

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

CIVIL APPEAL NO. 870 OF 2011
(Arising out of SLP (C) NO. 16944 OF 2010)

Kalyan Singh Chouhan

...Appellant

Versus

C.P. Joshi

...Respondent

JUDGMENT

Dr. B. S. CHAUHAN, J.

1. Leave granted.
2. This appeal has been preferred against the judgment and order dated 24.5.2010 in S.B. Election Petition No. 1 of 2009 and I.A. No. 6839 of 2010 of the High Court of Judicature for Rajasthan at Jodhpur. By the impugned judgment and order the High Court rejected the application dated 11.5.2010 praying for the summoning of certain documents on the ground that it was not permissible to summon the said documents, i.e., those tendered votes in respect of

which none of the parties had taken the pleadings nor an issue had been framed in respect of those tendered votes and, thus, it was not permissible to lead any evidence on the fact which is not in issue. More so, on the ground of delay, the application had been filed after framing of the issues.

3. **FACTS :**

(A) A Notification under Section 30 of the Representation of People Act, 1951 (hereinafter called as the 'Act 1951') dated 10.11.2008 was issued by Election Commission for holding elections to constitute 13th Legislative Assembly for the State of Rajasthan including the election scheduled for Nathdwara Legislative Assembly No. 176 (hereinafter called as 'the constituency'). The appellant as well as the respondent filed their nominations and were candidates of recognised National Parties. The poll was held on 4.12.2008.

(B) During the process of polling, there had been allegations/challenges at various booths that at least 10 votes alleged to have been cast by imposters and thus, 10 tendered votes were cast under Rule 42 of the Conduct of Election Rules, 1961 (hereinafter called as the 'Rules 1961'). The counting of votes took place on 8.12.2008 and the

appellant contesting on the BJP ticket secured 62216 votes, while Shri C.P. Joshi (INC) secured 62215 votes. At the request of the election agent, a recounting took place under Rule 63 of the Rules 1961. However, the result remained the same and, thus, the appellant was declared duly elected by a margin of one vote.

(C) The respondent filed an election petition on 15.1.2009 being S.B. Election Petition No. 1 of 2009 before the High Court of Rajasthan under Sections 80, 81, 100(1)(d)(iii) and Section 100(1)(d)(iv) of 1951 Act, inter-alia, alleging that:

- (i) Smt. Kalpana Kunwar and Smt. Kalpana Singh (wife of Petitioner) were one and the same person, but her name was registered at two places in the electoral rolls of the constituency and hence she had cast two votes in the election;
- (ii) Six (6) tendered votes cast in the election must be counted and the six (6) votes originally polled against the tendered votes must be rejected.

(D) The appellant filed the written statement contesting the said election petition and the trial is in progress in the High Court.

Both the parties have filed several applications before the High Court during the trial of the election petition and the appellant has

approached this Court time and again as is evident from the orders dated 16.12.2009 passed in S.L.P(C) No. 33725 of 2009; 1.4.2010 in S.L.P.(C) No. 8212 of 2010; and 23.4.2010 in S.L.P(C) No. 10633 of 2010. Appellant filed an application under Order VI Rule 16 read with Section 151 of the Code of Civil Procedure 1908 (hereinafter called as the 'CPC') and Section 87 of the Act 1951 for the deletion of paragraph Nos. 13 to 19 of the election petition. The said application was dismissed by the High Court vide order dated 19.11.2009. The appellant preferred S.L.P (C) No. 34688 of 2009 which was dismissed by this Court vide order dated 16.12.2009.

(E) The appellant preferred an application being I.A. No.6839 of 2010 dated 11.5.2010 to summon the marked copies of the electoral rolls; register of voters in Form No.17-A; and list of tendered votes in Form No.17-B relating to the polling station nos.68, 124 and 192 of the constituency. However, the said application has been dismissed by the High Court vide impugned judgment and order dated 24.5.2010. Hence, this appeal.

4. Shri Ram Jethmalani, learned senior advocate appearing for the appellant, has submitted that in order to do complete justice, all 10

tendered votes have to be recounted. In view of the fact that there was margin of only one vote, the law requires that all the tendered votes be counted. In order to fortify his submission, Shri Jethmalani placed reliance on the judgment of this Court in **Dr. Wilfred D'Souza v. Francis Menino Jesus Ferrao**, AIR 1977 SC 286, wherein it had been directed that all the tendered votes would be summoned and taken into consideration, i.e., that all the tendered votes have to be counted. The material issue in all the cases falling under Clause (d) of Section 100 of the Act 1951 remains whether the result of the election has been materially affected and, therefore, once the appellant raised his statutory right to lead evidence, in order to prevent the miscarriage of justice, it is necessary that all the tendered votes be counted. Thus, the impugned order is liable to be set aside.

