

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 7591 OF 2012
(Arising out of S.L.P. (C) No.28143 of 2010)

Ashok

...Appellant

Versus

Rajendra Bhausahab Mulak

...Respondent

With

CIVIL APPEAL NO. 7592 OF 2012
(Arising out of S.L.P. (C) No.28333 of 2010)

O R D E R

In view of conflicting views expressed by us, we refer this matter to a three Judge Bench for resolving the conflict. The Registry shall place the record before Hon'ble the Chief Justice of India for constituting an appropriate Bench.

.....J.
(T.S. THAKUR)

.....J.
(GYAN SUDHA MISRA)

New Delhi
October 18, 2012

REPORTABLE

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J U D G M E N T

T.S. THAKUR, J.

1.High Court of Judicature at Bombay, Nagpur Bench has dismissed Election Petitions No.1 and 2 of 2010 filed by the appellants-petitioners in these appeals. The High Court has taken the view that although the election petitions did not allege the commission of any corrupt practice against the returned candidate (respondent herein) and although the petitions sufficiently established the authenticity of the

documents relied upon by the petitioners yet the petitions were deficient inasmuch as the same did not disclose as to how the election of the returned candidate was materially affected by the alleged improper reception of the votes polled in the election. The hallmark of the order passed by the High Court is a copious reference to the decisions of this Court no matter some if not most of them had no or little relevance or application to the facts of the case before it, in the process adding to the bulk of the order under challenge. At the heart of the conclusion arrived at by the High Court is the argument that even when the election petitions contain specific averments alleging improper reception of 14 votes with the names of those who cast those votes, the same do not go further to state as to in whose favour the said votes were actually polled. This, according to the High Court, was an essential requirement for disclosure of a cause of action inasmuch as in the absence of a statement that the improperly received votes were polled and counted in favour of the returned candidate, neither the election petitions disclosed a cause of action nor was it possible to say that the result of the

election was materially affected by the narrow margin of the victory notwithstanding. We cannot do better than extract from the judgment of the High Court the passages from which the reasoning underlying the conclusion drawn by the High Court can be deduced albeit with some amount of difficulty. The High Court observed:

"The Election Petitioners here only point out a possibility of result of election being different if 14 or 5 votes can be excluded. It is not their case that said votes when displayed revealed that they were in favour of Rajendra or not in favour of Ashok. The Polling Agent of Petitioner at Kamptee is not being quoted or relied upon by Shri Ashok Mankar. Here, there are only two contestants and difference between them is of 4 votes only. The objection is about receipt of 14 or 5 votes. Several questions having bearing on result of said election being materially affected in so far as returned candidate is concerned, arise. The Petitioners have not pointed out the beneficiary of those 14 or 5 votes. It is not their plea that all those voters cast their vote in favour of Returned Candidate or did not vote in favour of defeated candidate. There is no plea about their political affinities either to associate or dis-associate them with BJP or National Congress (I) political parties. The said votes now can not be traced out & segregated. Hence when "displayed" what was seen & the vote was cast in whose favour ought to have been pleaded.

Election Petitioners can not seek rejection of 14 votes or 5 votes which according to them can be identified and ask for recount without even asserting that those votes or any number out of it has gone to Returned Candidate. These votes may have been excluded only if they were cancelled before they were inserted in ballot box as per Rule 39 of 1961 Rules. Otherwise, those votes can then be subjected only to Rule 56. If any violations or breaches of their duties by staff at Polling Station at Kamptee is to be alleged, it is apparent that adequate pleadings are must for said purpose. Timely protest by agent of Ashok would have been one such fact. If any thing was displayed and it was adverse to Ashok's interest, why objection was not lodged then & there is again an important factor. It is the result of election in so far as it concerns the returned candidate which is required to be proved as materially affected. Only possibility of election getting affected is not sufficient to un-sit the elected candidate.

Section 100 (1)(d)(iii) & (iv) requires pleading of illegalities as also irregularities and also of facts indicating material effect thereof on the election of the returned candidate. Only after these pleadings, evidence in relation thereto can come on record & not otherwise. Opinion of High Court contemplated by S.100(1) is possible only after due opportunity to returned candidate. Hence pleading of this material fact of link between the victory & lacunae/omissions is pre-requisite to formation of this opinion. A "triable issue" cannot be said to arise till then as no cause of action surfaces. Election Petitions cannot in its absence demonstrate how the result of election in so far as it concerns returned candidate is materially affected. Respondent's success with slender margin, in the absence of specific plea of any connection between it & alleged irregularities or illegalities and facts showing that connection, by itself cannot be the material fact. Pleading such link or connection cannot be pleading a material particular. The Election Petitions cannot be said to be "complete" without any whisper of such connection. Both Election Petitioners have avoided to plead vital link between the alleged breaches and the success of Returned Candidate. This omission cannot be allowed to be cured by amendment as limitation for filing Election petition has long expired and "material facts" cannot be now permitted to be added."

2. When these special leave petitions came up for hearing before this Court on 3rd April, 2012, Mr. V.A. Bobde, learned senior counsel for the respondents, raised a preliminary objection to the maintainability of the petitions. It was contended by Mr. Bobde that the impugned judgment and order of the High Court dismissing the election petitions filed by the petitioners being appealable under Section 116A of the Representation of People Act, 1950, the petitioners could not maintain the special leave petitions under Article 136 of the Constitution which deserves dismissal on that ground alone. Reliance in

support was placed by Mr. Bobde upon a decision of this Court in ***Dipak Chandra Ruhidas v. Chandan Kumar Sarkar (2003) 7 SCC 66.***

3. Section 116A of the Representation of the People Act, 1951 provides for appeals to this Court both on facts as also on questions of law from every order made by the High Court under Section 98 or 99 of the Act. Sub-section (2) of Section 116A prescribes a period of 30 days for filing of such appeals while proviso to sub-section (2) empowers this Court to entertain an appeal even after the expiry of the said period if the appellant shows sufficient cause for not preferring the appeal within such period.

4. Section 98 of the Act provides for the orders that the High Court shall make at the conclusion of the trial in an election petition. These orders could be in the nature of dismissal of an election petition or declaring the election of all or any of the returned candidates to be void or declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been declared elected. Section 86 of the Act deals with the trial of election petitions and, *inter alia*, provides that the High

Court shall dismiss an election petition which does not comply with the provisions of Sections 81 or 82 or Section 117 of the Act. Any such dismissal may come after the parties go to trial or even at the threshold. An election petition which does not call for dismissal on the ground that the same violates any one of the three provisions, namely, Section 81 or 82 or 117 may still be dismissed summarily and without the parties going to trial on the merits of the controversy under Order VII Rule 11 of CPC. Any such order if may not be qualifying for a challenge before this Court under Section 116A as an appeal is under that provision limited to only such orders as are passed under Section 98 of the Act at the conclusion of the trial of election petition. Strictly speaking, it could well be said that an order which does not fall within the four corners of Section 98 inasmuch as the same is not passed at the conclusion of the trial of an election petition may not qualify for being challenged in appeal under Section 116A including an order dismissing the petitions summarily under Section 86 of the Act for non-compliance of the provisions of the Sections 81, 82 and 117. What is important and what

makes a difference is the presence of an explanation under Section 86(1) that by a legal fiction makes an order passed under Section 86 of the Act to be an order under Section 98 thereof explanation reads :

"Explanation to Section 86: An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of Section 98."

