

PETITIONER:
SHRI DHARAMVIR

Vs.

RESPONDENT:
AMAR SINGH & ORS.

DATE OF JUDGMENT: 06/02/1996

BENCH:
PARIPOORNAN, K.S.(J)
BENCH:
PARIPOORNAN, K.S.(J)
VERMA, JAGDISH SARAN (J)

CITATION:
1996 SCC (3) 158 JT 1996 (2) 10
1996 SCALE (1)697

ACT:

HEADNOTE:

JUDGMENT:

WITH
CIVIL APPEAL NO. 2888 (NCE) OF 1989
Amar Singh & Ors.
V.
Shri Dharamvir & Ors.

WITH
SPECIAL LEAVE PETITION (C) NO. 12196 OF 1989
M.L. Sarwan
V.
Amar Singh & Ors.

J U D G M E N T

Paripoornan.J.

These are connected cases. The main appeal is C.A. No. 2886 of 1989. The Civil Appeals and the Special Leave Petition are preferred against the judgment of the Punjab and Haryana High Court, Chandigarh dated 2.6.1989 rendered in E.P. No. 7 of 1987. the validity of election to the Haryana Lagislative Assembly held in June, 1987 for the 67-Toshan Legislative Assembly seat is in issue. Civil Appeal No. 2886 of 1989 is the appeal filed by the returned candidate Shri Dharamvir, Lokdal (B) - first respondent in E.P. No. 7 of 1987 (as amended). The respondents therein are, petitioners 1 to 3 in the election petition, respondent No. 2 in the election petition Shri Bansi Lal (Indian National Congress) and respondents 3 to 15 in the election petition - independent candidates, who contested the election. Petitioners 1 to 3, respondent No. 2 and respondents 3 to 15 in the election petition are arrayed as respondents 1 to 17 in Civil Appeal No. 2886 of 1989. In Civil Appeal No. 2888 of 1989, the appellants are respondents 1 to 3 in Civil Appeal No. 2886 of 1989 (petitioners in the election petition). Special Leave Petition No. 12196 of 1989 is one filed by a person who was not a party in the High Court. The petitioner therein was the Returning Officer PW 9, Shri M.L. Sarwan, who, aggrieved

by certain observations made against him, has sought special leave to appeal against the judgment dated 2.6.1989. The election petition was one filed under Section 80 to 84 and 100 of Part VI, Chapter II of the Representation of People Act, 1951 (hereinafter referred to as the Act). In short, the prayer in the petition was to declare the election of the appellant (first respondent in the election petition) to the Haryana State Assembly from 67-Toshan Legislative Assembly seat (hereinafter referred to as the Assembly seat) held in June, 1987 as void and to declare the fourth respondent herein (respondent No. 2 in the election petition) Shri Bansi Lal (Indian National Congress) as elected. The High Court, by a detailed judgment dated 2.6.1989, held that the election of the appellant to the Assembly seat is void and set aside the same. The appellant was further disqualified for a period of six years from seeking election from the date the judgment came into force. It is from the aforesaid judgment, the first respondent in the election petition (appellant herein) has filed this appeal under Section 116-A of the Act.

2. For the sake of convenience, we will refer to the parties as they are arrayed in the appeal - Civil Appeal No. 2886 of 1989. The election for the Assembly seat was held on 17.6.1987. The counting of the votes took place on 18.6.1987. The results were declared on 19.6.1987. Shri Devi Lal, leader of Lok Dal (B) party was sworn in as Chief Minister of Haryana State on 20.6.1987. The appellant polled 32,547 votes, as against 30,361 votes polled by the fourth respondent. The invalidated votes amounted to 3,128, out of which in 2,799 votes, there were double markings in the ballot papers. In brief, the allegations to set aside the election are that the appellant was guilty of commission of corrupt practice of undue influence as envisaged by Section 123(2) of the Act by direct or indirect interference with the free exercise of electoral right. It was alleged that with the consent of the appellant, his counting agents started creating terror and brow-beating and threatening with physical injuries, the counting agents of other candidates, that the ballot papers of the fourth respondent were supplied by putting unauthorized rubber stamp, (a replica of the rubber stamp authorised by the Election Commission of India for marking the ballot papers), marks were cast on the ballot papers, which were in favour of the fourth respondent to invalidate the votes, that at least 10 to 15 votes of each polling booth cast in favour of the fourth respondent were included in the bundles of ballot papers of the appellant, that instructions were given to the counting agents that if any interference is made in the above, the person should be severely dealt with and notwithstanding the complaint made to the Returning Officer (PW 9) and the Observer (PW 12), no action was taken against the above unauthorized acts and threats, that unauthorized rubber seals were recovered by the Returning Officer from label No. 1 at the instance of police and votes spoiled on Table No. 2 were brought to the Returning Officer for being rejected as invalid, etc, but nothing was done to put an end to the above unauthorized acts. The Returning Officer (PW 9) was physically dealt with and the appellant was able to obtain an order of rejection of valid votes polled in favour of the fourth respondent as invalid with the assistance of the Returning Officer to further the prospects of his election and it was alleged that on these grounds, the election is liable to be set aside under Section 100(1)(d)(1) and (iii) of the Act. The votes cast in favour of the fourth respondent, which were tampered with and

rendered invalid, numbered to 3138. The counting agents of the fourth respondent were not allowed to effectively participate during the counting and there was suspension of the counting more than once. These and other allegations, by which the appellant furthered his prospects to invalidate the votes cast in favour of the fourth respondent caused rejection of valid votes cast in favour of the fourth respondent by affixing seal, unauthorisedly, and intimidation and physical threats were administered to PW 9 Returning Officer in the course of counting, etc. These averments are dealt with in paragraphs 7 to 9 of the election petition in detail (Paper body Vol. II P. 196 to 201). As against these allegations, the defence was one of total denial to the effect that no such incident took place. 3. In the light of the pleadings of the parties, the High Court condensed the electoral controversy into eleven issues, of which Issue Nos. 1,2,4,5 and 7 are material, for the purpose of this appeal. They are as follows:-

"1. Whether respondent No. 1, his counting agents and supporters with his consent committed corrupt practices of undue influence, by direct or indirect interference or any attempt to interfere in the free exercise of the electoral rights as detailed in paragraph 6 of the election petition?

