Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4820 OF 2007

Kalyan Kumar Gogoi ... Appellant

Versus

Ashutosh Agnihotri and another ... Respondents

J U D G M E N T

J.M. Panchal, J.

This appeal, filed under Section 116A of the Representation of People Act, 1951 ("the Act" for short), is directed against judgment dated August 28, 2007, rendered by the learned Single Judge of the Gauhati High Court in Election Petition No. 4 of 2006, by which the prayers made by the appellant to declare the election of

the respondent No. 2, who is returned candidate from Legislative Assembly Constituency of Dibrugarh, to be void and to order repoll in Polling Station No. 124 Manik Dutta L.P. School (Madhya) of 116 Dibrugarh Legislative Assembly Constituency, are rejected.

2. The facts emerging from the record of the case are as under: -

A notice was published inviting nominations from eligible candidates to contest the Assam State Legislative Assembly Election for 116 Dibrugarh Constituency as required by Section 31 of the Act read with Rule 3 of the Conduct of Election Rules, 1961, notifying the schedule of the election, which was as under: -

1.	Issue of notification	10.3.2006
2.	Last date for making nomination	17.3.2006
3.	Scrutiny of nomination papers	18.3.2006
4.	Last date for withdrawal of candidature	20.3.2006

5.	Date of poll	
03.4.2006		
6.	Counting of votes	11.5.2006
7.	Date before which election process Shall be completed	20.5.2006

The appellant filed his nomination papers to contest the Assam State Legislative Assembly Elections from 116 Dibrugarh Legislative Assembly Constituency as an approved candidate of the Indian National Congress. Along with him, the respondent No. 2 herein filed his nomination papers as the candidate of Bhartiya Janata Party for the said constituency. There were six other candidates also, who were in fray and had filed their nomination papers for contesting the said election. Upon scrutiny of the nomination papers of the eight candidates, papers of seven candidates including those of the appellant and the respondent No. 2 were declared valid by the Returning Officer. The polling took place for the Constituency in question on April 3, 2006. It may be mentioned that in 116 Dibrugarh Legislative Assembly

Constituency, in all there were 126 notified polling stations, names/particulars of which were published under Section 25 of the Act. On the date of polling one notified polling station, i.e., Polling Station No. 124 was not set up in the notified school, namely, Manik Dutta L.P. School (Madhya) and instead, the polling was conducted in another school, namely, Chiring Gaon Railway Colony L.P. School, which was admittedly not a notified polling station. It is not in dispute that the polling in the said non-notified polling station started at 7.00 A.M. The case of the appellant is that as the polling in the non-notified polling station continued up to 12.30 P.M., there was confusion and chaos amongst the voters and many of them went away without casting their votes. The appellant claims that his election agent lodged complaint before the Deputy Commissioner, Dibrugarh, who was also the Returning Officer, for the constituency concerned and, therefore, the polling station was shifted to the notified school and was made functional later on. It is necessary to mention that out of the total 1050

voters whose names were registered at the polling station located at the school notified, 557 voters had cast their votes, which constitute, according to the appellant, 53.8% of votes while the total polling percentage in the entire constituency was 67.23%. The counting of the votes for the election of the said constituency took place on May 12, 2006 and results were declared on the same day. The respondent No. 2 was declared elected having polled 28,424 votes as the appellant could secure 28,249 votes out of total valid votes of 79,736. Thus the margin of the votes between the appellant and the respondent No. 2 was of 175 votes.

On the same day, the appellant lodged a complaint before the Returning Officer demanding repoll at the polling station concerned inter alia making grievance that the shifting of the polling station from the notified area to Chiring Gaon Railway Colony L.P. School was illegal and deprived many voters from exercising their right of franchise due to utter confusion and/or chaos. The

appellant also made grievance about the manner in which the Electronic Voting Machines were shifted from Chiring Gaon Railway Colony L.P. School to Manik Dutta L.P. School (Madhya). In response to this complaint the Deputy Commissioner and District Election Officer, Dibrugarh, addressed a letter dated May 20, 2006 to the appellant mentioning that the problem about the functioning of Polling Station notified was solved immediately on the day of the polling under the guidance of the Election Observer in the presence of the Zonal Officer, Sector Officer of the Constituency Magistrate and Polling Agents and as the complaint lodged by the appellant was found to be an after thought, the same was not entertained.