5. The fiction is, however, limited to orders passed under Section 86(1) alone namely to cases where dismissal is for non-compliance with the provisions of Sections 81, 82 and 117 of the Act. It does not extend to dismissal under Order VII Rule 11 of the CPC for non-compliance with the provisions of Section 83 of the Act. In other words, if a petition does not state the material facts on which the petitioner relies as required under Section 83(1)(a) and thereby fails to disclose any cause of action and is consequently dismissed by the Court in exercise of its powers under Order VII, Rule 11 CPC, such an order of rejection of the petition is not in terms of Explanation to Section 86 treated as an order made under Section 98 so as to be appealable under Section 116A of the Act. Mr. Prasad was, therefore, perfectly justified in arguing that

since the High Court has, in the instant case, dismissed the election petitions not under Section 86 to which the Explanation appearing thereunder is attracted but under Order VII Rule 11 for the alleged failure of the petitioners to state the material facts on which they relied, the order passed by the High Court was not appealable under Section 116A. The only difficulty which was encountered by us in holding that the special leave petitions were maintainable is a decision of this Court in **Dipak Chandra Ruhidas** case (supra) where this Court has taken the view that Section 116A must be interpreted liberally and an order dismissing the election petition on the ground that the averments do not state material facts would be appealable under Section 116A. With utmost respect to the Hon'ble Judges comprising the Bench, we find that conclusion to be contrary to the scheme of the Act. We were, therefore, inclined to make a reference to a larger Bench for re-consideration of that view, for the same, in our opinion, extends the fiction created under the Explanation to Section 86 even to case where the Court does not invoke Section 86 while passing an order of dismissal but exercises

its power of rejection of the plaint/petition under Order VII Rule 11 CPC. It is noteworthy that an order under Order VII Rule 11 CPC by reason of Section 2(2) of the CPC is a decree hence appealable under Section 96 of the Code. Since, however, the right of appeal under the Representation of the People Act is regulated by Section 116A, the fact that an order rejecting a plaint under Order VII Rule 11 CPC would have been in the ordinary course appealable before the higher Court hearing such appeals would not make any difference. Inasmuch as the right of appeal is a creature of the statute, and Section 116A does not provide for an appeal against an order passed under Order VII Rule 11 CPC read with Section 83 of the Representation of the People Act, 1951 no resort can be taken to that provision by a process of interpretation of the Explanation to Section 86 or an artificial extension of the legal fiction beyond the said provision. Mr. Prasad was not, however, very keen to pursue his argument to its logical end for obvious reasons. A reference to a larger bench would inevitably delay the disposal of these appeals and even the election petitions. Mr. Prasad, therefore, chose

the alternative course available to him and sought permission of this Court to convert the SLPs into appeals under Section 116A of the Act. Two applications, one seeking permission to convert the petitions into an appeal under Section 116A and the other seeking condonation of delay in the filing of the appeals were accordingly made by the petitioner. Having heard learned counsel for the parties at some length we are inclined to allow both these applications in both the special leave petitions. Whether or not an appeal was maintainable against the impugned order was and continues to be a highly debatable issue as seen in the foregoing paragraphs. The petitioners appear to have been advised that the orders could be challenged only by way of SLPs. That advice cannot in the circumstances of the case, be said to be a reckless piece of advice nor can the petitioners be accused of lack of diligence in the matter when the SLPs were admittedly filed within the period of limitation stipulated for the purpose. The decision of this Court in ***Deputy Collector, Northern Sub-Division Panaji v. Comunidade of Bambolim (1995) 5 SCC 333***, recognizes a bonafide mistake on the

part of the counsel in pursuing a remedy as a good ground for condonation of delay in approaching the right forum in the right kind of proceedings. The limitation prescribed for filing an appeal under Section 116A is just about 30 days from the date of the order. There is, therefore, a delay of nearly 20 days in the filing of the appeal which deserves to be condoned. We accordingly allow the applications for conversion and for condonation of delay in both the special leave petitions and direct that the SLPs shall be treated as appeals filed under Section 116A of the Representation of the People Act.

6. That brings us to the merits of the controversy in the election petitions filed by the appellants. The election petitions specifically alleged improper reception of votes which had according to the appellant materially affected the result of the election. It is common ground that there were only two contestants namely the appellant-Ashok and the respondent-Rajendra Bhausaheb Mulak. The election was to the Maharashtra State Legislative Council from Nagpur Local Authorities Constituency. Result of the election declared on 21st January, 2010 showed that the appellant-

Ashok had polled 198 ballots as against 202 votes polled in favour of the respondent-Rajendra Bhausahab Mulak. The respondent thus won by a margin of only four votes. The election-petitioners' case as set out in the election petition was that the election was materially affected by the improper reception of as many as 14 votes out of a total of 400 votes in the course of elections. Specific averments, in regard to the votes so cast, were made in the election petition including averments based on the CD recording at each polling station obtained officially by the election-petitioner from the concerned authorities under the Right to Information Act, 2005. In para 11 to 17 of the election petition, the petitioner made specific averments regarding violation of the provisions of the Act and the Rules and improper reception of as many as 14 votes by voters who were named in these paragraphs. In para 17, the petitioner had further asserted that the improper reception of the 14 votes had materially affected the result of the election. Para 11 to 17 may at this stage be reproduced for ready reference:

"11..... On going through the said CD relating to Kamptee Polling Station, that was supplied by the Office of the Collector-cum-District

Election Officer, Nagpur it was found that a voter namely, Mrs. Begum Shehnaz Begum Akhtar entered the polling station along with another voter Shri Abdul Shakoor Usman Gani @ Shakoor Nagani who had accompanied her to the Polling booth in utter breach of the Election Rules and Handbook of the Returning Officer issued by the Election Commission of India under Art. 324 of the Constitution of India. Shri Abdul Shakoor Usman Gani @ Shakoor Nagani marked the ballot paper that had been issued to Mrs. Begum Shehnaz Begum Akhtar and thereafter displayed the said ballot paper to those present in the room where the ballot box had been kept and thereafter put the ballot paper in the ballot box. This act is visible from the CD that has been supplied to the petitioner by the Office of the Collector-cum-District election Officer, Nagpur. In accordance with Rule 39(4) of the Election Rules, no other voter can be allowed to enter a voting compartment when another elector is inside it. Thus, there has been violation of Rule 39 (4) of the Election Rules as one voter Ms. Begum Shehnaz Begum Akhtar was accompanied by another voter Shri AbdulShakoor Usman Gani @ Shakir Nagani and both voters entered the voting compartment together. Thus, there has also been a breach of Rule 39(5) to 39(8) of the Election Rules where there is breach of secrecy by display of the ballot paper, the vote in question is required to be cancelled by making an endorsement to that effect on the reverse of the ballot paper. However, the Returning Officer failed in his boundened duty in cancelling the said vote though its secrecy was blatantly violated in his very presence and permitted the same to be put in the ballot box. The petitioner submits that from the CD supplied by the Office of the respondent No.2 he has taken still photographs. The copies of the aforesaid photographs are filed along with the Election Petition as **Document No.17.**

12. The petitioner further submits that from the said CD, it was further revealed that another lady voter Ms.Rashida Khatoon Mohammed Tahir entered the polling booth at Kamptee Police Station accompanied by one Shri Niraj yadav, another voter at the said election. Both Ms.Rashida Khatoon Mohammed Tahir and Shri Niraj Yadav together went to the voting compartment along with the ballot paper that had been issued to Ms.Rashida Khatoon Mohammed Tahir. This act of two voters going together in the voting compartment at the same time was in violation of rule 39(4) of the Election Rules. There Shri Niraj Yadav marked the ballot paper that had been issued to Ms.Rashida Khatoon Mohammed Tahir. Thereafter, Shri Niraj Yadav displayed the marked ballot paper to others who were present in the polling booth and thereafter put the ballot paper in the ballot box. Thus, there was, again breach of secrecy of the vote polled on behalf of Ms.Rashida Khatoon Mohammed Tahir. As per the guidelines mentioned in the Handbook of the Returning Officer, it was the duty of the Presiding Officer, it was the duty of the Presiding officer to cancel the said

ballot paper on account of violation of its secrecy, the same having been displayed to others and the voter being accompanied by another voter. Though the Presiding Officer was very much present in the said room where this entire exercise took place, he remained merely a mute witness and failed to cancel the aforesaid vote as being void. Thus, the vote cast by Ms. Rashida Khatoon Mohammed Tahir was required to be cancelled and could not be taken into consideration. Thus, there has been a breach of Rule 39(5) to 39(8) of the Election Rules. The petitioner submits that from the CD supplied by the Office of the respondent No.2 he has taken still photographs. The copies of the aforesaid photographs are filed along with the Election Petition as Document No.18.

13. The petitioner further submits that it is clear from the CD relating to Kamptee Poling Station that another voter Shri Abdul Shakoor Usman Gani @ Shakoor Nagani, thereafter, exercised his franchise by marking the ballot paper issued to him. He, thereafter, came out of the voting compartment without folding the ballot paper in violation of rule 39(2)(c) of the Election Rules and, on the contrary, displayed the marked ballot paper to the Presiding Officer and others present there. Again, the Presiding Officer failed to act in accordance with the provisions of Rule 39(5) to 39(8) of the Election Rules as well as the guidelines prescribed in the Handbook of the Returning Officer issued by the Election Commission of India and failed to cancel the aforesaid vote on account of breach of its secrecy. On the contrary, the Presiding Officer allowed said Shri Abdul Shakoor Usman Gani @ Shakoor Nagani to put his vote in the ballot box. On account of breach of its secrecy the aforesaid vote of Shri Abdul Shakoor Usman Gani @ Shakoor Nagani could not have been taken into consideration as a valid vote. The petitioner submits that from the CD supplied by the Office of the respondent No.2 he has taken still photographs. The copies of the aforesaid photographs are filed along with the Election Petition as Document No.19.

