# The Indian Law Reports

FULL BENCH

*Before D. K. Mahajan, Prem Chand Pandit, Gurdev Singh, R. S. Narula and Bal Raj Tuli, JJ.*

GURDAS SINGH BADAL,—*Petitioner*

*versus*

THE ELECTION COMMISSION OF INDIA AND OTHERS,—*Respondents.*

**Civil Writ No. 1258 of 1971.**

May 18, 1971.

*Conduct of Election Rules* (1961)—*Rule* 93—*Constitution of India* (1950)—*Articles* 327 *and* 329—*Rule* 93, *empowering the Election Commission to order inspection of ballot-papers—Whether* ultra vires *Articles* 327 *and* 329 *of the Constitution—Article* 329(b)—*Bar of proceedings under—Conditions to be fulfilled—Stated—Power under the rule—Whether of* quasi-judicial *or of administrative nature—Notice to the returned candidate before passing an order of inspection—Whether essential—Exercise of power of inspection by the Court and the Election Commission—Common ingredients and salient differences between—Stated—Such power—Whether co-terminus with that of Court or Tribunal—Object of empowering Election Commission to allow inspection of ballot papers—Stated—Such inspection—Whether can be allowed in the absence of any proceedings relating to election pending before any authority or for collecting evidence for an election petition—Expression "for the purpose of election petition"—Interpretation of—Order of the Election Commission allowing inspection of the ballot-papers—Contents of—Such order—Whether can be passed merely on the seriousness of the allegations in the application for inspection.*

*Held* (per Full Bench), that the power of the Election Commission under Article 324(i) of the Constitution of India is made sacrosanct, and is saved from any possible encroachments on it by the Parliament in exercise of its legislative functions under Article 327. Nothing contained in Article 324, however, stands in the way of some additional powers or functions being vested in or assigned to the Election Commission. Article 324 does not state that no other function shall be vested in it except those conferred on the Commission by the Article itself. Hence the amendment of rule 93 of Conduct of Election Rules, 1961, with effect from March 31, 1962, empowering the Election Commission to order inspection of ballot-papers is not in any way *ultra vires* Article 327 of the Constitution. (Para 14)

*Held* (per Full Bench), that no one is deemed to call an election in question unless he prays for the returned candidate being summoned for trial of the issues, the decision of which may ultimately be relevant for impugning the result of the election. Amendment of rule 93 does not empower

the Election Commission to entertain any claim for adjudication or decision of any question or issue on the decision of which an election may be liable to be set aside or declared void. Nor does this provision empower anyone to claim any such adjudication or decision. Hence rule 93 empowering the Election Commission to allow inspection of documents without giving any decision on the merits of the allegations against the validity of the election, is not in any manner *ultra vires* Article 329(b)) of the Constitution. (Para 17)

*Held* (per Narula, J.), that a petition, application or proceedings will be barred by clause (b) of Article 329 of the Constitution only if the following four conditions are fulfilled:—(i) The application is other than an election petition, presented in the prescribed manner to the prescribed authority, (ii) The attack is made in the application on matters connected with the election proceedings, (iii) The attack is one on the decision of which the Court competent to try an election petition can set aside the election or declare it to be void, and (iv) Adjudication of the authority or the tribunal on the matter connected with the election proceedings referred to in clause (iii) above is invoked by the applicant, notwithstanding the fact whether the authority is or not empowered to adjudicate upon the matter. (Para 16)

*Held* (per Mahajan and Narula, JJ.), that the Election Commission, while giving its decision on an application under rule 93, is expected to act in a *quasi-judicial* manner as it cannot allow an application for inspection on consideration of expediency or policy, but must decide the same objectively on the material placed before it, and is bound to support the order with reasons. The function of the Commission under rule 93 being *quasi-judicial,* the well-known rule of natural justice of *audi alteram partem* would apply and no decision given by the Commission without affording the returned candidate an opportunity of showing cause against the proposed order would be valid. (Paras 38 and 52)