3. Thereupon, the appellant filed Election Petition No. 4 of 2006 on June 21, 2006 before the Gauhati High Court under Sections 80, 80(A) and 81 of the Act seeking a declaration that the election of the respondent No. 2 from constituency concerned was

void and an order directing repolling in Polling Station notified be made.

4. The respondent No. 2 filed his written statement mentioning amongst other facts that the shifting of the polling station from a notified place to a non-notified place and thereafter rectifying the defect did not vitiate the election nor had materially affected his result of the election. The respondent No. 1, i.e., Mr. Ashutosh Agnihotri, who was then District Election Officer, Dibrugarh and Returning Officer, filed his reply mentioning, inter alia, that though in the morning polling was held at a non-notified polling station, namely, Chiring Gaon Railway Colony L.P. School instead of Manik Dutta L.P. School (Madhya), voters were not deprived of their right of casting vote. The respondent No. 1 further stated that the appellant had never raised, prior to the declaration of the result, any objection or made any complaint about initial voting having taken

place at the polling station which was not notified or about subsequent shifting of the polling station to the notified place.

5. On the basis of pleadings of the parties, necessary issues for determination were framed and evidence was led by the parties. The appellant examined in all twelve witnesses whereas the respondent No. 2 examined six witnesses.

6. According to the learned Judge since the election petition was filed challenging the result of the returned candidate on the ground of non-compliance of the provisions of the Act and the Rules of 1961, the election petitioner, i.e., the appellant was required to prove such non-compliance and also that such non-compliance had materially affected the result of the election as proof of mere non-compliance of any of the provisions of the Act or the Rules framed thereunder by itself without showing that such non-compliance had

materially affected the result of the election of the returned candidate would not be sufficient to declare the election of the respondent No. 2 void under Section 100(1)(d)(iv) of the Act. The learned Judge held that the evidence adduced established that the distance between the two schools was hardly about 100 meters. The learned Judge also noticed that the evidence established that polling in the Chiring Gaon Railway Colony L.P. School had continued only up to 9.30 A.M. and after shifting the polling station to the notified school at around 9.45 A.M., the polling was resumed/had restarted at about 9.55 A.M. On consideration of the evidence, the learned Judge concluded that the Polling Station No. 124 was not set up in the notified place initially but was subsequently set up at the notified place and thus there was breach of provisions of Sections 25 and 56 of the Act as well as Rule 15 of the Rules of 1961. The learned Judge examined the contention of the appellant that the

Presiding Officer having found that the Polling Station No. 124 was set up in a non-notified place was duty bound to adjourn the polling which was taking place at the said polling station in exercise of powers conferred by Section 57(1) of the Act and the Presiding Officer having not done so, the election of the respondent No. 2 was liable to be set aside. However, the learned Judge found that the appellant had neither pleaded violation of any of the provisions of Section 57 of the Act nor led evidence to prove that the setting up of the Polling Station in a non-notified place and its subsequent shifting to the notified place amounted to 'sufficient cause' within the meaning of Section 57 of the Act and, therefore, concluded that it was not necessary to decide the said contention. On examination, the contention of the appellant, that the error and/or irregularity, namely, setting up of the polling station at the wrong place and subsequent shifting of the same at the notified place, committed during the

conduct of the election, should have been reported by the Returning Officer forthwith to the Election Commission and failure to so report, has vitiated the election of the respondent No. 2, was found to be without any substance because, according to the learned Judge, there was no pleading relating to breach of Section 58(1)(b) or commission of irregularity and/or error likely to vitiate the poll and it was further held that question of taking steps under Section 58 of the Act would arise only in a case where destruction of ballot boxes, E.V.M. is pleaded and proved and not otherwise. The case of the appellant that shifting was made to the notified place without sealing the EVM and other election materials also, was not accepted by the learned Judge because except the appellant, no other person present at that point of time at Chiring Gaon Railway Colony L.P. School had stated anything about the non-sealing of the EVM and other election materials.