14. The petitioner submits that after viewing the CD supplied from the Office of the Collector-cum-District Election Officer, Nagpur, it can be seen that another voter Shri Niraj Yadav took his ballot paper to the voting compartment and after marking the same, came out of the voting compartment without folding the ballot paper. This action was in breach of Rule 39(2) (c) of the Election Rules. The said Shri Niraj Yadav displayed his marked ballot paper to the Presiding Officer and others present in the polling booth, thereby violating the secrecy of voting. The Presiding Officer was very much present in the said room but, instead of cancelling the said vote on account of breach of its secrecy, permitted the said voter to put the said vote in the ballot box. Therefore, on account of violation of secrecy of the vote cast by Shri Niraj Yadav the same was required to be cancelled and it could not have been enlisted as a valid vote. There was, thus, breach of Rule 39(5) to 39(8) of the

Election Rules. The petitioner submits that from the CD supplied by the Office of the respondent No.2 he has taken still photographs. The copies of the aforesaid photographs are filed along with the Election Petition as Document No.20.

15. *The petitioner further submits that after viewing the CD supplied by the Office of the Collector-cum-District Election Officer, Nagpur, it is seen that another voter Shri Mushtaq Ahmed Abdul Shakoor exercised his franchise by marking his ballot paper. However before coming out of the voting compartment, said Shri Mushtaq Ahmed Abdul Shakoor did not fold the ballot paper as required by Rule 39(2)(c) of the Election Rules; but, on the contrary, he displayed the marked ballot paper to the Presiding officer and others who were present in the said room. The Presiding Officer was required to have cancelled the aforesaid vote on account of breach of its secrecy as required by rule 39(5) to 39(8) of the Election Rules and the guidelines mentioned in the Handbook of the Returning Officer issued by the Election Commission of India. However, instead of cancelling the aforesaid vote as invalid, the Presiding Officer permitted Shri Mushtaq Ahmed Abdul Shakoor to put the said ballot paper in the ballot box in violation of the laid down voting procedure and in violation of Rule 39(2)(c) of the Election Rules. Therefore, the vote cast by Shri Mushtaq Ahmed Abdul Shakoor could not have been enlisted as a valid vote as there was breach of secrecy during the actual polling. The petitioner submits that from the CD supplied by the Office of the respondent no.2 he has taken still photographs. The copies of the aforesaid photographs were filed along with the Election Petition as Document No.21.*

16. *The petitioner submits that a perusal of the CD supplied from the office of the Collector-cum-District Election Officer, Nagpur pertaining to Kamptee Polling Station, it can be seen that various voters were carrying a spy pen with in-built camera along with them. The said voters as can be identified from the CD are Smt. Savita Sharma, S/shri Siddhartha Rangari, Moreshwar Patil, Dilip Bandeduche, Prashant Nagarkar, Mukund Yadav, Mohammed Arshad Mohd. Altaf, Ukesh Lehandas and Smt. Pratibha Meshram. The aforesaid voters carried articles other than those that were permitted to be carried in the voting compartment in violation of the voting procedure and rules framed thereunder. In this regard, it is submitted that Rule 39(2)(b) read with Rule 70 of the Election Rules require an elector to record his vote on the ballot paper with the article supplied by the authorities for the said purpose. Under Rule 73(2)(e), a ballot paper marked by an elector otherwise supplied for the said purpose becomes invalid. It is submitted that each elector was supplied with a marked pen so as to mark the ballot paper. The above-mentioned voters carried a additional camera as can be seen from the CD referred to above. The spy pen is quite distinct from an ordinary pen on account of its size, colour and design, so much so that it can*

easily be differentiated from an ordinary pen. Thus, it is submitted that the Election Rules especially Rule 39 (2)(b), Rule 70 & Rule 73(2)(e) were violated during the course of polling at Kamptee Polling Station. The petitioner submits that from the CD supplied by the Office of the respondent No.2 he has taken still photographs. The copies of the aforesaid photographs are filed along with the Election Petition as Document No.22.

17.The petitioner submits that the votes that were cast by Mrs. Begum Shehaz Begum Akhtar and Ms. Rashida Khatoon Mohammed Tahit at the Kamptee Polling Station with the aid of other voters, namely, Shri Abdul Shakoor usman Gani @ Shakoor Nagani and Shri Niraj Yadav respectively, were in violation of the provisions of Rule 39(4) of the Election Rules. It is submitted that the said two voters, namely, Mrs. Begum Shehnaz Begum Akhtar and Ms.Rashida Khatoon Mohammed Tahir were neither illiterate, blind or infirm so as to take the aid of any companion. The report on the election submitted by the Returning Officer under paragraph 3 of Chapter XV of the said Act, especially Item No.16, indicates that there was no such voter who was illiterate, blind or infirm who had voted with the help of a companion. In any event, a companion cannot be another voter and Rule 39(4) of the Election Rules specifically prohibits one elector from entering the voting compartment when another elector is inside it. Therefore the said two votes polled by Mrs. Begum Shehnaz Begum Akhtar and Ms. Rashida Khatoon Mohammed Tahir cannot be taken into consideration as valid voters. Similarly, insofar as the votes polled by Shri Abdul Shakoor Usman Gani @ Shakoor Nagani, Niraj Yadav and Shri Mushtaq Ahmed Abdul Shakoor are concerned, they are also required to be excluded from consideration inasmuch as the said voters have displayed the marked ballot paper before putting the same in the ballot box. Rule 39(2)(c) requires the voter to fold the ballot paper so as to conceal his vote after he has marked the ballot paper. There being breach of aforesaid rule, the secrecy of voting has been violated. Similarly, there is breach of provision of Rules 39(5) to 39(8) of the Election Rules. Therefore, the said votes are required to be excluded from being considered as valid votes. It is further submitted that as many as nine voters, namely Smt. Savita Sharma, S/shri Siddartha Rangari, Moreshwar Patil, Dilip Bandeduche, Prashant Nagarkar, Mukund Yadav, Mohammed Arshad Mohd. Altaf, Ukesh Lehandas and Smt. Pratibha Meshram having carried an article other than that which was permissible to be carried in the voting compartment, have breached the provisions of Rule 39(2)(b) of said rules and there being breach of provisions of Rules 39(5) to 39(8) of the Election Rules, the votes polled by aforesaid nine voters also deserved to be excluded from being considered as valid votes. Similarly, the vote of Smt. Nirmala Rahul Gajbe that was polled at Narkhed Polling Station, where she was found carrying a spy-pen fitted with camera also deserved to be excluded from being considered as a valid vote,

*there being breach of provisions of Rule 39(2)(b) read with Rule 39(5) to 39(8) of the Election Rules. Therefore in all, said 14 votes are required to be excluded from being considered as valid votes. The result of the election has been materially affected. Therefore, the election of the returned candidate is required to be declared as void under Section 100 (1)(d) (iii) and (iv) of the said Act and it further needs to be declared that the petitioner is validly elected in place of the returned candidate under section 100 (a) of the said Act, the petitioner having received majority of the valid votes. The copy of the Handbook for Returning Officer issued by the Election Commission of India and supplied to the petitioner from the Officer of respondent No.2 is filed along with the Election Petition and Marked as **Document No.23.**"*

7.The High Court has noticed the above averments and recorded a finding that the same satisfied the requirement of Section 83 of the Act inasmuch as the material facts in regard to the alleged improper reception of votes had been stated by the petitioner. The High Court has said:

"In pleadings itself, authenticity of all these document is prima-facie sufficiently established. Essential facts to prove breaches of Rules with relevant legal provisions are sufficiently brought on record by him.

"xxxxxxxxxx"

Here, in both Petitions case of wrongful receipt of invalid or void votes sufficient in number to change the result is already pleaded. As held in Laxmi Kant Bajpayi vs. Haji Yaqoob, supra, where election petition was under Section 83 read with Section 100 (1) (d) (iii) & (iv) of 1951 Act, & the pleadings in election Petitioner reveal a clear complete picture of the circumstances and disclose a definite cause of action, the election petition cannot be summarily dismissed."