*Held* (per Pandit and Tuli, JJ.), that it is permissible for the Election Commission to allow inspection under rule 93 of the Rules to an applicant if the Commission is satisfied *prima facie* that the reception or rejection of votes was not proper or that the counting of votes had not been properly made. The rule requires him to record reasons before allowing inspection which means that he has to apply his mind and pass the order judiciously. The power to be exercised by the Election Commission in this matter is administrative and not *quasi-judicial* which has to be exercised judiciously after recording reasons. The reasons, of course, have to be germane to the principles of election and the requirements of the election law. The recording of reasons is a safeguard against the arbitrary exercise of power by the Election Commission. (Paras 95 and 96)

*Held* (per Pandit, J.), that the order for inspection or production of election papers mentioned in rule 93 of the Rules passed by the Election Commission does not determine the rights of any party, because neither anyone

has the right to claim inspection or production of these papers nor do the said papers belong to any person. The Commission has no authority to pronounce on the validity or otherwise of the ballot-papers. As the Commission does not decide any point in issue between the parties, no notice is necessary to the returned candidate and, therefore, the order allowing inspection passed by the Election Commission is of an administrative character and it is not a *quasi-judicial* one and no notice need be given to the returned candidate or any other candidate before passing it. The standards applicable to a *quasi-judicial* Tribunal are not applicable to the Commission, when he passes an order under rule 93. (Para 112)

*Held* (per Gurdev Singh, J.), that Rule 93 does not enjoin upon the Election Commission to give notice of the application for inspection to the returned candidate or any other candidate. Thus, there is no obligation as a matter of law to issue notice to the opposite party. However, where there is time to issue such notice to interested parties, especially the returned or defeated candidates, other than the applicant, the rules of natural justice require that such notice be issued and the party concerned heard before the order of inspection is made. Moreover, since the Election Commission is required to record reasons if he allows inspection it will be conducive to proper exercise of such power if he gives a hearing to other candidates where there is time to inform them. (Para 145)

*Held* (per Narula, J.), that even if the Election Commission acts administratively while allowing inspection of ballot-paper, but where the necessity to allow inspection is not so immediate or of such a pressing and urgent nature as not to permit the returned candidate to be called or heard, and there is no such urgency as would defeat the purposes of inspection if opportunity were allowed to the returned candidate, it would not only be expedient but proper that a notice of the application for inspection should be issued to the returned candidate so as to afford him an opportunity of making representation and of being heard for the consideration of the point in issue before permission to inspect is granted. (Para 65)

*Held* (per Tuli, J.), that from the language of proviso to rule 93, it is quite clear that the legislature did not intend that the Election Commission should hear the returned candidate or any other candidate before passing an order for inspection. At that stage, the matter is between the applicant for inspection and the Election Commission and no other person comes in. The Election Commission is of course not debarred from giving notice or hearing to the returned candidate or making some sort of inquiry if he so desired in order to satisfy himself that there is a *prima facie* case for allowing inspection because he has to record reasons in support thereof, but it cannot be laid down as a matter of law that he must, in all cases, give notice to the returned candidate or any other candidate and hear him or make some sort of inquiry before passing the order for inspection. The Election Commission has no jurisdiction or power to express any opinion with regard to the