2. Whether respondent No. 1, his counting agents and supporters with his consent committed corrupt practices of obtaining and procuring the assistance of a Returning Officer, for the furtherance of his election, as detailed in paragraph 7?

4. Whether the Returning Officer has improperly rejected the valid votes, polled in favour of respondent No. 2, and if so, what is its effect?

5. Whether the Returning Officer permitted respondent No. 1, his agents and his supporters to physically handle the valid votes of respondent No. 2 and to tamper with the same in violation of the Act and the Rules?

7. Whether Form 20 has been prepared subsequent to the declaration of election result on the basis of imaginary figures and if so, what is its effect?"

The findings on the above issues are summarised in the appeal petition, at pages 108 to 110, in the following terms:-

(i) Issue No.1 - the agents and supporters of the appellant with his consent put double marks, stamps, seals or thumb impressions on the votes cast in favour of respondent No. 4 thereby invalidating the same. The appellant was found guilty of commission of corrupt practice of undue influence under Section 123(2) of the Act.

(ii) Issue No. 2 - the appellant, his agents and supporters manhandled the returning officer and thus obtained procured the assistance of the returning officer for the furtherance of his

election prospects and thus guilty under Section 123(7) of the Act.

(iv) Issue No. 4 - returning officer improperly rejected votes which had been cast in favour of respondent No. 4.

(v) Issue No. 5 - returning officer had permitted the appellant, his agents and supporters to tamper with the votes in favour of respondent No. 4.

(vii) Issue No. 7 - election result in Form 20 had been prepared on the basis of imaginary figures and is thus liable to be set aside."

4. The petitioners in the E.P. examined 15 witnesses and the appellant-1st respondent examined 9 witnesses. While discussing the evidence in the case, the learned Judge of the High Court dealt with the official witnesses examined on behalf of the parties at great length. The aforesaid witnesses are 1) PW9 M.L. Sharwan, Returning Officer, 2) PW10 Shri Sunil Shourie, Police Officer who was on duty during counting of votes, 3) PW 11 Shri Yashpal Sharma, Deputy Superintendent of Police, who was posted at the time of counting, 4) PW 12 Shri R.S. Mann, I.A.S., Secretary, Transport Department, Punjab, who was deputed as Observer of the Election Commission, and 5) RW4 Shri K.C. Saha, Secretary, Election Commission of India. The appellant examined himself as RW1. There were other formal witnesses also. The High Court observed that the statements of PWs 10, 11 and 12 find corroboration on material particulars from the contemporaneous documents. It was held that the above witnesses are senior and responsible Government officers, that they are wholly independent and disinterested witnesses, that they are not in any way biased against the appellant and are not interested in the election petitioners or the fourth respondent, and that all the three witnesses were present in the counting hall on duty. The corroborative materials relied on by the High Court are PWs 9/5, 6, 7, 8 and 10, PWs 14/1 and 2, PWs 6/3-A, 3-B, 4-A, 5 and 6, PW 3/1, PW 8/1, PW 13/1, PW 7/1 and PW 12/1. The evidence of PWs 10, 11 and 12 were discussed at pages 42 to 47, 47 to 50 and 50 to 65 (Paperbook Vol.I). The Court also found that the evidence of respondent No. 7 Joint Electoral Officer, Haryana lends support to the deposition of PW 12. Similarly, the statements of PWs 8, 13, 14 and 15 were referred to show that they corroborate the statements of PWs 10, 11 and 12 (Paperbook Vol.I page 66). The evidence of PW 9 the Returning Officer was examined at great length (pages 67 to 77 of Paperbook Vol.I) and the Court observed that his statement does not inspire confidence and that while appearing as witness, he was under great "pressure". The Court also observed that PW 9 has made a very crude attempt to help the returned candidate (appellant) and it is difficult to believe an officer belonging to the State Civil Services and of his standing, will be coerced and pressurized to create documentary evidence for the success in an election petition. The Court was also of the view that PW 9 was trying to get out of the admissions in his report, Ext. PW 9/6, which are damaging to the case of the appellant. It was concluded that PW 9 is a self-confessed liar and that he had himself prepared incorrect reports and ante-dated them and no reliance can be placed on his statement made in Court. While discussing the evidence of the defence, at pages 78 to 84, the Court stated that the defence evidence is of negative nature and flies in the face of very cogent, convincing and blemishes evidence of PWs 10,

11 and 12, that the defence evidence cannot be accepted in preference to the evidence of PWs 10,11 and 12, that the facts and circumstances disclosed in the case run counter to the statements of RW 4, Secretary, Election Commission of India, that the report stated to have been submitted by him regarding his observation to the Chief Election Commission of India was not produced nor was available, that the evidence of RW 4 cannot be accepted in preference to the statements of PWs 10, 11 and 12 and has to be rejected.