5. On the other hand, Shri M.R. Calla, learned senior advocate appearing for the respondent, has vehemently opposed the appeal contending that the principles of equity and concept of substantial justice cannot be pressed into service in the present case. The election petition is to be adjudicated giving strict adherence to the statutory provisions without being influenced by any other concepts. The Court cannot permit a party to lead evidence unless an issue has been framed

on the controversy and an issue cannot be framed unless there are actual pleadings in respect thereof. The pleadings in the instant case related only to the 6 tendered votes and an issue has been framed only to that extent. Therefore, it is not permissible to take into consideration all 10 tendered votes. The judgment so heavily relied upon by Shri Ram Jethmalani, learned senior counsel, in **Wilfred D'Souza's case** (Supra) is quite distinguishable as Recrimination Petition under Section 97 of Act 1951 had been filed in that case. Thus, the ratio of the said judgment has no bearing in the case at hand. The appeal lacks merit and is liable to be dismissed.

6. We have considered the rival submissions made by learned counsel for the parties and perused the record.

The relevant pleadings, taken in the election petition, in this regard, are in paragraph Nos. 13 to 19 of the election petition which cumulatively specifically provide:

The names of Smt. Kamla W/o Shri Champa Lal R/o Near Charbhuj Temple, Village Gudla, Tehsil Nathdwara, District Rajasmand appeared at serial number 311 in Part 27; Shri Mana S/o Shri Roda R/o Guda, Village Sema, Tehsil Nathdwara, District Rajsamand, appeared at serial number 1122 in Part 61; Ms. Bargat

Banu D/o Shri Gani R/o Talesara Bhawan, Ward No. 19, Nathdwara, District Rajsamand appeared at serial number 146 in Part 73; Shri Dalu S/o Shri Navla R/o Village Soi Ki Bhagai, Post Khamnor, Tehsil Nathdwara, District Rajsamand appeared at serial no. 714 in Part 117; Smt. Nanu W/o Shri Peer Mohammed R/o Neelgar Basti, Village Railmagra, Tehsil Railmagra, District Rajsamand appeared at serial number 866 in Part No. 180; and Shri Shamboo Lal S/o Shri Tulsi Ram R/o Kalbelia Basti, Village Banerdia, Tehsil Railmagra, District Rajsamand appeared at serial number 502 in Part 199 of the electoral roll of the constituency. When the aforesaid six voters reached the concerned polling station to cast their respective votes, they found that some imposters had already cast their votes by electronic voting machine. They completed the legal formalities by filling up Form 17-B and were allowed to have tendered ballot papers and, thereafter, they cast their votes.

7. It was further pleaded in paragraph 19 of the election petition that the aforesaid 6 tendered votes have been cast by genuine voters and must be counted. In paragraph 20, it has been submitted that because of the non-counting of the 6 tendered votes, the result of the election stood materially affected on account of improper reception of

those votes. Thus, the same was liable to be rejected being not cast by genuine voters but by imposters.

8. In the written statement, the appellant has raised his doubts in respect of the aforesaid 6 tendered votes but has not taken any specific pleadings in respect of remaining 4 tendered votes. In paragraph 20 of the written statement, it has been denied that the result of the election stood materially affected on account of improper reception of those 6 tendered votes.

In fact, the pleadings by both the parties in the election petition as well as in the written statement make reference only to 6 tendered votes and not to 10 tendered votes.

9. In view of the pleadings taken by the parties, the High Court framed only two issues:

- (i) Whether Smt. Kalpana Kunwar, wife of the respondent, is also known as Kalpana Singh and whether she cast her vote at two Polling Stations Viz. Polling Station No. 39 and Polling Station No. 40 of the Nathdwara Legislative Assembly Constituency No. 176 and if so, what is the effect on the election of the respondent?

- (ii) Whether the six votes mentioned in Para Nos. 13 to 18 of the election petition were initially improperly received and should be removed from the valid votes and in their place tendered votes should be taken into account?