validity or otherwise of the accepted or rejected ballot-papers nor can he give any relief with regard thereto. The allowing of inspection, therefore, does not affect the election of the returned candidate nor does it decide any matter with regard to any part of the process of election which can be challenged only by means of an election petition and, therefore, the returned candidate or any other candidate has no right to claim that he must be heard before the order for inspection is made. If any material is collected as a result of the inspection of the election papers, it will have to be adjudicated upon by the Court hearing the election petition, in case the election petition is filed containing that material and in that case the returned candidate shall have ample opportunity to controvert or rebut the same. He has no right to say that a certain mode of collecting evidence in support of the grounds in an election petition should not be allowed to the election petitioner. All that he is entitled to is that before the matter with regard to the election is decided, he must be heard. That hearing he will get when an election petition is filed. The collection of evidence in the manner provided by the Rule cannot be said to prejudice the election of the returned candidate in any manner. Of course, if an order allowing inspection is not in conformity with the provisions of rule 93, the returned candidate has a right to challenge that order, but he has no right to complain that that order was passed without notice to him. Hence the Election Commission is not under any obligation to issue notice to or hear the returned candidate or any other candidate before passing an order for inspection under rule 93. Merely because there is enough time to issue a notice to the returned candidate before deciding the application for inspection is no ground to hold that the failure of the Election Commission to give a hearing to the returned candidate before passing the order vitiates that order. It is for the Election Commission to devise his own procedure for these matters when no procedure is provided in the Rules and all that the rule requires is that he must state reasons for allowing the application for inspection. If that requirement is fulfilled, the order is immune from attack.

(Paras 97, 98 and 102)

*Held* (per Narula, J.), that the essential common ingredients and features of the exercise of the power of ordering inspection of the ballot-papers under rule 93 of the Rules by the Court as well as by the Election Commission are these:—(i) An application under rule 93 can be allowed at the instance of only such a person who has vital interest in eliciting the information sought to be gathered by inspection; (ii) Such an application cannot be allowed unless definite allegations are made therein on a matter with which the Court or the Commission, as the case may be, is concerned; (iii) The application must be refused unless the Court or the Commission is satisfied that there is at least some *prima facie* truth in the material and relevant allegations; (iv) Judicial and objective approach has to be made by both the authorities in dealing with applications for inspection; (v) Inspection cannot be allowed for merely fishing out evidence. Inspection can, however, be allowed for gathering evidence. Information about which the applicant has to disclose in advance by stating as to what exactly he is going to look for in the secret papers; (vi) There must be satisfaction, supported by

reasons, as to why is inspection considered to be in the interest of justice and being unavoidably essential in the circumstances of a given case; (vii) Inspection is not to be allowed as a matter of course; and (viii) No inspection can be allowed either by the Court or by the Commission in such manner as to violate the secrecy of the ballot. (Para 20)

*Held* (per Narula, J.), that the following are the salient differences between the exercise of the power under rule 93 by the Court and the Commission:—(a) Courts cannot allow inspection except in the course of pending proceedings such as (i) an election petition or (ii) a criminal prosecution. The Commission can allow inspection even if no proceeding is pending before it; (b) The necessary characteristics and attributes of a Court which carry with them the traditional way of coming to a definitive decision are wanting in the case of the Commission; (c) Whereas satisfaction of the Court will be acquired by legally admissible evidence in a regular manner, the Commission may satisfy itself about the existence of reasons for allowing inspection in any fair and just manner demanded by the circumstances of a case unfettered by rules of evidence and civil procedure; (d) Whereas the Court has inherent power to allow inspection even without invoking rule 93, the Commission has no such power and cannot allow inspection except under that rule. (Para 21)

*Held* (per Tuli, J.), that the power of the Election Commission in allowing production and inspection of election papers is not co-terminus with the power of the competent Court or Tribunal or is for the same purpose and hedged in by the same limitations. The extent and scope of the power of the Election Commission, or the competent Court or Tribunal, has necessarily to be determined on the basis of the functions and powers to be exercised by each of them. In other words, the power of allowing inspection and production of election papers is to take colour from the functions of the authority which is entrusted with that power. The circumstances in which that power will be exercised can also not be the same. (Para 90)

*Held*, (per Narula, J.), that the object of empowering the Election Commission to allow inspection under rule 93 was (i) to meet the peculiar contingency of the possibility of the used ballots being destroyed before the Election Tribunal could possibly give a decision on an application for inspection; (ii) to enable a serious election-petitioner, normally a defeated candidate to check up the correctness of the evidence or information with him, or to scrutinise the used ballots more carefully in order to be sure of the information already held by him and if necessary to obtain an exact count of the ballots which may be found to have been illegally accepted or rejected; (iii) to permit inspection of used ballot-papers etc., if available by then even after the disposal of the election petition either for purpose of trial of election offences or for the purpose of departmental proceedings against the delinquent officials; and (iv) to give a wide power to the Commission to allow inspection in suitable cases, which power was later made subject to the solitary safeguard of being exercised in such a manner as would appear to be justified from the reasons recorded by the Commission. (Para 29)