5. On an analysis of the evidence in the case, the Court entered the following findings:

"From the evidence of PWs 10, 11 and 12 and the documents referred to above, it is established that the supporters of Lok Dal (B) candidates had created an atmosphere of awe, terror and hooliganism in the counting hall during the very first round of counting. Shri Sat Pal respondent No. 15 and his counting agent Diwan Singh were given beatings. The earthen pitchers were broken, furniture was scattered and the counting agents of the Congress (I) candidate were terrorized. Most of these counting agents left the counting hall. The counting hall had been surrounded by supporters of Ch. Dharamvir respondent No.1. Many of them were armed with lethal weapons. They were not permitted easy egress or ingress to the counting hall. Even the members of the police party who were deputed to bring back the agents of the Congress (I) candidate could get out of the hall only with great difficulty. The mob did not permit the return of the counting agent of the Congress (I) candidate though two valiant efforts in this behalf were made by the jawans of the CRPF. During the process of counting, duplicate markings were being put on the ballot papers which had been cast by the electors in favour of Ch. Bansi Lal the Congress (I) candidate. Thousand of votes were thus cancelled as invalid. According to Shri R.S. Mann (PW12) on such ballot papers bearing multiple marking there was visibly clear stamp mark put against the Congress (I) candidate, while the second mark or thumb impression or stamp impression was put against several other candidates. Counterfeit stamps were recovered from the counting hall. The Lok Dal (B) candidate was constantly moving from one table to another carrying whispering conversation giving clear impression that whatever was happening had his approval and was being monitored by him. At about 11.00/11.15 a.m. Shri Shourie and Shri Sharma noticed a person sitting on a table at the end of the left row affixing stamps and defacing the ballot papers. They proceeded towards that table. That person, on seeing them, threw the stamp

on the floor. Ch. Dharamvir respondent No. 1 who was standing there, put his foot on the stamp. This clearly establishes that the ballot papers of the Congress (I) candidates were being double marked, defaced and mutilated with the abetment, connivance and consent of Ch. Dharamvir respondent No. 1. As the result indicates the contest was only between respondent No. 1 and respondent No. 2. The remaining candidates had obtained very few votes. They were present in the counting hall and were aware of this fact. None of them could gain by spoiling the vote of respondent No. 2. It was only respondent No. 1 who could benefit by the wrongful rejection of the votes cast by the electors in favour of respondent No. 2. The counting agents of respondent No. 2 were not being permitted to come to the counting hall so that the illegal activities of the Lok Dal (B) candidate's agents should go on unhindered and unnoticed. Shri Sarwan in his first report Ext. PW 6/5 has clearly written that he received complaints regarding the use of marking stamps on ballot papers. He verified this fact from various counting supervisors and found that supervisors on tables No. 6 and 13 had been using stamps (for double marking). He further stated that the counting agents were being abused and coerced and they were helpless and could not count the votes properly. He had found a stamp pad being used by counting agents for putting thumb impressions on the ballot papers and getting them cancelled. He found that a substantial number of votes of Congress (I) candidates was cancelled and that had resulted for systematic defacement of the ballot papers by the counting agents. His report Ex. PW 9/6 bristles with the sordid details of the nefarious happenings in the counting hall. The report opens with a lament that there is an abnormal increase in the deliberate cancellation of votes of Congress (I) candidate by various mischievous counting agents who had marking stamps in their possession and had succeeded in spoiling ballot papers in favour of Congress (I) candidate. Even the additional supervisors deputed to oversee the counting of votes have also become silent spectators because of the coercive methods being deployed by the counting agents of opposition candidates (Respondent No. 1 was in real sense the opposition candidate against Ch. Bansi Lal). He has given an instance that 200 votes out of 678 votes of table No. 12 had been cancelled. He conceded that he

was unable to carry on the counting. He also observed that any such trend of cancellation of votes for 8 Bhiwani Parliamentary Constituency was not there. He further stated that the counting supervisors on the various tables felt a sense of insecurity while counting votes. They informed Shri Sarwan that they were helpless in view of the menace of spoiling the genuine votes polled in favour of the Congress (I) candidate. He concluded that no free, fair and proper counting of votes could be done. This was the view of the counting supervisors and counting assistants and Shri Sarwan was also of the same view. This document had come into existence at 2.00 a.m. on June 19, 1987. On receipt of this, Shri K.C. Saha, Secretary, Election Commission passed orders Ex. PW 9/7 and directed that counting may be temporarily suspended until 8.00 a.m. on June 19, 1987 and the counting must resume at 8.00 a.m. Matter does not rest there. Ch. Dharamvir respondent No. 1 his election agent Pawan Kumar and his supporters threatened, intimidated and even physically assaulted Shri Sarwan the Returning Officer, when the latter directed that 150 to 200 votes of Congress (I) candidates which had been put up for rejection before him on account of multiple marking, be not rejected and be credited to the Congress (I) candidate. More about it later. However, this fact also indicate that the double markings defacement and mutilation of ballot papers cast in favour of Congress (I) candidate was done under the inspiration, with the abetment and consent of Ch. Dharamvir respondent No.1."