Therefore, it is evident from the pleadings that the case has been limited only to 6 tendered votes and there had been no pleading in respect of the remaining 4 tendered votes either in the election petition or the written statement filed by the appellant.

10. In **Kailash v. Nanhku & Ors.**, AIR 2005 SC 2441, this Court held that the trial of an election petition is entirely different from the trial of a civil suit, as in a civil suit trial commences on framing the issues while trial of an election petition encompasses all proceedings commencing from the filing of the election petition up to the date of decision. Therefore, the procedure provided for the trial of civil suits under CPC is not applicable in its entirety to the trial of the election petition. For the purpose of the election petition, the word 'trial' includes the entire proceedings commencing from the time of filing the election petition till the pronouncement of the judgment. The applicability of the procedure in Election Tribunal is circumscribed

by two riders : firstly, the procedure prescribed in CPC is applicable only “as nearly as may be”, and secondly, the CPC would give way to any provisions of the Act or any rules made thereunder. Therefore, the procedure prescribed in CPC applies to election trial with flexibility and only as guidelines.

11. In **Harcharan Singh v. S. Mohinder Singh & Ors.**, AIR 1968 SC 1500, this Court considered the application of doctrine of equity and substantial justice etc. in election law and came to the conclusion as under :-

*“The statutory requirements of election law must be strictly observed. An election dispute is a statutory proceeding unknown to the common law; **it is not an action at law or in equity.** The primary purpose of the diverse provisions of the election law which may appear to be technical is to safeguard the purity of the election process, and the Courts will not ordinarily minimise their operation.”* (Emphasis added)

12. Similarly in **Jyoti Basu & Ors. v. Debi Ghosal & Ors.**, AIR 1982 SC 983; this Court held as under :-

“A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election.

*Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction and a special jurisdiction has always to be exercised in accordance with the statute creating it. **Concepts familiar to Common Law and Equity must remain strangers to Election Law** unless statutorily embodied. **A Court has no right to resort to them on considerations of alleged policy** because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket.**We have noticed the necessity to rid ourselves of notions based on Common Law or Equity.** We see that we must seek an answer to the question within the four corners of the statute.”*

(Emphasis added)

13. In **Chanda Singh v. Ch. Shiv Ram Varma &**

Ors., AIR 1975 SC 403, this Court held as under:-

“A democracy runs smooth on the wheels of periodic and pure elections. The verdict at the polls announced by the Returning Officers lead to the formation of governments. A certain amount of stability in the electoral process is essential. If the counting of the ballots are interfered with by too frequent and flippant re-counts by courts a new threat to the certainty of the poll system is introduced through the judicial instrument. Moreover, the secrecy of the ballot which is

sacrosanct becomes exposed to deleterious prying, if re-count of votes is made easy. The general reaction, if there is judicial relaxation on this issue, may well be a fresh pressure on luckless candidates, particularly when the winning margin is only of a few hundred votes as here, to ask for a re-count Micawberishly looking for numerical good fortune or windfall of chance discovery of illegal rejection or reception of ballots. This may tend to a dangerous disorientation which invades the democratic order by injecting widespread scope for reopening of declared returns, unless the court restricts recourse to re-count to cases of genuine apprehension of miscount or illegality or other compulsions of justice necessitating such a drastic step.”

14. During the trial of an election petition, it is not permissible for the court to permit a party to seek a roving enquiry. The party must plead the material fact and adduce evidence to substantiate the same so that the court may proceed to adjudicate upon that issue. 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 recount the votes;*

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

(v) *Secrecy of the ballot requires to be guarded.*

(Vide : **Dr. Jagjit Singh v. Giani Kartar Singh & Ors.**, AIR 1966 SC 773; **Suresh Prasad Yadav v. Jai Prakash Mishra & Ors.**, AIR 1975 SC 376; **M. Chinnasamy v. K.C. Palanisamy & Ors.**, AIR 2004 SC 541; **Chandrika Prasad Yadav v. State of Bihar & Ors.**, AIR 2004 SC 2036; **Tanaji Ramchandra Nimhan v. Swati Vinayak Nimhan**, AIR 2006 SC 1218; **Gursewak Singh v. Avtar Singh & Ors.**, AIR 2006 SC 1791; and **Baldev Singh v. Shinder Pal Singh & Anr.**, (2007) 1 SCC 341).