8.The High Court all the same found the election petition deficient on account of the absence of a specific averment to the effect that the votes that were improperly received were cast in favour of the successful candidate. We find

that reason to be unsustainable. The averments made in the election petition, in our opinion, sufficiently disclosed a cause of action inasmuch as the essential, the pivotal and the basic facts relevant to the charge levelled by the appellants had been stated with sufficient clarity by the petitioners in their respective election petitions. The question whether the votes improperly received were polled in favour of one or the other candidate was not an essential or material fact the absence whereof could possibly result in the summary dismissal of the election petitions. We draw support for that view from the decision of this Court in ***Virender Nath Gautam v. Satpal Singh and Ors. (2007) 3 SCC 617***. That was also a case where the election-petitioner had been defeated by a narrow margin of 51 votes only. The challenge to the election was founded on the plea that as many as 188 votes had been wrongly counted in spite of the fact that all those votes were invalid votes and that since the margin was only 51 votes, wrong counting of 188 invalid votes materially affected the result of the election. It was further alleged that 37 votes of dead persons had been cast and they were

thus void and could not, therefore, have been counted. The petitioner gave names of all the 37 voters and annexed death certificates of 36 of such persons. So also there were allegations that there was double voting by 60 voters in violation of Section 62(4) of the Act. Another 19 votes were challenged on the ground of being void as the voters had exercised their right to vote in two constituencies. In addition there were allegations of material irregularities in counting of postal ballot papers. The High Court had despite such assertions dismissed the election petition holding that there was nothing to show as to how many votes of dead persons had been cast in favour of the returned candidate. The High Court also held that the election petition did not disclose as to how the petitioner came to know about dead persons casting their votes nor was it indicated as to how the petitioner came to know about the persons listed having voted in two different constituencies. Reversing the view taken by the High Court, this Court observed that the election petition stated all the requisite material facts and that the High Court committed an error in examining the correctness of the allegations at

an intermediary stage which could be done only at the time of trial. As to whether the election-petitioner was required to make a statement that the void votes were polled in favour of the returned candidates this Court held that the same was not a material fact to be stated in the petition.

This Court observed:

"49. On the basis of our conclusions and reasoning in respect of paras 8(i) to (iii), the finding of the High Court on para 8(iv) also cannot be said to be in consonance with law. Whether or not six persons had been issued voting papers twice and whether or not those voters had polled in favour of the returned candidate cannot be said to be a material fact to be stated in the election petition. What are required to be stated in the petition are material facts to maintain the petition."

9. The High Court has in support of its conclusion drawn support from the decisions of this Court in ***Shiv Charan Singh S/o Angad Singh v. Chandra Bhan Singh S/o Mahavir Singh and Ors. (1988) 2 SCC 12*** and ***T.H. Musthaffa v. M.P. Varghese (1999) 8 SCC 692*** to hold that in order to succeed, the election-petitioners have to prove by adducing evidence, that the result of the election was materially affected by the improper reception of votes. There can be no quarrel with this proposition that in order to succeed the election petitioners have not only to prove

by leading requisite evidence that votes were improperly received but also that such improper reception materially affected the result of the election in so far as the returned candidate was concerned. The question is whether an election petition could be dismissed summarily on the ground that production of any such evidence was not possible. In ***Shiv Charan Singh's*** case (supra), this Court was dealing with an appeal under Section 116A of the Act after the High Court had tried the election petition on merits and held the election of the returned candidate to be void with a direction to the election commission to hold a fresh election. In that case, the margin of victory of the returned candidate was no more than 4497, over Roshan Lal, the candidate who polled the 2nd highest number of votes. Kanhaya Lal, the candidate who had polled 17841 votes was held ineligible to contest being less than 25 years of age. The High Court was of the view that since the number of votes polled by Kanhaya Lal whose nomination papers were wrongly accepted were far more than the margin of victory the election of the returned candidate was materially affected by the improper

acceptance of the nomination paper of Kanhaya Lal. This Court did not agree with that reasoning. Relying upon the decision of this Court in **Vashist Narain Sharma v. Dev Chandra AIR 1954 SC 513**, this Court held that the margin of victory being less than the votes polled by an improperly nominated candidate did not by itself mean that the result of the election was materially affected. The election petitioner, observed this Court is required to lead evidence to prove as a fact that the result of the election was indeed materially affected, no matter it may be difficult and even impossible for the election petitioner to adduce, any such proof. This Court observed:

"The result of the election can be affected only on the proof that the votes polled by the candidate whose nomination paper had wrongly been accepted would have been distributed in such a manner amongst the remaining candidates that some other candidate (other than the returned candidate) would have polled the highest number of valid votes. In other words the result of the election of the candidate cannot be held to have been materially affected unless it is proved that in the absence of the candidate whose nomination paper was wrongly accepted in the election contest, any other candidate (other than the returned candidate) would have polled the majority of valid votes. In the absence of any such proof the result cannot be held to have been materially affected. The burden to prove this material effect is difficult and many times it is almost impossible to produce the requisite proof. But the difficulty in proving this fact does not alter the position of law. The legislative intent is clear that unless the burden howsoever difficult it may be, is discharged, the election cannot be declared void. The difficulty of proving the material effect was expressly noted by this Court in

Vashist Narain Sharma and Paokai Haokip cases and the court observed that the difficulty could be resolved by the legislature and not by the courts. Since then the Act has been amended several times, but Parliament has not altered the burden of proof placed on the election petitioner under Section 100(1)(d) of the Act. Therefore the law laid in the aforesaid decisions still holds the field. It is not permissible in law to avoid the election of the returned candidate on speculations or conjectures relating to the manner in which the wasted votes would have been distributed amongst the remaining validly nominated candidates. Legislative intent is apparent that the harsh and difficult burden of proving material effect on the result of the election has to be discharged by the person challenging the election and the courts cannot speculate on the question. In the absence of positive proof of material effect on the result of the election of the returned candidate, the election must be allowed to stand and the court should not interfere with the election on speculation and conjectures."

10. There are two dimensions to the above observations. The first is that the election petition had been allowed by the High Court after a full fledged trial. It was not a case of summary dismissal of an election petition on the ground that no evidence can be produced to prove that the result of the election in so far as the returned candidate was materially affected by improper reception of any vote as is the position in the case at hand. The High Court in the case at hand failed to notice that difference and hastened to conclude that the election petition could not be tried with whatever chances the petitioner may have had to avoid the election in question.

11. The second dimension is that although the legal position emerging from the decisions is of vintage value, it may have the effect of obliterating Section 100(1)(d)(i) and (iii) of the Act. We say it with utmost respect for the Judges who delivered the decisions in the two cases referred to above that the decisions require the election petitioners to produce evidence in what would be a totally hypothetical situation defying any attempt to show that the votes polled by a candidate whose nomination was improperly accepted would have been polled in his absence in a fashion that would have materially affected the result of the election so far as the elected candidate is concerned. So also it would be near impossible to satisfactorily prove in a given case that the improperly received votes would have gone to one or the other candidate. The question is whether an election petitioner can be asked to prove something that is not amenable to proof and whether by doing so a ground that is recognised by the statute as a valid ground for declaring the election to be void can be rendered otiose or sterile. What is noteworthy is that the difficulty which would arise in giving effect to Section 100(1)d(i) and (iii) has been

noticed by this Court in **Vashist Narain Sharma's** case (supra) but instead of finding an answer to the same the Court has left the issue to be resolved by the legislature, in the following words:

"It is impossible to accept the ipse dixit of witnesses coming from one side or the other to say that all or some of the votes would have gone to one or the other on some supposed or imaginary ground. The question is one of fact and has to be proved by positive evidence. If the petitioner is unable to adduce evidence in a case such as the present, the only inescapable conclusion to which the Tribunal can come is that the burden is not discharged and that the election must stand. Such result may operate harshly upon the petitioner seeking to set aside the election on the ground of improper acceptance of a nomination paper, but neither the Tribunal, nor this Court is concerned with the inconvenience resulting from the operation of the law. How this state of things can be remedied is a matter entirely for the legislature to consider."

12. In **Swantraj and Ors. v. State of Maharashtra (1975) 3 SCC 322**, this Court said that every legislation is a social document and judicial construction seeks to decipher the statutory mission, language permitting, taking cue from the rule in **Heydon's case (1584) 76 E.R. 637**, of suppressing the evil and advancing the remedy. This Court held that what must tilt the balance is the purpose of the statute, its potential frustration and judicial avoidance of the mischief by a construction whereby the licensing

meets the ends of ensuring pure and potent remedies for the people. This Court placed much reliance upon the following passage from **Maxwell on the Interpretation**

of Statutes:

"There is no doubt that 'the office of the Judge is, to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief. To carry out effectively the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined: quando aliquid prohibetur, prohibetur et omne pe quod devenitur ad illud.