(Emphasis supplied)

6. Discussing the evidence of the defence, the Court held thus:

"In view of the above discussion, I hold that the agents and supporters of Ch. Dharamvir respondent No. 1 with his consent and connivance, put double marks, stamps, seals or thumb impressions on the valid ballot papers cast by the electors in favour of Ch. Bansi Lal, respondent No. 2 and as a result of this double marking, the ballot papers were rejected. Ch. Dharamvir respondent No. 1 thus, indirectly interfered with the free exercise of electoral rights of the electors of 67 Toshan Assembly Constituency and he is guilty of commission of corrupt practice of undue influence as defined in Sub-section (2) of Section 123 of the Act. Issue No. 1 is, therefore, decided in favour of the

petitioners and against respondent No. 1. I also hold that Ch. Dharamvir, his election agents Shri Pawan Kumar and his supporters had manhandled and physically assaulted Shri M.L. Sarwan who is a Gazetted Officer in the service of the State of Haryana when he (Shri Sarwan) directed that 150 or 200 ballot papers which have been put up before him for rejection on the ground that they were pore multiple marking, be counted in favour of the Congress (I) candidate and when he refused to entertain the application moved by Ch. Dharamvir, respondent No.1, for recount. As a result of this intimidation, Shri Sarwan. Returning Officer, gave in and begged pardon and promised that he would do what they wanted and thereafter he continued initialling the ballot papers which were brought before him for cancellation on the grounds of multiple markings. Thus Ch. Dharamvir, respondent No.1, obtained/procured the assistance of Shri M.L. Sarwan for the furtherance of his election prospects and he is guilty of the corrupt practice of obtaining/procuring the assistance of a gazetted officer within the meaning of sub section (7) of section 123 of the Act. Issue No. 2 is, thus, decided in favour of the petitioners and against respondent No.1.

xx xx xx

It is evident from the statement of Shri M.L. Sarwan (PW9) that Part II of more than 50 forms 16 was blank and that the account of votes counted relating to the polling booths was not entered therein. The result in Form-20 is tabulated from the entries in Part II of Form-16. Substantial number of these forms did not have any entries of the votes counted. So, it can safely be held that the election result in Form-20 had been prepared on the basis of imaginary figures and is thus liable to be set aside. Thus issue No. 7 is decided in favour of the petitioners and against respondent No.1."

(Emphasis supplied)

7. On the basis of the above findings, the Court concluded thus:

"..... I allow this petition with costs and hold the election of Ch. Dharamvir respondent No. 1 to the Haryana State Legislative Assembly from 67 Toshan Assembly Constituency to be void and set aside the same. I further hold Ch. Dharamvir respondent No. 1 to be disqualified for a period of six years from seeking election from the date this order comes into effect. Respondent No. 1 shall bear the costs of the petitioners, which are assessed at

Rs.5,000/-."

8. We heard Mr. R.K. Khanna, Advocate, who appeared for the appellant and Mr. D.V. Sehgal, Senior Advocate, who appeared for the fourth respondent.

9. The appellant's counsel raised three main pleas. They are: (i) The various acts of hooliganism and nefarious activities at the time of counting of the votes, as stated in the election petition, are not true and have not been proved: (ii) The statutory provisions relied on section 123(2), section 123(7) or section 100 of the Act may not apply. It is only Section 64-A of the Act, which is applicable to the facts disclosed in the case; and (iii) The High Court was totally in error in disqualifying the appellant for a period of six years from seeking election. Under the Statute, the power is vested with the President to determine the question as to whether any person should be disqualified and if so, for what period.

10. On the other hand, counsel for the respondents submitted his reply to the above three pleas as hereunder. Counsel for the respondents urged (i) there is abundant material in the case to show that the hooliganism and goondaism prevailed during the counting of votes at the instance of the appellant and the nefarious and illegal activities alleged in the election petition stand employ proved by the evidence in the case, more particularly by the evidence afforded by the responsible officers and contemporaneous documents, (ii) Sections 123(2) and 123(7) read with Sections 100(1) and 135-A(d) amply bring out the various corrupt practices indulged in by the appellant and his henchmen and the High Court was justified in holding so, and (iii) It is true that in view of Section 8-A of the Act (enacted by Act 40 of 1975 with effect from 6.8.1975). that the question regarding determination of disqualification is left to the President and the High Court was not justified in pronouncing on the matter.

11. It is common ground that the High Court was not justified in disqualifying the appellant for a period of six years from seeking election. Under the Statute, the High Court is incompetent to order disqualification. Section 8-A of Act 43/51 as amended by Act 40 of 1975 concludes the matter. On this ground, the finding of the High Court that the appellant is disqualified from contesting election for a period of six years should be set aside. We hereby do so.

12. Now we are concerned only with the first two points urged on behalf of the appellant. Regarding the first point, we have to say, at the outset, that the petitioner has stated the details of the various acts of hooliganism, threat, intimidation and other nefarious activities that were indulged in by the appellant and his henchmen at the time of counting of the votes in paras 7 to 9 of the election petition. As against the positive case so pleaded by the petitioners in the election petition, the sole defence put up by the main respondent in the election petition (appellant herein) was one of clear denial. In other words, there are no two versions of the incident. In these circumstances, the only question that arises for consideration is, whether the incident, as alleged by the petitioners in the election petition, stands proved. The High Court has accepted the evidence tendered by the petitioners in this regard and entered appropriate findings holding that the appellant and his supporters put double markings, stamps, seals or thumb impressions on the votes cast in favour of respondent No.4 thereby invalidating the same. The High Court has also held that the appellant, his agents and supporters manhandled the Returning Officer (PW

9) and procured the officers assistance for the furtherance of his election prospects, the Returning Officer improperly rejected the votes cast in favour of the fourth respondent and permitted the appellant and his supporters to stamp the votes cast in favour of the fourth respondent. The findings arrived at by the High Court have been extracted by us in paragraph 3 (supra). The findings so entered are pure findings of fact, based on appreciation of the oral evidence adduced in the case. The golden rule to be observed by the appellate court when findings of fact are challenged has been succinctly stated by this Court in Sarju Parshad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh and Others (AIR 1951 SC 120). Delivering the judgment of the Bench, B.K. Mukherjea, J., at page 121 (para 7) stated the law, thus:

"The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is -- and it is nothing more than a rule of practice -- that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact: vide Lord Atkin's observations in W.C. Macdonald v. Fred Latimer [AIR (16) 1929 PC 15 at P. 18]: (112 I.C. 375). The gist of the numerous decisions on the subject was clearly summed up by Viscount Simon in Watt v. Thomas (1947) AC 484 at P. 486: (1947-1 ALL E.R. 582), and his observations were adopted and reproduced in extension by the Judicial Committees in a very recent appeal from the Madras High Court: vide Veeraswami v. Talluri Narayya [AIR (36) 1949 PC 32 (ILR 1949 Mad. 487)]. The observations are as follows:

"But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the

trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a Judge on first instance, when estimating the value of verbal testimony, has the advantage (which is denied to counts of appeal) of having the witnesses before him and observing the manner in which their evidence is given." "

(Emphasis supplied)

The same principle has been restated in *Madhusudan Das v. Smt. Narayani Bai and Others* (AIR 1983 SC 114). This Court observed thus in paragraph 8 of the judgment:

"..... It would be right to refer to the general principle that, in an appeal against a trial court decree, when the appellate court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial Court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. In this connection, reference may usefully be made to *W.C. Macdonald v. Fred Latimer*, AIR 1929 PC 15, 18 where the Privy Counsel laid down that when there is a direct conflict between the oral evidence of the parties, and there is no documentary evidence that clearly affirms one view or contradicts the other, and there is no sufficient balance of improbability to displace the trial court's findings as to the truth of the oral evidence, the appellate court can interfere only on very clear proof of mistake by the trial court. In *watt v. Thomas*, 1947 AC 484, 486 it was observed: "..... It is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given." This was adverted to with approval by the Privy Council in *Sara Veeraswami v. Talluri Narayya* (deceased), AIR 1949 PC 32. and found favour with this Court in *Sarju Parshad v. Raja Jwaleshwari Pratap Narain Singh*, 1950 SCR 781, 783 (AIR

"64-A, Destruction, loss, etc, of ballot papers at the time of counting --
(1) If at any time before the counting of votes is completed any ballot papers used at a polling station or at a place fixed for the poll are unlawfully taken out of the custody of the returning officer or are accidentally or intentionally destroyed or lost or are damaged or tampered with, to such an extent that the result of place cannot be ascertained, the returning officer

shall forthwith report the matter to the Election Commission.

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) xx xx xx xx xx

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

(c) xx xx xx xx xx

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

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

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

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

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void.

123. Corrupt practices-- The following shall be deemed to be corrupt practices for the purpose of this Act:--(1) xx xx

(2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person with the consent of the candidate or his election agent, with the free exercise of any electoral right.

123(7). The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person with the consent of a candidate or his election agent, any assistance other than the giving of vote for the furtherance of the prospects of that candidate's election, from any person in the service of the Government and belonging to any of the following classes, namely:

(a) gazetted officers;

(b) stipendiary Judges and Magistrates;

(c) members of the police forces of the Union.

(d) members of the police forces;

(e) excise officers;

(f) revenue offices other than village revenue officers known as lambardars, malguzars, patels, deshmukhs or by any other name, whose duty is to collect land revenue and who are remunerated by a share of, or commission on, the amount of land revenue collected by them but

who do not discharge any police functions; and
(g) such other class of persons in the service of the Government as may be prescribed.

123(8). Booth capturing by a candidate or his agent or other person.

135-A. Offence of booth capturing:--
Whoever commits an offence of booth capturing shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine, and where such offence is committed by a person in the service of the Government, he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine.

xxx xxx xxx

(d) seizure of a place for counting of votes by any person or persons, making the counting authorities surrender the ballot papers or voting machines and the doing of anything which affects the orderly counting of votes;

(e) doing by any person in the service of Government, of all or any of the aforesaid activities or aiding or conniving at, any such activity in the furtherance of the prospects of the election of a candidate."

(Emphasis supplied)

14. We will now take up the first point urged by the appellant's counsel to the effect that the various acts of hooliganism and other nefarious activities as alleged in the election petition did not take place and there is no material to support the said plea. This is the main issue in this case. Of the five official witnesses, the court below has correctly, in our view, laid stress on the evidence and contemporaneous reports of PW 12 Mr. R.S. Mann. IAS, Secretary, Transport Department, Punjab, who was deputed as Observer of Election Commission. PW 12 sent a detailed report to the Secretary, Election Commission of India dated 21.8.1987 along with Annexures 1 and 2. Annexure 1 dated 18.6.1987 is a message on phone from Chief Secretary, Haryana (Chief Electoral Officer) to Mr. R.S. Man, camp at Bhiwani. therein, the report given by Mr. Mann that there was scuffle in the morning between the counting agents of Bansi Lal and others and the counting agents were not allowed entry into the counting hall and with reference to the information conveyed to the Chief Election Commissioner by Mr. Mann, appropriate directions have been given by the Chief Electoral Officer, have been stated. Annexure II dated 18.6.1987 is a communication by the Returning Officer (PW 9) to Mr. A.C. Saha (RW 4), Secretary, Election Commission intimating abnormal increase of deliberate cancellation of votes of Congress (I) candidate by various mischievous persons who have marked stamps in their possession and have been successful in spoiling the ballot papers polled in favour of Congress (I) candidate. In Annexure II, the Returning Officer also referred to the fact that these mischievous and unauthorized acts came to the notice of Mr. Mann (PW 12) and the Returning Officer and so a communication was sent stating that no free, fair and proper