15. In **Gajanan Krishnaji Bapat & Anr. v. Dattaji Raghobaji Meghe & Ors.**, AIR 1995 SC 2284; this Court held that the court cannot consider any fact which is 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.

16. Pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are

more to help the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is settled legal proposition that “as a rule relief not founded on the pleadings should not be granted.” Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide : **Sri Mahant Govind Rao v. Sita Ram Kesho**, (1898) 25 Ind. App. 195; **M/s. Trojan & Co. v. RM. N.N. Nagappa Chettiar**, AIR 1953 SC 235; **Raruha Singh v. Achal Singh & Ors.**, AIR 1961 SC 1097; **Om Prakash Gupta v. Ranbir B. Goyal**, AIR 2002 SC 665; **Ishwar Dutt v. Land Acquisition Collector & Anr.**, AIR 2005 SC 3165; and **State of Maharashtra v. Hindustan Construction Company Ltd.**, (2010) 4 SCC 518.)

17. This Court in **Ram Sarup Gupta (dead) by L.Rs. v. Bishun Narain Inter College & Ors.**, AIR 1987 SC 1242 held as under:

"It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be

pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet..... In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question.”

18. This Court in **Bachhaj Nahar v. Nilima Mandal & Ors.** , AIR

2009 SC 1103, held as under:

“The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration.

The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue..... Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.

The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc.”

19. In **J.K. Iron & Steel Co. Ltd, Kanpur v. The Iron and Steel Mazdoor Union, Kanpur**, AIR 1956 SC 231, this Court observed:

“It is not open to the Tribunals to fly off at a tangent and, disregarding the pleadings, to reach any conclusions that they think are just and proper.”

20. **Order XIV Rule 1 CPC reads:**

“Issues arise when a material proposition of fact or law is affirmed by the party and denied by the other.”

Therefore, it is neither desirable nor required for the court to frame an issue not arising on the pleadings. The Court should not decide a suit on a matter/point on which no issue has been framed. (Vide: **Raja Bommadevara Venkata Narasimha Naidu & Anr. v. Raja Bommadevara Bhashya Karlu Naidu & Ors.**, (1902) 29 Ind. App. 76 (PC); **Sita Ram v. Radha Bai & Ors.**, AIR 1968 SC 535; **Gappulal v. Thakurji Shriji Dwarkadheeshji & Anr.**, AIR 1969 SC 1291; and **Biswanath Agarwalla v. Sabitri Bera**, (2009) 15 SCC 693).

21. The object of framing issues is to ascertain/shorten the area of dispute and pinpoint the points required to be determined by the

court. The issues are framed so that no party at the trial is taken by surprise. It is the issues fixed and not the pleadings that guide the parties in the matter of adducing evidence. [Vide : **Sayad Muhammad. v. Fatteh Muhammad** (1894-95) 22 Ind. App. 4 (PC).]

22. In **Kashi Nath** (Dead) through L.Rs. **v. Jaganath**, (2003) 8 SCC 740, this Court held that where the evidence is not in line with the pleadings and is at variance with it, the said evidence cannot be looked into or relied upon. While deciding the said case, this Court placed a very heavy reliance on the judgment of the Privy Council in **Siddik Mohd. Shah v. Saran**, AIR 1930 PC 57.

23. There may be an exceptional case wherein 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 thereof by the other side. In such an eventuality, absence of an issue would not be fatal and it would not be permissible for a party to submit that there has been a mis-trial and the proceedings stood vitiated. (vide: **Nagubai Ammal & Ors. v. B. Shama Rao & Ors.**, AIR 1956 SC 593; **Nedunuri Kameswaramma v. Sampati Subba Rao**, AIR 1963 SC

884; **Kunju Kesavan v. M.M. Philip & Ors.**, AIR 1964 SC 164; **Kali Prasad Agarwalla (dead) by L.Rs. & Ors. v. M/s. Bharat Coking Coal Ltd. & Ors.**, AIR 1989 SC 1530; **Sayed Akhtar v. Abdul Ahad**, (2003) (7) SCC 52; and **Bhuwan Singh v. Oriental Insurance Co. Ltd.**, AIR 2009 SC 2177).