7. Having held that there was non-compliance of the provisions of Sections 25 and 56 of the Act and Rule 15 of 1961 Rules, the learned Judge further examined the question whether such non-compliance had materially affected the result of the election. After noticing that the question as to whether the infraction of law has materially affected the result of the election or not, is purely a question of fact, it was held that no presumption or any inference of fact can be raised that the result of the election of the returned candidate must have been materially affected and the fact that such infraction had materially affected the result of the election, must be proved by adducing cogent and reliable evidence. The learned Judge thereafter discussed the evidence on record and concluded that none of the witnesses had stated that a large number of voters had left the notified place without casting their votes because of non-availability of the polling facility at the notified place. In view of the above

mentioned conclusions, the learned Judge held that initially voting, which had taken place at the non-notified place, had not materially affected the election result of the respondent No. 2 and dismissed the election petition by the impugned judgment, giving rise to the instant appeal.

8. This Court has heard the learned counsel for the parties at length and in great detail. This Court has also considered the documents forming part of the present appeal.

9. The first grievance made by Dr. Rajiv Dhavan, learned senior counsel for the appellant, was that a wrong test of burden of proof, namely, absolute test was adopted by the learned Judge of the High Court, which could not have been adopted in view of the provisions of Section 100(1)(d)(iv) of the Act and the test of either broad probabilities or the test of sufficiency of evidence should have been applied while considering the question whether polling at

the non-notified place and curtailing of time of voting had materially affected the result of the election. According to the learned counsel for the appellant, the hearsay rule on appreciation of evidence cannot be made applicable while determining the question whether polling at the non-notified place and curtailing of time of voting had materially affected the result of the election, so far as a candidate contesting election and his agents are concerned and, therefore, reliable testimony of the appellant and that of his agents should have been accepted by the learned Judge. According to the learned counsel for the appellant, one of the reasons given by the High Court for disbelieving some of the witnesses was that though they were illiterate, they had filed affidavits in English language through their lawyer and on being asked about the contents of the affidavit, they had stated that they were not in position to explain the same, forgetting the material fact that they had acted

through their lawyer and the lawyer on the basis of instructions given by them had prepared their affidavits. The learned counsel argued that the reasons assigned by the learned Judge in the impugned judgment for dismissing the Election Petition filed by the appellant are not only erroneous but contrary to the evidence on record and, therefore, this Court should accept the appeal.

10. Mr. Nagendra Rai, learned counsel for the respondent No. 2, argued that burden of proof was rightly placed on the appellant in view of several reported decisions of this Court, which firmly lay down the principle that the ground pleaded for setting aside an election, must be proved beyond reasonable doubt and, therefore, no error can be said to have been committed by the learned Judge in applying the principle of burden of proof to the facts of the case. According to the learned counsel for the respondent No. 2, hearsay evidence remains

hearsay and the said rule has to be applied to all matters including the determination of the question whether voting at the non-notified place and curtailing of time of voting had materially affected the result of the election of the respondent No. 2. It was, therefore, pleaded that it is not correct to argue that hearsay rule cannot be made applicable while determining the validity of election of the returned candidate under Section 100(1)(d)(iv) of the Act. What was maintained before this Court by the learned counsel for the respondent No. 2 was that on behalf of the illiterate people, affidavits were prepared by lawyer without making the illiterate people aware about the contents of the affidavits and, therefore, the High Court was justified in brushing aside the evidence of those witnesses while considering the question whether polling at a non-notified place had, in fact, affected the result of election materially. The learned counsel submitted that cogent and convincing reasons have been given

by the learned Judge in the impugned judgment for dismissing the election petition filed by the appellant and, therefore, this Court should not interfere with the same in the instant appeal, more particularly, when the period left at the disposal of the respondent No. 2, so far as his term as MLA is concerned, is less than a year.

11. The first question to be considered is whether there had been or not a breach of the Act and the Rules in the conduct of the election at this constituency. It is hardly necessary for this Court to go over the evidence with a view to ascertaining whether there was or was not a breach of the Act and the Rules in the conduct of the election concerned. Having read the evidence on record, this Court is in entire agreement with the decision of the learned Single Judge that by the change of venue of casting votes, breach of the provisions of Sections 25 and 56 of the Act read with Rule 15 of the Rules of 1961 was

committed by the officials who were in charge of the conduct of the election at this constituency.