counting of votes can be done. These two communications are dated 18.6.1987, the day on which the counting of the votes of the Toshani and Bhiwani Assembly constituencies took place, Ext. PW 12/1, communication by Mr. R.S. Mann, Observer to the Secretary, Election Commission of India, is a very detailed one containing nearly 20 pages (PB 3 P.43 to 63). The report sent to the Election Commission about the happenings in the counting hall on 18.6.1987 and 19.6.1987 signed by Mr. Mann and exhibited as PW 12/1 was proved when he was examined as PW 12. When examined as PW 12, Mr. Mann stated that he had made notes of what transpired in the counting hall and the report EX. PW 12/1 was prepared from the notes. The High Court observed that "there is sufficient intrinsic evidence in the report of its truthfulness. It bristles with minute details of the happenings. Such details could not be conjured up by Mr. Mann. It was sent to the Election Commission shortly after the declaration of the result and that too in the discharge of his official duties. Since he had been appointed as Observer by the Election Commissioner, Mr. Mann was obliged to send a report about his observations relating to the election and counting process and the report contains information regarding the other constituency also. The evidence and the report of Mr. Mann fully support the version of PWs 10 and 11 regarding the mutilation and defacing of votes polled in favour of Mr. Bansi Lal, respondent No.2" (PB Vol.I p.65-66). The contents of the report are revealing. Referring to the counting, Mr. Mann has stated therein that he was in the hall where counting for Toshani constituency was done and it was here "that some very dramatic and shocking incidents took place". He adds that because of the directions received on telephone from the Chief Election Commissioner, he stayed on in the counting hall throughout the period when counting was taking place and the counting started for the Toshani constituency at 7.00 a.m. on 18.6.1987 and was over at 8.30 a.m. on 19.6.1987. PW 12 has referred to the fact of complaints made by Congress (I) candidate's agents regarding the harassment and intimidation at the hands of the Lok Dal agents and that a scuffle took place between an independent candidate and Lok Dal agents. He has stated further that some counting agents were forcibly handling the ballot papers and the warning of the Returning Officer fell into deaf ears, that no counting agent of the Congress party was present on the various tables and that Lok Dal candidate's agents were using duplicate seals in their possession to mutilate or double mark such of the ballot papers which had been originally marked by the voter in favour of the Congress candidate. Though this was brought to the notice of the Returning Officer, he pleaded his helplessness stating that if a probe is made, it would lead to a very explosive situation. The report further contains the following statement:-

"....To our surprise, some time later, from the same table about which the complaints had been made by Shri Dalal, a constable reported that a seal was lying under one of the chairs. The Returning Officer immediately proceeded there and recovered the seal. This seal was actually the rubber facsimile and the bottom part of the rubber seal without the wooden handle. The Returning Officer put the seal in his pocket without taking any further action. It also appeared at that stage that the

number of rejected votes was going up constantly and most of the votes were being rejected on the ground of multiple marking. In the meantime I had telephonically intimated to the Chief Electoral Officer at Chandigarh of the whole situation. Around that time a call came from the Chief Election Commissioner himself making enquiries about the state of affairs..... That complaints of harassment of the counting staff as well as of the Congress counting agents and also of malpractices like mutilating and marking the ballot papers by the Lok Dal workers had been received. At about 4.50 p.m. I received a message from the Chief Electoral Officer (original copy enclosed as Annexure I) As I moved round in the hall. I saw with horror that duplicate seals were being affixed freely on ballot papers and even thumb impressions were being applied on the ballot papers. What was more shocking, the counting staff did not object to it and at one or two places it was clear that the counting staff was conniving at this. I brought these alarming facts to the notice of the Returning Officer who pleaded his complete helplessness in the matter saying that any action on his part would invite serious trouble inside the counting hall..... On the arrival of the Commission's officers, I briefed them about various developments emphasizing that the election agents of the Congress candidates were absent but were pressing hard to come in and that major malpractices in the form of multiple-marking in the counting hall were going on As the counting continued one could make out that the malpractice noticed earlier were still continuing and the number of rejected votes kept on becoming alarmingly larger and larger. The S.P. (whose name is Shri Sunil Suri and is presently posted in Chandigarh) told the Secretary that on this particle table he had seen with his own eyes that one of the counting staff was affixing duplicate seals in violation of all laws. He stated that at least fifty seals could be recovered from the Hall. Shri Suri also started shouting that a mockery was being made of the election procedures, frauds were being permitted openly and that if no action was taken, the police force would feel humiliated and they would rather like to go out...."

Even though the officers of the Election Commission were patrolling the hall, it seems that the mischievous elements continued with their activities of tampering with the ballot papers. This

was possible because the counting staff just turned their face to other side and in some cases, they even joined in this hefarious plot. At about 3.30 a.m. the Returning Officer got fed up with state of affairs as the things really worsened and he wrote a letter to Shri Saha. Secretary, Election Commission who was present in the hall. This letter is annexed in original as Annexure II. In this letter the Returning Officer expressed his helplessness in curbing the malpractices which were gravely harming the Congress candidate and requested for guidance from the Election Commission's officers. He started scrutinizing the rejected ballot papers very carefully and ruled that nearly 90% to 95% of the votes rejected on the grounds of multiple-marking actually were cast in favour of the Congress and accordingly decided that these votes henceforth should not be rejected but should be credited to the lot of the Congress candidate. The Returning Officer produced from his pocket the seal which had been recovered earlier and told Shri Dharamvir that he should ask his conscience if it was not a fact that a larger number of such seals were in the possession of his agents in the hall and that they were using these seals to tamper with the ballot papers. Shri Dharamvir replied that this might be so but there is no law under which the Returning Officer could treat such ballot papers as valid and then allocate them to the Congress candidate. Shri Dharamvir and his colleagues held out dire threats to the Returning Officer saying that they had come determined to leave the hall as winners and they would not allow the Returning Officer at any cost to prevent the Lok Dal victory. In the face of this intimidation, the Returning Officer gave in. I had a detailed discussion with the officers of the Election Commission to whom I suggested that since malpractices had been indulged in on a very large scale, it would be very appropriate if before the Returning Officer declared the result, the entire matter was reported to the Commission. The Officers of the Election Commission opined that this was a matter to be decided by the Returning Officer only."