24. Therefore, in view of the above, it is evident that the party to the election petition must plead the material fact and substantiate its averment by adducing sufficient evidence. The court cannot travel beyond the pleadings and the issue cannot be framed unless there are pleadings to raise the controversy on a particular fact or law. It is, therefore, not permissible for the court to allow the party to lead evidence which is not in the line of the pleadings. Even if the evidence is led that is just to be ignored as the same cannot be taken into consideration.

25. In **Jabar Singh v. Genda Lal**, AIR 1964 SC 1200, a Constitution Bench of this court while dealing with a similar issue observed as under:

“It would be convenient if we take a simple case of an election petition whether the petitioner makes only one claim and that is that the election

of the returned candidate is void. This claim can be made under Section 100. Section 100(1)(a),(b) and (c) refer to three distinct grounds on which the election of the returned candidate can be challenged. We are not concerned with any of these grounds. In dealing with the challenge to the validity of the election of the returned candidate under Section 100(1)(d), it would be noticed that what the election petitioner has to prove is not only the existence of one or the other of the grounds specified in clauses (i) to (iv) of Section 100(1)(d), but it has also to establish that as a result of the existence of the said ground the result of the election insofar as it concerns a returned candidate has been materially affected. It is thus obvious that what the Tribunal has to find is whether or not the election insofar as it concerns the returned candidate has been materially affected, and that means that the only point which the Tribunal has to decide is has the election of the returned candidate been materially affected? And no other enquiry is legitimate or permissible in such a case. This requirement of Section 100(1)(d) necessarily imports limitations on the scope of the enquiry. Confining ourselves to clause (iii) of Section 100(1)(d), what the Tribunal has to consider is whether there has been an improper reception of votes in favour of the returned candidate. It may also enquire whether there has been a refusal or rejection of any vote in regard to any other candidate or whether there has been a reception of any vote which is void and this can only be the reception of a void vote in favour of the returned candidate. In other words, the scope of the enquiry in a case falling under Section 100(1)(d)(iii) is to determine whether any votes have been improperly cast in favour of the returned candidate, or any votes have been improperly refused or rejected in regard to any

*other candidate. These are the only two matters which would be relevant in deciding whether the election of the returned candidate has been materially affected or not. At this enquiry, the onus is on the petitioner to show that by reason of the infirmities specified in Section 100(1)(d)(iii), the result of the returned candidate's election has been materially affected, and that, incidentally, helps to determine the scope of the enquiry. Therefore, it seems to us that in the case of a petition where the **only claim** made is that the election of the returned candidate is void, the scope of the enquiry is clearly limited by the requirement of Section 100(1)(d) itself. The enquiry is limited not because the returned candidate has not recriminated under Section 97(1); in fact, Section 97(1) has no application to the case falling under Section 100(1)(d)(iii); the scope of the enquiry is limited for the simple reason that what the clause requires to be considered is whether the election of the returned candidate has been materially affected and nothing else. If the result of the enquiry is in favour of the petitioner who challenges the election of the returned candidate, the Tribunal has to make a declaration to that effect, and that declaration brings to an end the proceedings in the election petition."*

(Emphasis added)

26. In **T.A. Ahammed Kabeer v. A.A. Azeez & Ors.**, AIR 2003 SC 2271, this Court dealt with the judgment of the Constitution Bench observing:

*"We have already stated that the rigorous rule propounded by the Constitution Bench in **Jabar Singh v. Genda Lal**, AIR 1964 SC 1200, has met*

with criticism in some of the subsequent decisions of this Court though by Benches of lesser coram and an attempt at seeking reconsideration of the majority opinion in Jabar Singh case (supra) has so far proved to be abortive. The view of the law taken by the Constitution Bench in Jabar Singh (supra) is binding on us. Analysing the majority opinion in Jabar Singh case (supra) and the view taken in several decisions of this Court, referred to hereinabove, we sum up the law as under:

(1) In an election petition wherein the limited relief sought for is the declaration that the election of the returned candidate is void on the ground under Section 100(1)(d)(iii) of the Act, the scope of enquiry shall remain confined to two questions: (a) finding out any votes having been improperly cast in favour of the returned candidate, and (b) any votes having been improperly refused or rejected in regard to any other candidate. In such a case an enquiry cannot be held into and the election petition decided on the finding (a) that any votes have been improperly cast in favour of a candidate other than the returned candidate, or (b) any votes were improperly refused or rejected in regard to the returned candidate.