12. This shows that the matter is governed by Section 100(1)(d)(iv) of the Act. The question still remains whether the condition precedent to the avoidance of the election of the returned candidate which requires proof from the election petitioner, i.e., the appellant that the result of the election had been materially affected insofar as the returned candidate, i.e., the respondent No. 2, was concerned, has been established in this case.

13. This Court finds that the learned Judge has recorded a finding that cogent and reliable evidence should be adduced by an election petitioner when election of the successful candidate is challenged on the ground of breach of provisions of Section 100(1)(d)(iv) of the Act. The contention advanced by Dr. Rajiv Dhavan, learned counsel for the appellant, that the test of either broad probabilities or the test

of sufficiency of evidence should be applied while deciding the question whether the result of the elected candidate is materially affected or not cannot be accepted. Section 100(1)(d)(iv) of the Act reads as under: -

> "**100. Grounds for declaring election to be void.** – (1) Subject to the provisions of sub-section (2) if the High Court is of opinion –
>
> (a) to (c) .....
>
> (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected –
>
> (i) to (iii) .....
>
> (iv) by any non-compliance with the provisions of the Constitution or of this Act or any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void."

14. It may be mentioned that here in this case non-compliance with the provisions of the 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, insofar as 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 insofar as it concerns 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 the Act 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 a

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 shall not be voided unless and until it is proved that the result of the election insofar as it concerns a returned candidate is materially affected. The volume of opinion expressed in judicial pronouncements, preponderates in favour of the view that the burden of proving that the votes not cast would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned

candidate lies upon one who objects to the validity of the election. Therefore, the standard of proof to be adopted, while judging the question whether the result of the election insofar as it concerns a returned candidate is materially affected, would be proof beyond reasonable doubt or beyond pale of doubt and not the test of proof as suggested by the learned counsel for the appellant.

This part of the case depends upon the ruling of this Court in **Vashisht Narain Sharma** vs. **Dev Chandra** **(1955) 1 SCR 509 : AIR 1954 SC 513**. In that case, there was a difference of 111 votes between the returned candidate and the candidate who had secured the next higher number of votes. One candidate by name of Dudh Nath Singh was found not competent to stand election and the question arose whether the votes wasted on Dudh Nath Singh, if they had been polled in favour of remaining candidates, would have materially affected the fate of the election. Certain principles were stated as to

how the probable effect upon the election of the successful candidate, of votes which were wasted (in this case effect of votes not cast) must be worked out. Two witnesses were brought to depose that if Dudh Nath Singh had not been a candidate for whom no voting had to be done, the voters would have voted for the next successful candidate. Ghulam Hasan, J. did not accept this kind of evidence. It is observed as follows: -

> "It is impossible to accept the ipse dixit of witnesses coming for 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 the election must stand."

While interpreting the words "the result of the election has been materially affected" occurring in Section 100(1)(c), this Court in the said case notified that these words have been the subject of much controversy before the Election Tribunals and the opinions expressed were

not uniform or consistent. While putting the controversy at rest, it was observed as under: -

> "These words seem to us to indicate that the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that the wasted votes would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate."

In another para in the said decision it is observed: -

> "It will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate. The casting of votes at an election depends upon a variety of factors and it is not possible for any one to predicate how many or which proportion of the votes will go to one or the other of the candidates. While it must be recognized that the petitioner in such a case is confronted with a difficult situation, it is not possible to relieve him of the duty imposed upon him by Section 100(1)(c) and hold without evidence that the duty has been discharged."

15. Again, in **Paokai Haokip** vs. **Rishang and others** **AIR 1969 SC 663**, the appellant who was the returned candidate from the Outer Manipur Parliamentary

Constituency had received 30,403 votes as against the next candidate, who had received 28,862 votes. There was thus a majority of 1541 votes.

The candidate, who had secured the second largest number of votes, had filed election petition. The main ground of attack, which had succeeded in the Judicial Commissioner's Court, was that polling was disturbed because of numerous circumstances. These were that the polling centres were, in some cases, changed from the original buildings to other buildings of which due notification was not issued earlier, with the result that many of the voters who had gone to vote at the old polling booths had found no arrangement for voting and rather than going to the new polling station, had gone away without casting their votes. The second ground was that owing to firing by the Naga Hostiles, the voting at some of the polling stations was disturbed and almost no votes were cast. The third ground was that the polling hours, at some stations, were reduced with the result that some

of the voters, who had gone to the polling station, were unable to cast their votes.