*Held* (per Gurdev Singh J.), that an Election Commission cannot exercise its power to order production and inspection of ballot-papers, etc., when no proceeding, in which scrutiny of such papers is necessary, is pending before it. Since it is by the same provision that the Election Commission, Tribunal and Courts are empowered to allow opening, production and inspection of ballot-papers ,and as power cannot be exercised by Tribunal or Court when no proceedings are pending before them, the Election Commission does not have wider power to allow inspection at any time it likes. It can do so only when some proceeding is pending before it and in relation to the election. (Para 124)

*Held* (per Gurdev Singh, J.), that although the nature of the proceedings in which a Court, Tribunal or Election Commission may be approached to allow inspection or production of documents, etc., would be different, yet the basic rule that the inspection is not to be allowed for fishing out evidence or making a roving enquiry for the purpose of an election petition has to be observed by all the three authorities, namely, the Election Commission, the Court and the Tribunal, while dealing with a petition for inspection of ballot-papers etc. Unless this rule is observed, the mischief which follows on ordering a roving enquiry or fishing out evidence would be done. The expression "for the purpose of election petition" in Rule 93 cannot be read to mean the same thing as "for the purpose of instituting or maintaining an election petition." The correct interpretation, of this rule is that if inspection is required in connection with an offence committed in relation to ballot-papers, it cannot be allowed to enable the party concerned not only for maintaining the prosecution but for instituting it as well, but so far as an election petition is concerned, it is to be allowed by the High Court only when the election petition is pending and the allegations contained therein require the production or inspection of ballot-papers, counterfoils, ,etc., so as to dispose of the matters arising in the election petition.

(Paras 127 and 131)

*Held* (per Narula, J.), it is neither possible nor proper to prescribe any magic incantation for being repeated in valid orders permitting inspection. In the nature of things each case must depend on its own facts. No specific words need be present in an order permitting inspection. The order must nevertheless *ex facie* show the material considered, the *prima facie* satisfaction about the allegations which have been considered to justify permitting inspection and the reasons for such justification. Those reasons must be clearly and unambiguously decipherable from the order itself and not from any formal order which may subsequently be drawn on its basis. The mere statement of the allegation made in the application for inspection, being serious, is no reason in the eye of law for allowing inspection under rule 93(1). (Para 47)

*Held* (per Tuli, J.), that the language of rule 93 shows that it depends on the subjective satisfaction of the Election Commission, that a case for inspection has been made out and that he can pass the order allowing inspection. When he has to form such an opinion, he is to consider the material

placed before him, can constitute proper material for deciding such an application. All that has to be seen is that the material that has been considered is relevant and germane to the order that is going to be passed. The order of the Election Commission cannot be impugned on the ground that it does not set out the allegations of fact made by the applicant which were considered to be serious by the Election Commission and on the faith of which he satisfies himself that a *prima facie* case for allowing inspection of the election papers sought has been made out. At the stage of consideration in the application for the inspection, the Election Commission has to confine himself to the allegations made in the application for inspection and cannot make any further inquiry into the matter. He can only make up his mind on the nature, substance and quality of the allegations and pass his order on the basis thereof. The reason for allowing inspection has perforce to refer to the seriousness or otherwise of the allegations made. (Paras 103 and 106)

*Petition under Articles 226/227 of the Constitution of India praying that a writ of certiorari, mandamus, prohibition or any other suitable writ, direction or order quashing the order of Respondent No. 1 the Election Commission of India and the Returning Officer be prohibited from making available to respondent Iqbal Singh the ballot-papers, etc., for inspection and further praying that during the pendency of the writ petition the Respondents be restrained from complying with the orders of the Election Commission of India.*

H. L. SIBAL, SENIOR ADVOCATE, M. R. SHARMA, S. C. SIBAL, NAROTAM SINGH AND R. N. NARULA, ADVOCATES, with him, for the petitioner.