(2) A recrimination by the returned candidate or any other party can be filed under Section 97(1) in a case where in an election petition an additional declaration is claimed that any candidate other than the returned candidate has been duly elected.

(3) For the purpose of enabling an enquiry that any votes have been improperly cast in favour of any candidate other than the returned candidate or any votes have been improperly refused or rejected in regard to the returned candidate the Election Court shall acquire jurisdiction to do so only on two conditions being satisfied: (i) the election petition seeks a declaration that any

candidate other than the returned candidate has been duly elected over and above the declaration that the election of the returned candidate is void; and (ii) a recrimination petition under Section 97(1) is filed.

(4) A recrimination petition must satisfy the same requirements as that of an election petition in the matter of pleadings, signing and verification as an election petition is required to fulfil within the meaning of Section 83 of the Act and must be accompanied by the security or the further security referred to in Sections 117 and 118 of the Act.

(5) The bar on enquiry enacted by Section 97 read with Section 100(1)(d)(iii) of the Act is attracted when the validity of the votes is to be gone into and adjudged or in other words the question of improper reception, refusal or rejection of any vote or reception of any vote which is void is to be gone into. The bar is not attracted to a case where it is merely a question of correct counting of the votes without entering into adjudication as to propriety, impropriety or validity of acceptance, rejection or reception of any vote. In other words, where on a re-count the Election Judge finds the result of re-count to be different from the one arrived at by the Returning Officer or when the Election Judge finds that there was an error of counting the bar is not attracted because the court in a pure and simple counting carried out by it or under its directions is not adjudicating upon any issue as to improper reception, refusal or rejection of any vote or the reception of any vote which is void but is performing mechanical process of counting or re-counting by placing the vote at the place where it ought to have been placed. A case of error in counting would fall within the purview of sub-clause (iv), and not sub-clause (iii) of clause (d) of sub-section (1) of Section 100 of the Act.”

27. Therefore, in the case at hand, the election petitioner/respondent has claimed only that there has been irregularity/illegality in counting of 6 tendered votes and the case squarely falls within the ambit of Section 100(1)(d)(iii) of the Act, 1951. Election petitioner has further pleaded that the result of the election stood materially affected because of improper receiving the six tendered votes and in absence of any Recrimination Petition in the case the appellant cannot be permitted to lead evidence on the fact which is not in issue.

28. The judgment in **Wilfred D'Souza's case** (Supra) has distinguishable features. In that case, the appellant had asserted that the result of the election of the respondent had been materially affected by the improper reception, refusal and rejection of votes and a specific prayer had been made by the appellant in the election petition that the **election of the respondent be declared void and the appellant be declared to be duly elected**. The respondent had denied that the tendered votes were cast by genuine voters. The issue had been framed in that case as under:

“Whether the petitioner proves that the vote or votes were initially improperly received and

should be removed and in their place tendered vote or votes should be taken into account.”

The Election Tribunal therein did not record any evidence on behalf of the respondents and proceeded to decide the case after the evidence of the witnesses of the appellant had been recorded and after the box containing the relevant papers had been opened and those papers were examined. In view of the fact that the appellant had adduced prima facie proof in respect of two of the tendered ballot papers, the Election Tribunal was to call upon the respondent to adduce his evidence and the evidence should not be constrained only to the two tendered ballot papers in respect of which the appellant had not adduced any evidence, but would relate to some or all the other 8 tendered ballot papers in respect of which the appellant had not adduced any evidence.

JUDGMENT

That was, admittedly, a case wherein a Recrimination Petition under Section 97 of the Act 1951 had been filed. In the instant case, there is no such claim made by the parties. In the instant case, an application had been filed to summon the other 4 tendered votes, also making a submission that those documents were required by the parties to resolve the controversy without giving any reason or

justification for the same. Admittedly, there is no reference to these 4 tendered votes either in the election petition or in the written statement. The said 4 tendered votes neither had been relied upon in the reply by the appellant nor had been entered in the list of documents. Thus, the judgment in this case is quite distinguishable from the case at hand.

29. In view of the above, we do not find any cogent reason to interfere with the well reasoned judgment and order of the High Court impugned herein. The facts and circumstances of the case do not warrant review of the order passed by the High Court. The appeal lacks merit and is accordingly dismissed.

.....J.
(P. SATHASIVAM)

.....J.
(Dr. B.S. CHAUHAN)

**New Delhi,
January 24, 2011**