This Court considered the evidence led in the said case and after concluding that by the change of venue and owing to the firing, a number of voters had, probably failed to record their votes, held that the matter was governed by Section 100(1)(d)(iv) of the Act. Having held so, the Court then proceeded to consider the question whether the condition precedent to the avoidance of the election of the returned candidate, which requires proof from the election petitioner that the result of the election had been materially affected insofar as the returned candidate was concerned, was established. After extensively quoting from **Vashisht Narain Sharma's** case the Court noticed that witnesses were brought forward to state that a number of voters did not vote because of change of venue or because of firing and that they had decided to vote en bloc for the election petitioner. This Court, on appreciation of evidence led in that case held

that the kind of evidence adduced was merely an assertion on the part of the witnesses, who could not have spoken for 500 voters for the simple reason that casting of votes at an election depended upon a variety of factors and it was not possible for anyone to predict how many or which proportion of votes would have gone to one or the other of the candidates. Therefore, the Court refused to accept the statement even of a Headman that the whole village would have voted in favour of one candidate to the exclusion of the others. The Court in the said case examined the polling pattern in the election and after applying the law of averages, concluded that it was demonstrated at once that the election petitioner could not have expected to wipe off the large arrears under which he was labouring and that he could not have, therefore, made a successful bid for the seat, even with the assistance of the voters who had not cast their votes. Noting that the learned Judicial Commissioner had reached the conclusion by committing the same error, which was criticized in **Vashisht Narain Sharma's**

case, this Court observed that the learned Judicial Commissioner had taken the statement of the witnesses at their worth and had held on the basis of those statements that all the votes that had not been cast, would have gone to the election petitioner. This Court ruled in the said case that for this approach adopted by the learned Judicial Commissioner there was no foundation in fact, it was a surmise and it was anybody's guess as to how these people who had not voted, would have actually voted. This Court, on appreciation of evidence, held that the decision of the learned Judicial Commissioner that the election was in contravention of the Act and the Rules was correct, but that did not alter the position with regard to Section 100(1)(d)(iv) of the Act, which required that election petitioner must go a little further and prove that the result of the election had been materially affected. After holding that the election petitioner had failed to prove that the result of the election insofar as it concerned the returned candidate, had been materially affected, the appeal was allowed and

it was declared that the election of the returned candidate would stand. What is important to notice is that while allowing the appeal of the returned candidate, the Court has made following pertinent observations regarding burden of proof which hold the field even today: -

> It is no doubt true that the burden which is placed by law is very strict; even if it is strict it is for the courts to apply it. It is for the Legislature to consider whether it should be altered. If there is another way of determining the burden, the law should say it and not the courts. It is only in given instances that, taking the law as it is, the courts can reach the conclusion whether the burden of proof has been successfully discharged by the election petitioner or not."

16. In the light of the principles stated above what this Court has to see is whether the burden has been successfully discharged by the election petitioner by demonstrating to the Court positively that the poll would have gone against the returned candidate if the breach of the provisions of the Act and the Rules had

not occurred and proper poll had taken place at the notified polling station.

17. Before considering the question posed above, it would be relevant to deal with the argument raised by the learned counsel for the appellant that hearsay rule of appreciation of evidence would not be applicable to the determination of the question whether the result of the election of the respondent No. 2 was materially affected because of change of venue of the polling station.

18. The word 'evidence' is used in common parlance in three different senses : (a) as equivalent to relevant (b) as equivalent to proof and (c) as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts. Though, in the definition of the word "evidence" given in Section 3 of the Evidence Act one finds only oral and documentary evidence, this word is also used in phrases such as : best evidence,

circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc. The idea of best evidence is implicit in the Evidence Act. Evidence under the Act, consists of statements made by a witness or contained in a document. If it is a case of oral evidence, the Act requires that only that person who has actually perceived something by that sense, by which it is capable of perception, should make the statement about it and no one else. If it is documentary evidence, the Evidence Act requires that ordinarily the original should be produced, because a copy may contain omissions or mistakes of a deliberate or accidental nature. These principles are expressed in Sections 60 and 64 of the Evidence Act.