(Emphasis supplied)

Mr. Mann wound up the above by stating thus:

"..... The election ended in a victory for the Lok Dal candidate by a margin of 2185 votes. The number of rejected votes was around 3800.

From the above narration of facts it would be clear that almost the entire

counting was done in an atmosphere of hooliganism, coercion and lawlessness. The situation was very poorly handled by the Returning Officer who completely failed to take effective steps to curb the malpractices being indulged in openly by the Lok Dal candidate and others. Not only the number of rejected votes was exceptionally large but very distinct features of the rejected votes were (a) almost 90% of them were rejected on grounds of multiple marking; and (b) those ballot papers which were rejected on the ground of multiple-marking had invariably one clear stamp mark against Congress candidate while the second mark of a thumb impression or stamp impression was put on one of the several other candidates. The Lok Dal candidate was constantly moving from one table to another carrying whispering conversation giving a clear impression that whatever was happening had his approval and was actually being monitored by him. A greater and more dare-devilish fraud on the electoral process is difficult to imagine. What is even more shocking is the fact that all this happened in the constituency of the C.M. who is otherwise known to be a strong man."

(Emphasis supplied)

15. We perused through the depositions of Mr. Mann (PW 12) contained in PB Vol.II at p. 562 to 568. He has sworn in terms of Ex. PW 12/1 report and the annexures thereto. It is surprising that on various aspects stated in Ext. PW 12/1 and the two annexures, and the statements contained in Chief examination about the incident that happened, there was practically no cross examination. It is also relevant to notice that the statement of PW 12 that he contacted the Chief Election Officer (Chief Secretary) while the counting was going on, as stated in the report was not questioned or assailed.

16 We were taken through relevant passages from the evidence of PW 8 Mr. Jayprakash Dalal (PB Vol.II at p.511), PW 9 Mr. M.L. Sharwan (PB Vol.II at p. 522 to 544), PW 10(PB. Vol II at p. 545 to 550) and PW 11 (PB Vol.II at p. 551 to 556). On a perusal of the above evidence, we are satisfied that the discussion of the evidence of PWs 9,10,11 and 12 at p. 42 to 77 of PB Vol.1, and of the defence evidence, in particular that of RW 4, from p.80 to 83 (PB Vol.I) and the conclusion of the High Court that the evidence of PWs 10,11 and 12 do not suffer from any inherent infirmity and inspires confidence, whereas the evidence of PW 9 as well as RW 4 are not acceptable and lack credibility, is unassailable. The evidence of PW 9 Returning Officer is contradictory and is at variance with the evidence of PW 12 and PW 10 and PW 11. in material particulars. The authentic, contemporaneous documents along with the evidence of the official witnesses, PWs 10 to 12, are revealing and intrinsically reliable, disclosing true state of affairs. What is more, PW 9 was deposing against his own admission (PW 9/6) and stands self condemned by his own evidence. Ex. PW 9/6 is a letter by PW 9 to RW 4 (Mr.

Sahe) at 2.55 a.m. on 19th, wherein it is stated that abnormal increase of deliberate cancellation of votes of Congress (I) candidate by mischievous counting agents, who had been making use of the stamps in their possession and had succeeded in shoaling the ballot papers in favour of Congress (I) candidate (see PB Vol. I p. 38 and 69). The other official witness, RW 4 Mr. Saha, is the Secretary to the Election Commission of India. He reached the place where counting of votes was going on, rather late, only at 9.30 p.m. on 18.6.1987, apprehending trouble or alerted by some complaint or untoward incident. Which necessitated his proceeding to the place of counting of votes. It is stated that the Chief Election Commissioner had deputed him gradually. He cannot speak of anything that happened before 9.30 p.m. on 18.6.1987. It should be noticed that PW 12, in his communication Ex. PW 12/1 dated 21.6.1987, has stated that he had stayed on in the counting hall throughout the period when counting was taking place for Toshani Constituency i.e. from 7.00 a.m. on 18.6.1987 to 8.30 a.m. on 19.6.1987. The evidence of PW 12 would furnish more clinching and adequate material as to what happened before the arrival of RW 4 MR. Saha at 9.30 p.m. By this time, out of 130 polling stations, votes of only 18 stations remained to be counted. RW 4 would say that he filed a report in writing to the Election Commission (PB Vol. II at p. 693), put the copy of the said report was not available. This basic contemporaneous document. If produced or available, would have disclosed facts distinctly and the truth. He recalls the report submitted by PW 12 Mr. Mann soon after his arrival and would say that soon after his arrival he had a talk with him and understood that counting was suspended for a while. A perusal of the deposition of RW 4 in the light of the clinching evidence adduced by PWs 10 to 12. We are equally satisfied that the observations against non-acceptance of the testimony of PW 9 Returning Officer are also justified. The adverse comments by the High Court against PW 9 the Returning Officer that he made very crude attempt to help the returned candidate (appellant) and it is difficult to believe an officer belonging to the State Civil Services and of his standing will be coerced and pressurized to create documentary evidence for success of an election petition', 'he was trying to get out of the admission in his report, he is a self-confessed liar', 'he had himself prepared incorrect reports and ante-dated them and that no reliance can be placed on his statement in court' are all justified on facts.