This manner of construction has two aspects. One is that the courts, mindful of the mischief rule, will not be astute to narrow the language of a statute so as to allow persons within its purview to escape its net. The other is that the statute may be applied to the substance rather than the mere form of transactions, thus defeating any shifts and contrivances which parties may have devised in the hope of thereby falling outside the Act. When the courts find an attempt at concealment, they will, in the words of Wilmot, C.J. 'brush away the cobweb varnish, and shew the transactions in their true light'."

13. Reference may also be made to the decision of this Court in **Kanwar Singh v. Delhi Administration (AIR 1965 SC 871)**, where this Court observed:

"It is the duty of the court in construing a statute to give effect to the intention of the legislature. If, therefore, giving a literal meaning to a word used by the draftsman, particularly in a penal statute, would defeat the object of the legislature, which is to suppress a mischief, the court can depart from the dictionary meaning or even the popular meaning of the word and instead give it a meaning which will 'advance the remedy and suppress the

mischief'."

14. In ***State of Tamil Nadu v. N.K. Kandaswami (1974) 4 SCC 745***, this Court held that while interpreting a penal provision which is also remedial in nature a construction that would defeat its purpose or have the effect of obliterating it from the statute book should be eschewed and that if more than one constructions are possible the Court ought to choose a construction that would preserve the workability and efficacy of the statute rather than an interpretation that would render the law otiose or sterile. This Court relied upon the following passage from the ***Seaford Court Estates Ltd. v. Asher [1949] 2 All E.R. 155*** wherein Lord Denning, L.J. observed:

"The English language is not an instrument of mathematical precision. Our literature would be much poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the

language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. ... A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do so as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

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15. The interpretation of Section 100(1)(d) and in particular the true import of the expression "the result of the election in so far as it concerns a returned candidate has been materially affected" is a serious issue, which may arise for consideration but only after the election petition is tried by the High Court and after the parties have adduced whatever evidence may be available to them. All that we need to say for the present is that the decision of this Court in ***Vashist Narain Sharma's*** case (supra) and ***Samant N. Balakrishna and Anr. v. George Fernandez and Ors.*** (1969) 3 SCC 238, and ***Inayatullah v. Divanchand Mahajan*** 15 ELR 210, requiring positive proof of the adverse effect of the improper acceptance of a nomination paper or improper reception of votes, on the result of the election qua the returned candidate have been considered and explained by a three-Judge Bench of this Court in

Cheedi Ram v. Jhilmit Ram and Ors. (1984) 2 SCC

281. That was a case where the margin of victory was just about 373 votes, while the votes polled by the candidate whose nomination papers were improperly accepted were many times more. There was no evidence, as indeed there could be none, to show as to how those votes would have got distributed among the remaining candidates if the nomination papers had not been improperly accepted. This Court held that a Court cannot lay down an impossible standard of proof and hold that the fact required to be proved was not proved on that standard. This Court further held that in the facts of a given case, a Court could hold a fact as proved if a reasonable probability supported that conclusion. Applying that test this Court held that the improper acceptance of the nomination papers of Moti Ram, one of the candidates, had materially affected the election of the returned candidate. Chinnappa Reddy J. speaking for the Court conceptualised three situations that would arise in such cases in the following words:

"...True, the burden of establishing that the result of the election has been materially affected as a result of the improper acceptance of a nomination is on the person impeaching the election. The

burden is readily discharged if the nomination which has been improperly accepted was that of the successful candidate himself. On the other hand, the burden is wholly incapable of being discharged if the candidate whose nomination was improperly accepted obtained a less number of votes than the difference between the number of votes secured by the successful candidate and the number of votes secured by the candidate who got the next highest number of votes. In both these situations, the answers are obvious. The complication arises only in cases where the candidate, whose nomination was improperly accepted, has secured a larger number of votes than the difference between the number of votes secured by the successful candidate and the number of votes got by the candidate securing the next highest number of votes...."

16. The Court then dealt with the third situation out of the three mentioned above and held:

".....In this situation, the answer to the question whether the result of the election could be said to have been materially affected must depend on the facts, circumstances and reasonable probabilities of the case, particularly on the difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes, as compared with the number of votes secured by the candidate whose nomination was improperly accepted and the proportion which the number of wasted votes (the votes secured by the candidate whose nomination was improperly accepted) bears to the number of votes secured by the successful candidate. If the number of votes secured by the candidate whose nomination was rejected is not disproportionately large as compared with the difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes, it would be next to impossible to conclude that the result of the election has been materially affected. But, on the other hand, if the number of votes secured by the candidate whose nomination was improperly accepted is disproportionately large as compared with the difference between the votes secured by the successful candidate and the candidate securing the next highest number of votes and if the votes secured by the candidate whose nomination was improperly accepted bears a fairly high proportion to the votes secured by the successful candidate, the reasonable probability is that the result of the election has been materially affected and one may venture to hold the fact as proved. Under the Indian Evidence Act, a fact is said to be proved when after

considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. If having regard to the facts and circumstances of a case, the reasonable probability is all one way, a court must not lay down an impossible standard of proof and hold a fact as not proved. In the present case, the candidate whose nomination was improperly accepted had obtained 6710 votes, that is, almost 20 times the difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes. Not merely that. The number of votes secured by the candidate whose nomination was improperly accepted bore a fairly high proportion to the number of votes secured by the successful candidate — it was a little over one-third. Surely, in that situation, the result of the election may safely be said to have been affected.”

17. We find ourselves in respectful agreement with the above reasoning. There can indeed be fact situations where the Court may legitimately hold even in the absence of affirmative evidence, that the result of the election was materially affected by improper acceptance of the nomination paper or the improper reception of votes. Beyond that we do not wish to say anything on this aspect at this stage.

18. In **T.H. Musthaffa's** case (supra) relied upon by the High Court, also the election petition was tried on merits and on the basis of evidence adduced by the parties, the Court had eventually dismissed the same. In an appeal

against the said order under Section 116 A of the Act, this Court noted that the allegations made in the course of the petition regarding acceptance of invalid votes was deficient inasmuch as the number of votes that were liable to be rejected was not stated. This Court also noted that there was no indication as to how many of such votes had been polled in favour of the returned candidates to enable it to determine whether the same had materially affected the result of the election. In the absence of any such plea, the High Court could not have, declared this Court, granted the relief of recount and the refusal of the High Court to do so was justified. There is nothing in that decision which advances the case of the respondent-turned candidate before us. Apart from the fact that the averments made in the election petitions in the present case are specific and the individuals who have cast their votes have been named and reason given why the votes cast by them were improperly received, the petitioner has alleged that exclusion of five votes cast by the persons named in the petition would materially affect the result of the election. Suffice it to say that the question whether any votes were

improperly received and if so, whether such reception had materially affected the result of the election are matters to be examined at the trial after the parties have adduced evidence in support of their respective cases. Dismissal of the election petitions at the threshold was in the facts and circumstances not justified. In the result, we allow these appeals, set aside the judgment and order passed by the High Court and restore the election petitions to be tried by the High Court on merits in accordance with law. No costs.



.....J.
(T.S. THAKUR)

New Delhi
October 18, 2012

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7591 OF 2012
(Arising out of SLP (C) 28143 of 2010)

Ashok

..Appellant

Verus

Rajendra Bhausahab Mulak

..Respondent

WITH

CIVIL APPEAL NO. 7592 OF 2012
(Arising out of SLP (C) No. 28333/2010)

J U D G E M E N T

GYAN SUDHA MISRA, J.

1. Having deliberated over the arguments and counter arguments advanced on behalf of the appellant and the respondent in the light of the ratio of a catena of decisions as to what would constitute ‘material facts’ and ‘material particulars’ which could be held to be materially affecting the result of the election so as to entertain an election petition challenging the same, as also the reasonings assigned in the impugned judgment and order of the High Court, I have not been able to persuade myself to take a view that the judgment and order dismissing the election petition of the appellant is fit to be set aside.

2. The petitioner had filed an election petition challenging the election of the respondent not on the ground of indulgence in corrupt practice in any manner but on the plea of breach of the Conduct of Election Rules, 1961 at the instance of a few voters and inaction of the Presiding Officer at the polling station by failing to mark them as invalid votes. It has been alleged by the petitioner that at least 5 out of 14 votes had been cast by such voters who were accompanied by another person to the voting compartment at the time of actual casting of vote in the election which was in breach of Rule 39 (5) to 39 (8) of the Election Rules and hence reception of such votes by including them at the time of counting of votes ought to be declared as illegal. It is for this purpose that he filed an election petition which has been dismissed on the ground that it failed to declare material particulars which could be held to have materially affecting the election result.