19. The term 'hearsay' is used with reference to what is done or written as well as to what is spoken and in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person. The word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say. Sometimes it means whatever a person declares on information given by someone else and sometimes it is treated as nearly synonymous with irrelevant. The sayings and doings of third person are, as a rule, irrelevant, so that no proof of them can be admitted. Every act done or spoken which is relevant on any ground must be proved by someone who saw it with his own eyes and heard it with his own ears.

20. The argument that the rule of appreciation of hearsay evidence would not apply to determination of the question whether change of venue of polling station

has materially affected the result of the election of the returned candidate, cannot be accepted for the simple reason that, this question has to be determined in a properly constituted election petition to be tried by a High Court in view of the provisions contained in Part VI of the Representation of the People Act, 1951 and Section 87(2) of the Act of 1951, which specifically provides that the provisions of the Indian Evidence Act, 1872, shall subject to the provisions of the Act, be deemed to apply in all respects to the trial of an election petition. The learned counsel for the appellant could not point out any provision of the Act of 1951, which excludes the application of rule of appreciation of hearsay evidence to the determination of question posed for consideration of this Court in the instant appeal.

21. Here comes the rule of appreciation of hearsay evidence. Hearsay evidence is excluded on the ground that it is always desirable, in the interest of justice, to

get the person, whose statement is relied upon, into court for his examination in the regular way, in order that many possible sources of inaccuracy and untrustworthiness can be brought to light and exposed, if they exist, by the test of cross-examination. The phrase "hearsay evidence" is not used in the Evidence Act because it is inaccurate and vague. It is a fundamental rule of evidence under the Indian Law that hearsay evidence is inadmissible. A statement, oral or written, made otherwise than a witness in giving evidence and a statement contained or recorded in any book, document or record whatever, proof of which is not admitted on other grounds, are deemed to be irrelevant for the purpose of proving the truth of the matter stated. An assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted. That this species of evidence cannot be tested by cross-examination and that, in many cases, it supposes some better

testimony which ought to be offered in a particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness, its incompetency to satisfy the mind of a Judge about the existence of a fact, and the fraud which may be practiced with impunity, under its cover, combine to support the rule that hearsay evidence is inadmissible.

22. The reasons why hearsay evidence is not received as relevant evidence are: (a) the person giving such evidence does not feel any responsibility. The law requires all evidence to be given under personal responsibility, i.e., every witness must give his testimony, under such circumstance, as expose him to all the penalties of falsehood. If the person giving hearsay evidence is cornered, he has a line of escape by saying “I do not know, but so and so told me”, (b) truth is diluted and diminished with each repetition

and (c) if permitted, gives ample scope for playing fraud by saying "someone told me that.....". It would be attaching importance to false rumour flying from one foul lip to another. Thus statement of witnesses based on information received from others is inadmissible.

23. In the light of the above stated principles of law, this Court will have to decide the question whether it is proved by the appellant, beyond reasonable doubt that the result of the election, insofar as the respondent No. 2 is concerned, was materially affected because of change of venue of the polling station. The first attempt made by the appellant is to establish that about 200 to 300 voters had gone away without casting their votes when they found that no arrangements were made for casting votes at the notified place.

24. The evidence in this case, which has been brought out by the election petitioner, is the kind of evidence

which has been criticized by this Court in several reported decisions. The analysis of the evidence tendered by the witnesses of the appellant makes it very clear that none of them had seen big number of voters, i.e., 200/300 returning back without casting their votes, because the polling station was initially arranged at a non-notified place and was subsequently shifted to the notified place. In fact, a close analysis of the evidence tendered by the witnesses of the appellant indicates that they have exaggerated the facts. For example, Dr. Kalyan Kumar Gogoi, i.e., the appellant as PW-1, had stated in his evidence that the distance between Manik Dutta L.P. School (Madhya) and Chiring Gaon Railway Colony L.P. School was about one and half kilometers whereas as a material fact, the distance found was hardly 440 feet and the schools were visible from each other. What is relevant to notice is that his evidence further discloses that he was informed by his workers, i.e., Durlav Kalita and Pushpanath Sharma that a

