of the said figure on the top. The learned counsel appearing for the first respondent would contend that the intention of the voter is absolutely no relevance since the rules specifically state that the figure '1' has to be put. While discussing the rules and referring to the judicial pronouncements, I have already held that a duty is cast upon the Returning Officer as well as the court to ascertain the intention of the voter. As long as the figure marked resembles '1', it is illegal to reject the ballot mechanically whenever a doubt arises that the figure marked does not accord in all respects with the figure viewed by the Returning Officer or the court. This ballot, however, clearly shows that the figure '1' was specifically and correctly marked and therefore, the Returning Officer rightly validated the said vote in favour of the petitioner.
>
> In Ex.X-2, the voter marked figure '1' in the panel meant for the petitioner. It was objected to by the first respondent that it looks like 'dot'. On careful examination, I found that the voter in fact marked figure '1', but it is short in length and the width appears to be more because of the discharge of more ink from the instrument supplied to the elector by the Returning Officer for the purpose of marking. According to me, this was improperly rejected by the Returning Officer

saying that it looks like 'dot', but not one. By carefully examining the ballot paper unhesitatingly, I hold that the voter marked figure '1' and it has to be validated in favour of the petitioner and accordingly, the same is validated for the petitioner.

xxx xxx xxx xxx

In Ex.X-3, a 'tick' mark was put in the column meant for the first respondent in addition to figure '1' which was clearly put in the space meant for the petitioner. This apart, the voter wrote that his vote is for 'Venkata Ram Reddy' (petitioner). By the said writing, it is not possible to identify the voter. From the writing, it is also not possible to draw any inference that there was prior arrangement between the petitioner and the voter to write those words. It is also not possible to presume that the writing furnishes any reasonable or probable information or evidence to find out the identity of the voter. As regards the 'tick' mark since such mark is not contemplated by the rules it has to be ignored. For all these reasons, since the figure '1' was clearly put by the voter, it has to be validated in favour of the petitioner. Accordingly, the same is validated in favour of the petitioner.

xxx xxx xxx xxx

As regards Ex.Y-13, it requires to be noticed that the figure '1' was clearly and specifically put in the column meant for the petitioner. However, the elector in the space provided for the petitioner for marking the figure put his signature apart from marking figure '1'. From the signature also it is not possible to trace out the identity of the voter and therefore, this vote also can be validated in favour of the petitioner and accordingly, it is validated in favour of the petitioner."

27. In view of the above, the High Court concluded the trial of the election petition declaring the respondent elected by margin of two votes as he secured 338 votes, while the appellant secured 336 votes.

28. We have gone through the record of the case including the four disputed ballots i.e. Ex. X-1 to 3 and Ex.Y-13 with the help of the learned counsel for the parties. We agree with the reasoning given by the High Court with respect to Ex. X-1 and 2. However, Ex.X-3 has to be held to be an invalid ballot because of the ambiguity and the additional marking i.e. "his vote is for Venkata Rama Reddy" on it. Further, though the elector has put the mark '1' in front of the name of the respondent no. 1, however, he has also put a tick mark in front of the name of the appellant. Therefore, it is impossible to make out in whose favour the elector has voted and hence, this ballot is rejected as being invalid.

29. As regards Ex.Y-13, the voter has, in addition to putting the mark '1' in front of the name of the respondent no. 1, put his signature as well. The said signature is legible and distinguishable and keeping in mind that only 701 votes were polled, it would not be difficult to identify the elector and, thus, the ballot is invalid being hit by Rule 73 (2) (d) of the Rules.

30. In view of the above, after modification of the impugned judgment and order, the appellant and the respondent no.1 get equal number of votes i.e. 336 votes each. Therefore, the judgment and order of the High Court insofar as it relates to allowing the election petition is modified to that extent.

31. In such a fact-situation provisions of Section 102 of the Act have to be resorted to, however, as the result of the election stood materially affected, we may first consider the recrimination petition filed by the appellant. In the recrimination petition, the appellant had raised the following issues:

> "(a) That one vote marked as '7' was illegally counted in favour of the 1st Respondent herein by the 2nd Respondent in spite of the objections raised by the petitioner at the time of counting and a written application to reject the said vote was filed by the petitioner herein.
>
> (b) The 2nd Respondent has illegally counted one vote in favour of the 1st Respondent though the figure '9' was marked on the ballot paper and though it is clearly looking as '9'.
>
> (c) The 2nd Respondent has illegally rejected one vote which is validly polled in favour of the petitioner herein

on the ground that the voter has put '2' after the figure '1' in the column allotted to the petitioner. According to law, the 2nd Respondent has to treat that vote as valid and counted in favour of the petitioner herein in whose favour '1' is put on the ballot paper and by ignoring the subsequent figure.

(d) The 2nd Respondent has illegally rejected some other votes validly polled in favour of the petitioner on flimsy and untenable grounds."

32. As regards the ground (d) it is to be noticed that the same is non-descriptive and vague. Any ground raised in a recrimination petition has to be specific and the court cannot be asked to make a roving and fishing enquiry on the mere asking of a party. Thus, ground (d) is not worth consideration.

33. Coming to ground (a), the same relates to Ex.P-19. The appellant has claimed that on the said ballot mark `7' had been put which was treated as mark `1' and counted in favour of the respondent no. 1. On a careful examination of the said exhibit, it is to be held that though the same may appear to be `7' but it is also another form of writing `1' and thus, there was no illegality committed by the Returning Officer in holding the same in favour of the respondent no.

1. Ground (b) relates to Ex.P-16, wherein one long stroke is made to make a mark denoting the number `1'. However, on the upper side of the stroke there is also a small curve connecting the stroke. The appellant has claimed that due to the said curve the figure on the ballot is in fact `9' and, hence, should have been declared invalid. The contention is noted just to be rejected as such a figure is to be read only as `1' for it is impossible to take such a technical and impractical view. If all the ballots are started to be scrutinized and examined in such a hyper technical manner then most of the ballots would only stand rejected. Hence, we hold that the mark `1' is made on Ex.P-16 and the same is to be counted in favour of respondent no. 1 as has been done.

34. However, Ex.Y-11 is to be declared as invalid. Not only is there scribbling on the said ballot but the final mark that is made on the ballot is `2' which is in direct conflict with Rule 73(2)(a) of the Rules and hence, the Returning Officer rightly rejected the same.

35. In view of the above, we reach the inescapable conclusion that even after deciding the Recrimination Petition, the appellant and the respondent no.1 have received equal number of votes.

36. In such a fact-situation the decision as to who will be the returned candidate is to be decided by the draw of lots by virtue of the provisions of Section 102 of the Act.

37. In view of the above, in the presence of all the learned counsel for the parties we have drawn the lots in the open Court and by draw of lots, the appellant succeeds.

38. The appeals stand disposed of accordingly in favour of appellant. No costs.

…….....J.
(Dr. B.S. CHAUHAN)

…….....J.
(J. CHELAMESWAR)

…….....J.
(M.Y. EQBAL)

NEW DELHI
February 4, 2014.