3. Thus, this matter does not relate to a case where the respondent returned candidate is alleged to have indulged in corrupt practice but it is based specifically on the ground of breach of the Election Rules. But even in cases where the election petition is filed on the ground of corrupt practice, this Court time and again has held that “the electoral process in a

democracy undoubtedly is too sacrosanct to be permitted or allowed to be polluted by corrupt practice and if the court records a finding of commission of corrupt practice by a returned candidate or his election agent or by any other person with the consent of returned candidate or his election agent, then the election of the returned candidate shall be declared to be void and in that event challenge to such election obviously would be entertained.” But at the same time it cannot be overlooked as was observed by the Supreme Court in the case of **R.P. Moidutty vs. P.T. Kunju Mohammad & Anr.**, 2000 (1) SCC 481 and a series of authorities too numerous to mention, that it is basic to the law of election and election petition, that in a democracy, the mandate of the people expressed in the form of their ballot, must prevail and be respected by the Court and that is why the election of a successful candidate is not to be set aside lightly since the consequences flowing from the allegation of corrupt practice or alleged breach of any Rule affecting the election of a returned candidate is far more serious and hence the Supreme Court time and again has held that utmost care and caution are required to be applied while dealing with the allegation of indulgence in corrupt practices at the instance of the defeated candidate as in the process, misappreciation of evidence and

hence error of judgment in coming to a definite conclusion cannot be ruled out.

4. It is in this backdrop that the preliminary question as to whether the election petition filed by the respondent is fit to be dismissed on the ground of lack of material facts with material particulars which materially affects the result of the election assumes great significance and hence are fit to be taken care of at the stage when the election petitions are entertained. In this context, it is further apt to remember that this Court in the case of **Kalyan Kumar Gagoi Vs. Ashutosh Agnihotri**, 2011 (1) SCALE 516 has held – “that the election of the returned candidate should not normally be allowed to be set aside unless there are cogent and convincing reasons. The success of a winning candidate at an election cannot be lightly interfered with. This is all the more so when the election of a successful candidate is sought to be set aside for no fault of his but of someone else”. That is why the scheme of Section 100 of the Representation of People Act, 1961 especially clause (d) of sub-section (1) thereof clearly prescribes that in spite of the availability of grounds contemplated by sub-clauses (i) to (iv) of clause (d), the election of a returned candidate cannot be voided unless and until it is proved that the result of the election in so far as it concerns a returned candidate is

materially affected. It is no doubt true that such material facts and material particulars depend upon the facts of each case and no rule of universal application can be applied to test the correctness of the allegation that material facts clearly affect the result of the election and it is the fact of each case which will be relevant for determination as to whether the election petition was fit to be rejected on the plea of lack of material facts and material particulars or it was fit to be entertained if the same disclosed a cause of action for consideration by the court so as to entertain the election petition. But the language of Section 100 (1) (c) of the Representation of People Act, 1951 is too clear for any speculation about possibility.

5. Fortunately, for the respondent/returned candidate, the basis of the election petition filed by the appellant in the instant matter is not on the allegation of indulgence in corrupt practice but breach of the rule of secrecy of the ballot by the voters and inaction on the part of the Presiding Officer to mark them as invalid votes as the specific allegation is improper reception and acceptance of at least 5 votes out of the 14 votes which according to the appellant has materially affected the result of the election due to which he had filed election petition challenging the election of the respondent who has won the

election by a thin margin of 4 votes.

6. Admittedly, the common ground is that there were mainly two contestants, namely, the appellant –Ashok and the respondent Rajendra Bhausaheb Mulak for the election to the Maharashtra State Legislative Council from Nagpur Local Authorities Constituency. The result of the election which was declared on 21.1.2010 admittedly showed that the appellant Ashok had been polled 198 votes as against 202 votes polled in favour of the respondent-Rajendra Bhausaheb Mulak. The respondent thus has won by a thin margin of 4 votes. The election petitioner's case as set out in the election petition admittedly was that the election was materially affected by the improper reception of votes and as many as 14 votes out of a total of 400 votes were invalid which were polled in the course of the election by voters who were accompanied by another person to the voting compartment which was a breach of the election rules to the Representation of People Act, 1951. Specific averments in regard to such polling of votes is that the voter namely Mrs. Begam Shehaz Begum Akhtar entered the polling station along with another voter Abdul Shakoor Usman Gani @ Shakoor Nagani who had accompanied her to the voting compartment in utter breach of the election rules and hand book of the returning officer issued by the Election

Commission of India under Article 324 of the Constitution of India. Similarly, another lady voter Ms. Rashida Khatoon Mohammed Tahir was alleged to have entered the polling booth at Kamptee Polling Station accompanied by one Shri Niraj Yadav, yet another voter at the said election was accompanied by Shri Niraj Yadav who went to the voting compartment along with the ballot paper which had been issued to Ms. Rashida Khatoon Mohammed Tahir. Further, two other voters namely Abdul Shakoor and Usman Gani were alleged to have voted and by showing their ballot to others on the polling booth and in all 14 votes polled by 14 voters were thus alleged as to have been polled by the voters in breach of Rule 39(5) to 39(8) of the Election Rules, 1951 as the Presiding Officer did not cancel the said votes although the irregularities were clear and apparent which happened in front of him. The petitioner/appellant thus took the categorical plea that “if 5 votes are treated as cancelled and excluded from consideration then it can be said with certainty that the petitioner had received majority of the valid votes and therefore, petitioner deserved to be declared as elected. The petitioner thus wanted the Court to assume that the said disputed votes were cast in favour of the respondent No.1, without specifically pleading this vital and material fact.

7. However, learned counsel for the petitioner conveniently ignored and overlooked that it is not the case of the petitioner-appellant that all the 14 votes which were alleged to have been polled in breach of the Rules were polled in favour of the respondent. In absence of this vital 'material particular', the plea of the petitioner that inclusion of all such votes in which the voter had been accompanied by another person had materially affected the result of the election, does not disclose a cause of action which would lead to the irresistible conclusion that it has materially affected the result of the election. The petitioner however sought to fill in this material lacuna by raising pleas in this regard at a much later stage.

8. There is yet another important aspect of the matter regarding breach of the Rules admittedly, neither the petitioner nor any of his representative had raised any objection at the time of polling that the voter was accompanied by another person while casting his vote or that the secrecy of the votes were breached. The petitioner has taken this plea in the election petition for the first time that he had seen such accompaniment in the CD which he procured at a later stage after declaration of the election result completely overlooking

that if no such plea or objection had been raised at the time of actual polling, then after declaration of the result, breach of such rules viz. Rules 39 (5) to 39 (8) could not have been allowed to be raised straightaway by way of an election petition for the first time as that clearly amounts to absence of ingredients of such breach and absence of material particulars in regard to the polling, relying merely on the CD which he claims to have procured later rendering the entire plea of materially affecting the result of the election to be speculative in nature and hence fit to be rejected outright.

9. It is relevant in this context to refer to Rule 39 of The Conduct of Election Rules, 1961. Relevant extracts of the said Rule is quoted hereinbefore for facility of reference.

39. Maintenance of secrecy of voting by electors within polling station and voting procedure. – (1) Every elector to whom a ballot paper has been issued under rule 38 or under any other provision of these rules, shall maintain secrecy of voting within the polling station and for that purpose observe the voting procedure hereinafter laid down.

(2) The elector on receiving the ballot paper shall forthwith –

- (a) proceed to one of the voting compartments;
- (b) there make a mark on the ballot paper with the instrument supplied for the purpose on or near the symbol of the candidate for whom he intends to vote;
- (c) fold the ballot paper so as to conceal his vote;
- (4) No elector shall be allowed to enter a voting compartment

when another elector is inside it.

(5) If an elector to whom a ballot paper has been issued, refuses, after warning given by the Presiding Officer, to observe the procedure as laid down in sub-rule (2), the ballot paper issued to him shall, whether he has recorded his vote thereon or not, be taken back from him by the Presiding Officer or a polling officer under the direction of the Presiding Officer.

(6) After the ballot paper has been taken back, the Presiding Officer shall record on its back the words "Cancelled : voting procedure violated" and put his signature below those words.

(7) All the ballot papers on which the words "Cancelled : voting procedure violated" are recorded, shall be kept in a separate cover which shall bear on its face the words "Ballot papers : voting procedure violated".

(8) Without prejudice to any other penalty to which an elector, from whom a ballot paper has been taken back under sub-rule (5), may be liable, the vote, if any, recorded on such ballot paper shall not be counted.