large number of voters could not cast their votes. He does not claim that he himself had seen the voters returning because of specification of non-notified place as place for voting. The worker Durlav Kalita has not been examined by appellant and the second worker Pushpanath Sharma, who has been examined as PW3, has not been found to be reliable by this Court, hence the assertion of the appellant that he was told by his abovenamed two workers that a large number of voters had gone away without casting their votes when they found that no arrangements for casting votes at the notified place were made, will have to be regarded as hearsay evidence and, therefore, inadmissible in evidence. The evidence of Dugdha Chandra Gogoi PW-2 establishes that he was the election agent of the appellant and according to him he had informed the appellant that about 200 to 300 voters had gone away when they had found that no arrangements were made for voting at the notified venue. However, he has in no uncertain terms stated

during his cross-examination that he had set up booths at Manik Dutta L.P. School (Madhya) Polling Station as well as Chiring Gaon Railway Colony L.P. School. If that was so, those who had come for voting at Manik Dutta L.P. School (Madhya) Polling Station between 7.00 A.M. to 9.45 A.M., could have been directed to go to Chiring Gaon Railway Colony L.P. School Polling Station and vice versa after the polling station was shifted from non-notified place to the notified place. Therefore, his assertion that he had informed the appellant that about 200 to 300 voters had gone away without casting their votes when it was found by them that no voting arrangements were made at the notified venue, does not inspire confidence of this Court. Similarly, witness Pushpanath Sharma, examined by the appellant as PW-3, has stated that on reaching Manik Dutta L.P. School (Madhya), he had learnt that the polling station was not set up there and there was utter confusion. The witness has thereafter stated that he

had enquired about non-setting up of polling station at the notified place and learnt that, unable to locate the polling station set up at a place which was not notified, many voters had left without casting their votes. This is nothing else but hearsay evidence and it would be hazardous to act upon such an evidence for the purpose of setting aside the election of an elected candidate. Moreover, this Court finds that PW-6, i.e., Sri Pranjal Borah, has stated that on the day of the poll, i.e., on April 3, 2006 at about 11.30 O'clock in the morning when he went to cast his vote at 124 Manik Dutta L.P. School (Madhya) polling station, i.e., the notified place, he found that the polling station was not set up there. This has turned out to be utter lie because as per the finding recorded by the learned Single Judge on appreciation of evidence with which this Court completely agrees on re-appreciation of evidence, is that by 9.45 A.M. the notified Polling Station had started functioning fully and the voters were found standing in queue to cast

their votes. Similar is the state of affairs so far as evidence of witness No. 8 Smt. Subarna Borah and witness No. 9 Smt. Pratima Borah are concerned. It means that the witnesses are not only unreliable but have tendency to state untrue facts. One of the grounds mentioned by the learned Single Judge of the High Court for disbelieving the witnesses of the appellant is that they were illiterate, but their affidavits were got prepared in English language through lawyer which were treated as their examination-in-chief. There is no denial by the appellant that the witnesses were illiterate and that their affidavits were prepared by the lawyer and were presented before the Court. The persons, who had put their thumb marks on the affidavits, which were in English language, could have been hardly made aware about the English contents of the affidavits sworn by them. The evidence tendered by the appellant to establish that about 200 to 300 voters had gone back on not finding the polling station at the

notified place has not inspired the confidence of the learned Single Judge of the High Court, who had advantage of observing demeanour of the witnesses. On re-appreciation of the said evidence it has not inspired confidence of this Court also. Under the circumstances, this Court finds that it is hazardous to rely upon the evidence adduced by the appellant for coming to the conclusion that because of specification of wrong place as polling station, the result, so far as the same concerns respondent No. 2, was materially affected. It is relevant to notice that the election in question had taken place on April 3, 2006 and the result was declared on May 11, 2006. However, for the first time the appellant filed a complaint regarding polling having taken place at a non-notified place only on May 12, 2006. Further, in the belatedly filed complaint, it was never claimed by the appellant that casting of the votes had taken place initially at a non-notified place and, therefore, about 200 to 300 voters, who had gone to the notified place to cast their votes,