17. Now we will take up the second plea, that Section 123(2) or Section 123(7) or Section 100 of the Act, is not applicable to the instant case. In our view, Section 64-A of the Act relied on is inapplicable. The said section deals with a situation where the counting of votes is not complete and in case the irregularities mentioned therein should occur, the powers detailed therein can be exercised by the Election Commissioner. That section has no application to the present case. We are also satisfied that Sections 123(2) and 123(7) are inapplicable herein. Prima facie, it appears to us that Section 123(2) and 123(7) deal with corrupt practices indulged at a stage prior to the casting of the votes. Section 123(2) in terms, states that undue influence, with the free exercise of any electoral right, is a corrupt practice. Similarly, Section 123(7) refers to a corrupt practice done for the furtherance of the prospects of that candidate's election. Prima facie, these two sub-sections will apply only to pre-voting stage and not post-voting stage.

18. Reliance placed on Section 100(1) (b) read with Sections 123(2), (7) or (8) and 135-A(d) is also misplaced. Section 100(1)(d) is a general provision and does not, in terms, refer to a corrupt or fraudulent act practised by a candidate or his henchmen at the time of counting of votes and its impact on the results of the election. We have held that Section 123(B) deals with booth capturing by a candidate or his agent. The said section was inserted only with effect from 15.3.1989 - long after the elections and counting in the instant case were over. So Section 123(B) is inapplicable. Similarly, Section 135-A(d), which was inserted by Act 1 of 1989 with effect from 15.3.1989, has no retrospective effect since the election and the counting of votes and the declaration were over long before the said date.

19. In our view, the provisions of Section 100(1)(d) of the Act are clearly attracted on the facts of this case. The findings are to the effect that during the process of counting, duplicate markings were being put on the ballot papers which had been cast by the electors in favour of Mr. Bansi Lal, the Congress (1) candidate and thousands of votes were thus cancelled and rendered invalid and whatever happened in that behalf was monitored and approved by the appellant herein. The further finding is that the ballot papers of the Congress (I) candidate were being double marked, defaced and mutilated with the abetment, connivance and consent of the appellant and it was only the appellant who could benefit by the wrongful rejection of the votes cast by the electors in favour of the fourth respondent. On the basis of the above finding, we hold that the various acts of hooliganism and other fraudulent and nefarious acts and activities, as alleged in the election petition, against the appellant have been amply proved by the petitioners in the election petition. We repel the plea to the contra. We also hold that the result of the election, so far as it concerned the appellant, has been materially affected by the improper rejection of the votes obtained by the fourth respondent Congress candidate, attracting Section 100(1) (d) of the Act. This is sufficient to hold that the appellant, the returned candidate, has been guilty of corrupt practice, as rightly held by the High Court. In the circumstances, the election of the returned candidate, the appellant, was rightly held to be void and liable to be set aside. We uphold the conclusion of the High Court on this point and dismiss the appeal - C.A. No.2886/NCE/1989, but on a different basis.

20 Subject to the modification contained in paragraph 10 (supra) regarding the disqualification of the appellant to seek election for a period of six years, the judgment of the High Court is affirmed. The appeal is dismissed with costs, quantified at Rs.10,000/-.

21. In C.A. 2888 of 1989. the appellants are respondents 1 to 3 in C.A. No. 2886/NCE/1989. They are the petitioners in the election petition. They attack the judgment dated 2.6.1989 rendered by the High Court in Election Petition No.7 of 1987 insofar as the Court declined to order scrutiny and inspection of the ballot papers and in failing to declare the fourth respondent Mr. Bansi Lal as elected. We are of the view that the High Court was justified in holding the above two aspects against the appellants in this appeal. The High Court has stated rightly, in our view, that since it has been found that the votes cast in favour of the fourth respondent Mr. Bansi Lal have been double-marked, defaced or mutilated resulting in their cancellation, no further useful purpose would be served by inspection and

scrutiny of the ballot papers. The High Court has also held that the scrutiny cannot conclusively determine as to which ballot papers had been initially marked in favour of which candidate. So also, the High Court held that on the basis of the evidence, a finding cannot be entered that in fact the fourth respondent Mr. Bansi Lal received a majority of the valid votes and so, the prayer for declaring Mr. bansi Lal as elected cannot be granted. On both the counts, we concur with the decision of the High Court. We, therefore, hold that there is no merit in the appeal - C.A. No. 2888 of 1989. The said appeal is dismissed, but without costs.

22. Lastly, we will deal with S.L.P. No. 12196 of 1989. This petition seeking special leave is filed by Mr. M.L. Sarwan, PW 9, who was the Returning Officer in the election to the Haryana Assembly held in June 1987 for the 67-Toshan Legislative Assembly seat. He was not a party in the High Court. He was only a witness (PW ()). The role played by him during the counting of votes and the statements made by him in Court had to be evaluated in the light of other clinching evidence disclosed in the case and in so evaluating the evidence as a whole, the High Court had occasion to make some strictures and observations against this witness. The plea is that the High Court was unjustified in making the said adverse observations. We have dealt with this matter while dealing with the main appeal - C.A. No. 2886 of 1989 - and had occasion to fully concur with the observations made by the High Court in that regard. For the reasons stated therein, we dismiss the special leave petition - S.L.P. (C) No. 12196 of 1989 - but without costs.

23. The appeals and the special leave petition are disposed of, as above.