10. It is clear on perusal of the aforesaid Rules that the procedure for casting of votes clearly envisages that if the voting procedure has been violated, an objection should have been raised by the candidate or his representative as the Presiding Officer under Rule 6 was required to mark "Cancelled: voting procedure violated" and put his signature below those words. Thereafter, all the ballot papers on which the words "Cancelled: voting procedure violated" are recorded is required to be kept in separate cover which shall bear on its

face the words “Ballot papers: voting procedure violated”.

11. In continuation, Rule 8 further lays down that without prejudice to any other penalty to which an elector, from whom a ballot paper has been taken back under sub-rule (5), may be liable, the vote, if any, recorded on such ballot paper shall not be counted. Thus, this Rule although does not envisage a penalty to the voter, it is clearly laid down that such ballot paper shall not be counted for the purpose of election. An inference can clearly be drawn from this Rule that the candidate or his representative is expected to raise objection at the time of actual polling regarding violation of Rules 5, 6, 7 and 8 of Section 39 so that the votes which were alleged to have been polled in breach of the aforesaid Rules could be cancelled by the Presiding Officer. The election petitioner admittedly has not lodged any complaint anywhere regarding the inaction of the Presiding Officer by writing on the back of the ballot paper – “Cancelled : voting procedure violated” and put his signature below those words. If the Presiding Officer violates to discharge his duty in this regard obviously it must be construed that a complaint ought to have been registered somewhere for cancellation of such ballot papers and if the said action has been taken by the petitioner, then it was open for him to challenge the same by way of an election petition at

the appropriate stage. But the admitted position in the matter is that the petitioner or his representative or anyone else connected to the polling had nowhere complained of any such violation of the voting procedure and at later stage that he saw such violation on the CD which he had later procured from the Collector. But in absence of any complaint by the candidate at the time of polling, is not capable of establishing as to how these rules could be alleged to have been violated expecting the Presiding Officer to cancel the votes on account of violation of the procedures and keep them in a separate packet so as to prevent them from counting. The CD on which the petitioner was relied to prove violation of Rules 39 (5) to 39 (8) cannot possibly establish absence of any protest lodged by the candidate or his agent regarding violation of the procedure as the very basis of challenge alleging violation of Rule 39 is based on allegation but not supported by material particulars so as to establish violation of Rule 39 of The Election Rules, 1961.

12. It is further to be taken note that there was total non-compliance of the provisions of Section 81 (3) of the RP Act, 1951 as the original CD which formed an integral part of the Election Petition, was not produced along with the Election Petition and what was produced as Document No.11 was merely a truncated, doctored and an edited copy thereof.

Thus in absence of the original CD containing full video recording of the polling, there was non-compliance of Section 81 (3) thereby making the petition liable to be dismissed. In the case of **Mulayam Singh Yadav Vs. Dharampal Yadav** reported in (2001) SCC 98 this Hon'ble Court in a similar circumstance has held as follows:

“7. The principal question, therefore, that we have to decide is whether Schedule 14 and the video cassette therein referred to are an integral part of the Election Petition and whether the failure to file the Original thereof in the court along with the Election Petition attracts Section 81 and therefore, Section 86 (1) of the RP Act, 1951.

“11. Whether or not schedule 14 is an integral part of the Election Petition does not depend on whether or not the draftsman of the Election Petition has so averred. It has to be decided objectively, taking into account all relevant facts and circumstances. Schedule 14 is one of 25 schedules which is, as a matter of fact, part of the bound Election Petition,... Clearly, the video cassette mentioned and verified in schedule 14 is as much an integral part of the Election Petition as the papers and documents mentioned and verified in the other schedules... Further, that the video cassette mentioned and verified in Schedule 14 is a part of the Election Petition and was intended to be such is evident from the affidavit of the first respondent verifying the allegation of corrupt practice made in the Election Petitioner. Therein, the first respondent has verified the correctness of what is stated in para 83 of the election petition, which refers to schedule 14 and which has

been quoted above and to schedule 14 itself. Yet again, that the video cassette mentioned and verified in schedule 14 is and was intended to be a part of the Election Petition is shown by the fact that 15 video cassettes which were copies of the video cassettes mentioned and verified in schedule 14 were filed in the High Court along with the Election Petition for being served upon the respondents.”

“13. We are, therefore, satisfied that the video cassettes mentioned and verified in schedule 14 is an integral part of the Election Petition and that it should have been filed in Court along with copies thereof for service upon the respondents to the Election Petition. Whereas 15 copies thereof were filed for serving upon the respondents, the video cassette itself was not filed. The Election Petition as filed was, therefore, not complete.”

13. It is further to be noted that in order to make out a cause of action for challenging the election under Section 100 (1) (d) (iii) (iv) all the material facts have to be pleaded which are necessary to show that the election of the returned candidate was ‘materially affected’ by the improper reception of votes or improper reception of any vote which is void or by non-compliance of the provisions of the Constitution or of the Act or of the rules or orders made under the Act. In the present case, petitioner’s only allegation is that certain votes were improperly accepted because of non-observance of the election rules. According to the petitioner, these disputed votes which are more than the margin of votes between the

returned candidate and the petitioner are required to be excluded from being considered as valid votes. If these disputed votes, are treated as cancelled and excluded from consideration then according to the petitioner he receives majority of the valid votes and deserves to be declared as elected. These allegations, as has been rightly held by the High Court, are not sufficient to demonstrate as to how the result of the election in so far it concerned the returned candidate is 'materially affected'. The High Court, in my opinion, has rightly held that The Election Petitioners only point out a possibility of the result of election being different if 14 or 5 votes can be excluded. It is not their case that the said votes when displayed revealed that they were in favour of Rajendra and not in favour of Ashok. The petitioners have not pointed out the beneficiary of those 14 or 5 votes. It is not their plea that all those voters cast their vote in favour of returned candidate or did not cast in favour of defeated candidate. There is no plea about their political affinities either to associate or disassociate with any political party. The said votes now cannot be traced out or segregated. Hence when 'displayed' what was seen and the vote was cast in whose favour ought to have been pleaded which is missing. Thus, link between the victory and lacunae/omissions is pre-

requisites to formation of this opinion. A triable issue cannot be said to arise till then as no cause of action surfaces.

14. In absence of any allegation that the disputed votes were cast in favour of the returned candidate, the petitioner failed to make out a case that the election was 'materially affected' merely on the ground of alleged improper acceptance of the said votes. The material fact which ought to have been pleaded in the Election Petition was not only that the disputed votes ought not to have been accepted, but those votes were cast in favour of respondent No.1 and if they were not so accepted, then the result of the election would be materially affected. These facts become material in the present case especially because the petitioner had not alleged any corrupt practice against the respondent No.1 and the petitioner himself had come up with a case that the ballot papers were displayed to those present in the room where the ballot box had been kept. Pleading these material facts for the first time at the stage in the SLP is impermissible and cannot be taken cognizance of. Thus, the contention of the respondent that the material facts so as to make out a cause of action have not been pleaded stands vindicated.

15. The present SLP is devoid of merits and

substance also in view of the recent judgment of **Kalyan Kumar Gagoi Vs. Ashutosh Agnihotri** reported in 2011 (1) SCALE 516 wherein it was held as follows :

“14. It may be mentioned here that in this case non-compliance to the provisions of Representation of People Act, 1951 and the Election Rules of 1961 was by the officers, who were in charge of the conduct of the election and not by the elected candidate. It is true that if clause (iv) is read in isolation, then one may be tempted to come to the conclusion that any non-compliance with the provisions of the Constitution or of the Act of 1951 or any Rules of 1961, Rules or Orders made under the Act would render the election of the returned candidate void. But one cannot forget the important fact that clause (d) begins with a rider, namely, that the result of the election in so far it concerns a returned candidate must have been materially affected. This means that if it is not proved to the satisfaction of the court that the result of the election in so far as it concerned a returned candidate has been materially affected, the election of the returned candidate would not be liable to be declared void notwithstanding non-compliance with the provisions of the Constitution or of any Rules of 1961, Rules or Orders made thereunder. It is well to remember that this Court has laid down in several reported decisions that the election of the returned candidate should not normally be set aside unless there are cogent and convincing reasons. The success of a winning candidate at an election cannot be lightly interfered with. This is all the more so when the election of a successful candidate is sought to be set aside for no fault of his but of someone else. That is why

the scheme of Section 100 of the Act especially clause (d) of sub-section (1) thereof clearly prescribes that in spite of the availability of grounds contemplated by sub-clauses (i) to (iv) of clause (d), the election of a returned candidate cannot be voided unless and until it is proved that the result of the election in so far as it concerns a returned candidate is materially affected.”