had returned back without casting their votes, when they had learnt that the polling station was not set up at the notified place. Similarly, in the Election Petition it is nowhere mentioned by the appellant that before the shifting of the notified place polling station, voters, who were roughly 200 to 300 in number, had to return back without casting their votes. The evidence adduced by the appellant does not establish beyond reasonable doubt that about 200 to 300 voters had gone away, without casting their votes when it was found by them that no arrangements were made for casting votes at the notified place. The finding recorded by the learned Single Judge on this point is eminently just and is hereby upheld. What is relevant to notice is that out of 1050 voters, whose names were registered at the notified polling station, 557 voters had cast their votes. It means that the voting percentage was 53.8%. The assertion made by the witnesses of the appellant that roughly about 200 to 300 voters could not cast their votes because of

shifting of official polling station, cannot be believed for the other weighty reason that the general pattern of polling not only in this constituency but in the whole of India is that all the voters do not always go to the polls. Voting in India is not compulsory and, therefore, no minimum percentage of votes has been prescribed either for treating an election in a constituency as valid or for securing the return of a candidate at the election. The voters may not turn up in large number to cast their votes for variety of reasons such as an agitation going on in the State concerned on national and/or regional issues or because of boycott call given by some of the recognized State parties, in the wake of certain political developments in the State or because of disruptive activities of some extremist elements, etc. It is common knowledge that voting and abstention from voting as also the pattern of voting, depend upon complex and variety of factors, which may defy reasoning and logic. Depending on a particular

combination of contesting candidates and the political party fielding them, the same set of voters may cast their votes in a particular way and may respond differently on a change in such combination. Voters, it is said, have a short lived memory and not an inflexible allegiance to political parties and candidates. Election manifestos of political parties and candidates in a given election, recent happenings, incidents and speeches delivered before the time of voting may persuade the voters to change their mind and decision to vote for a particular party or candidate, giving up their previous commitment or belief. In **Paokai Haokip** vs. **Rishang AIR 1969 SC 663**, this Court has taken judicial notice of the fact that in India all the voters do not always go to the polls and that the casting of votes at an election depends upon a variety of factors and it is not possible for anyone to predicate how many or which proportion of votes will go to one or the other of the candidate. Therefore, 200 to 300 voters not casting

their votes can hardly be attributed to change of venue of the polling station, though the evidence on record does not indicate at all that about 200 to 300 voters had gone back without casting their votes. Even if it assumed for sake of argument that about 200 to 300 voters had gone away without casting their votes on learning that no polling station was set up at the notified place, this Court finds that no evidence relating to the pattern of voting as was disclosed in the various polling booths at which the voters had in fact gone, was adduced by the appellant, as was adduced in case of **Paokai Haokip** (supra) on the basis of which the law of averages was arrived at against the election petitioner therein. Therefore, it is very difficult to accept the *ipse* dixit of the appellant and his witnesses that if 200 to 300 had not gone away without casting their votes due to non-setting up of notified polling station, they would have voted in favour of the appellant. There is no warrant for drawing presumption that those, who had gone away

without casting votes, would have cast their votes in favour of the appellant, if there had been no change of venue of voting. **Vashisht Narain's** case insists on proof. In the opinion of this Court, the matter cannot be considered on possibility. There is no room for a reasonable judicial guess.

25. The heads of substantive rights in Section 100(1) are laid down in two parts: the first dealing with situations in which the election must be declared void on proof of certain facts and the second in which the election can only be declared void if the result of the election, insofar as it concerns the returned candidate, can be held to be materially affected on proof of some other facts. The appellant has totally failed to prove that the election of the respondent No. 2, who is returned candidate, was materially affected because of non-compliance with the provisions of the Representation of the People Act, 1951, or Rules or Orders made under it.

26. On the facts and in the circumstances of the case this Court is of the firm opinion that the learned Single Judge of the High Court did not commit any error in dismissing the petition filed by the appellant challenging the election of the respondent No. 2. Therefore, the appeal, which lacks merits, deserves to be dismissed.

27. For the foregoing reasons, the appeal fails and is dismissed. There shall be no order as to costs.

.....J.
[J.M. Panchal]

.....J.
[Gyan Sudha Misra]

New Delhi;
January 18, 2011.