16. It is further worthwhile to take note of the legal position reflected in the decision of the Court in the matter of **Vashisht Narain Sharma Vs. Dev Chandra and others**, AIR 1954 S.C. 513 wherein this Court observed as follows:

“It is not permissible in law to avoid the election of the returned candidate on speculation or conjectures relating to the manner in which the wasted votes would have been distributed amongst the remaining validly nominated candidates In the absence of positive proof of material effect on the result of the election of the returned candidate, the election must be allowed to stand and the Court should not interfere with the election on speculation and conjectures.”

When the case of the petitioner/appellant is examined on the anvil of the aforesaid position and on the prevailing facts, it is apparent that the petitioner/appellant is indulging in a process which amounts to speculation and conjecture in absence of material particulars; for instance, if it were the

specific plea of the petitioner that all 14 votes or at least 4 votes which were cast in which the voters were alleged to have been accompanied by another person were in fact polled in favour of the respondent so as to influence the election result, the plea of the petitioner could be held as amounting to materially affecting the election result. But in absence of this candid relevant and factual detail, the election petition obviously is based only on such averment, which will have to be held speculative and conjectural in nature and can hardly be held to be disclosing 'material facts with material particulars' so as to conclude that it materially affected the result of the election. Even assuming that the election petition were to be allowed in spite of absence of such material particulars, the net result would be the recounting of the votes by declaring 14 votes as invalid which were alleged to have been polled in breach of the election rules but could hardly be identified or deciphered. To clarify it further, it may be stated that even if the election petition were to be allowed by declaring the 14 votes as invalid, it is inconceivable as to how those 14 votes which were alleged to have been polled by those voters who had been accompanied by another person could be identified so as to hold that the alleged invalid votes materially affected the result of the election.

17. What is sought to be emphasized is that in the absence of any identification mark of those votes which are alleged to have been polled by voters accompanied by another person and is alleged to be in breach of the Rules cannot possibly be identified so as to treat them as invalid votes and if that is so, the election petition is clearly based on vague material and hence would be unjust to allow the election to be questioned by entertaining the election petition where the losing candidate/the petitioner had himself not alleged any corrupt practice in holding the election but merely a breach of the election rule in regard to which he had not complained at all at the time of election or even thereafter but straightway filed the election petition challenging the election on the basis of an alleged CD after the election result was declared. Thus, the entertainment of an election petition on such speculative material can hardly be held to be disclosing material facts with material particular which would justify the challenge to an election by entertaining an election petition as the same does not spell out material particulars which would affect the election result.

18. It is well settled legal position that no evidence can be led on a matter unless there is a pleading

thereon. Therefore, unless it was pleaded that the invalid votes were cast in favour of the returned candidate, no evidence can be led to that effect. In a petition seeking to challenge an election on the ground stated in Section 100 (1) (d) (iii) and (iv), it was imperative for the petitioner to plead the most crucial and vitally material fact that the invalid votes were cast in favour of the returned candidate because then alone could it be pleaded and proved that “the result of the election, in so far as it concerns a returned candidate, has been materially affected” within the meaning of Section 100 (1) (d). The words “in so far as it concerns a returned candidate” and “has been materially affected” read with clauses (iii) and (iv) clearly show the legislative intent to place the burden of pleading and proving that the improper reception of votes or violation of law in regard to casting of votes benefited the returned candidate and materially affected his election as a returned candidate. It is not enough to show mere improper reception of votes or reception of votes or non-compliance with law. In addition it has to be pleaded and proved that this materially affected the election in so far as it concerns the returned candidate. The language of Section 100 (1) (d) (iii) and (iv) itself clearly indicates the requirement of pleading the vitally material fact that the votes were improperly or

unlawfully cast in favour of the returned candidate. In the present case, lack of pleading that the votes were cast in favour of the respondent leads to absence of cause of action for the petition for invalidating the election under Section 100 (1) (d) (iii) and (iv).

19. Thus, merely because the margin of difference between the winner and the loser was four votes and five votes were disputed by the petitioner would not give rise to any valid cause of action. The petitioner's contention in this regard is unsustainable in law. Thus, the ratio of the judgment in the case of **Mayar (HK) Ltd Vs. Owners & Parties**, (2006) 3 SCC 100 is of no assistance to the petitioner as it is settled legal position that merely because the wasted votes or accepted or rejected votes are more than the margin, it cannot be said that the election has been materially affected.

20. Since the petitioner had failed to plead material facts as contemplated under Section 83 (1) (a) of the RP Act, which alone could give cause of action for claiming that the election of the respondent was materially affected within the meaning of Section 100 (1) (d) (iii) and (iv), the petition was rightly dismissed. In the matter of **T.H. Musthaffa Vs. M.P. Varghese (Supra)**, this Court relying upon the ratio of this

Court in **Jabar Singh Vs. Genda Lal**, (1964) SCR 54, it was held that the scope of the enquiry in a case under Section 100 (1) (d) (iii) is to determine whether any votes had been improperly cast in favour of the returned candidate or any votes had been improperly refused or rejected in regard to any other candidate. These are the only two matters which would be relevant for deciding whether the election of a returned candidate had been materially affected or not. But, in view of the facts of this case where the petitioner has failed to disclose as to whether the alleged improper reception of 14 or 5 votes were cast in favour of which candidate, it is clear that the election petition failed to disclose material particulars in this regard so as to give rise to a cause of action apart from the fact that no objection was raised at the time of actual polling.

21. I thus find substance in the view taken by the High Court in the impugned judgment, that the election petitioner herein has only pointed out a possibility of result of election being different if 14 or 5 votes were to be excluded from counting. The High Court appears to be correct in my view while stating that the case of the petitioner is not that the said votes reveal that they were in favour of respondent - Rajendra or not in favour of petitioner - Ashok. But the objection is only that those votes ought not to have been

taken into consideration while counting the votes. As already stated in absence of identification of those votes which are alleged to have been cast by the voters in the company of another person, it would be difficult to identify them so as to infer as to which are the votes which ought not to have been reckoned for counting by declaring them invalid. In that event even if the petitioner's election petition were to be allowed, the entire trial would result into an exercise in futility leading the controversy nowhere. It is in view of this inevitable consequence that I hold that the election petition filed by the petitioner indicates absence of 'material particulars' which materially affected the result of the election so as to entertain a challenge to the same. To contend that the alleged breach of secrecy would render the entire election result as void so as to order for a repoll in spite of absence of any objection by the defeated candidates or his representative in this regard at the time of polling would be an outrageous contention in my view which is fit to be rejected outright. Fortunately, this is not even the contention of the petitioner and rightly so, as he has confined his challenge only to the extent of challenging the validity of 5 or 14 votes alleging breach of secrecy, which materially affected the election result. This contention is extremely fragile and hence has no force for the reasoning

recorded hereinbefore.

22. I am, therefore, conclusively of the view that the impugned judgment and order of the High Court is not required to be interfered with and the election petition was rightly held to be fit for rejection for want of material facts and material particulars which could materially affect the result of the election.

New Delhi
October 18, 2012

.....J.
(Gyan Sudha Misra)



JUDGMENT

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

C.A. No. 7591 of 2012 @
Petition(s) for Special Leave to Appeal (Civil) No(s).28143/2010
(From the judgement and order dated 02/08/2010 in EP No.1/2010 of
The HIGH COURT OF BOMBAY AT NAGPUR)

ASHOK

Petitioner(s)

VERSUS

RAJENDRA BHAUSAHEB MULAK
WITH

Respondent(s)

C.A. No. 7592 of 2012 @
SLP(C) NO. 28333 of 2010

Date: 18/10/2012 This Petition was called on for JUDGMENT today.

COUSEL FOR THE APPEARING PARTIES:

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Mr. R.C. Kohli, Adv.

Mrs. Shally Bhasin Maheshwari

Mr. Shivaji M. Jadhav, Adv.

The Court made the following
O R D E R

Hon'ble Mr. Justice T.S. Thakur and Hon'ble Mrs. Justice Gyan Sudha Misra pronounced separate judgments expressing their conflicting views in the matter.

Leave granted.

The Hon'ble Court referred this matter to a three Judge Bench for resolving the conflict. The Registry shall place the record before Hon'ble the Chief Justice of India for constituting an appropriate Bench. The matters are referred to a larger Bench.

(N.K. Goel)
Court Master

(Veena Khara)
Court Master

(Signed Reportable Judgments and consent order are
placed on the file)