ASHOK SEN, SENIOR ADVOCATE, AND G. L. SANGHI, BHAGIRATH DASS, HARBHAGWAN SINGH, R. L. SHARMA, AMARJIT CHAUDHRY, GOBINDER SINGH SANDHU, P. S. DAULTA, V. G. Dogra, AND MRS. ADARASH, ADVOCATES, *for respondent* No. 3.

## JUDGMENT

NARULA, J.—The validity and legality of the order of the Election Commission, dated March 15, 1971, allowing Iqbal Singh, respondent No. 3 to inspect the rejected and the counted ballot-papers polled in favour of Gurdas Singh Badal, petitioner, the successful candidate at the mid-term poll held on March 5, 1971, in respect of the Fazilka Parliamentary Constituency, has been called in question in this writ petition by the abovementioned returned candidate on the following grounds :—

(1) The amendment made in rule 93 of the Conduct of Election Rules, 1961, on and with effect from March 31, 1962, empowering the Election Commission to order inspection

of unused and used ballot-papers and the marked copy of the electoral roll etc., is *ultra vires* Article 327 of the Constitution as the said Article has to be read subject to the provisions of Article 324 ;

(2) The impugned amendment of rule 93 is *ultra vires* Article 329(b) of the Constitution as it empowers the Election Commission to permit a step in the process of election being called in question otherwise than by way of an election petition ;

(3) Even if the power vested in the Election Commission to allow inspection is constitutional and valid, the said power can be exercised only in the circumstances and only subject to those limitations which apply to the jurisdiction of a Court or Tribunal to allow inspection under the same rule. In other words the jurisdiction of the Election Commission under rule 93 is co-extensive with and not larger or wider than that of a Court under that rule. The impugned order passed in this case by the Election Commission does not satisfy the positive and negative tests laid down by the Supreme Court in that behalf and is, therefore, liable to be struck down ;

(4) The power conferred on the Election Commission under rule 93 is permitted to be exercised only subject to the proviso to that rule and not otherwise. No order passed by the Election Commission under rule 93 would be valid if it is not supported by any reasons. In order to sustain the validity of the order for inspection, it must be shown that the reasons given by the Election Commission (to satisfy the requirements of the proviso to rule 93) are germane to the purposes of allowing the inspection ;

(5) The order impugned in the present case is not supported by any reasons, inasmuch as merely stating that the allegations made in the application for inspection, if true, would be serious, is no reason in the eye of law. Even otherwise the record produced by the Election Commission shows complete non-application of mind of the Commission to the matter in controversy; and

(6) The impugned order is also liable to be quashed as it has been passed in violation of the principles of natural justice and the order seriously prejudices and eclipses the constitutional right of the petitioner to continue as a member of the Lok Sabha.

(2) Before dealing with the abovementioned contentions, notice may at this stage be taken of the relevant facts which have led to the filing of this petition.

(3) Polling for the mid-term election from the Fazilka Parliamentary Constituency took place on March 5, 1971. This Constituency is comprised of eight Assembly Constituencies. Though there were eight candidates at the election, the real contest was between the petitioner on the one hand, and respondent No. 3 on the other. The Deputy Commissioner. Ferozepore, who was the District Election Officer, for the Constituency in question, had been appointed as the Returning Officer. On an application of the third respondent, the Election Commission had appointed Shri R. D. Sharma, Under Secretary, as an Observer for this Constituency. It is not disputed that he toured the Constituency extensively during the polling and also supervised the counting. He also entertained and adjudicated upon a verbal complaint made by the third respondent. A copy of the Observer's report, dated March 12, 1971, and decision on the complaint of the third respondent is Annexure 'C' to the petition.

(4) Votes were counted from the 10th to the 12th of March, 1971, the last day having been devoted to the counting of postal ballots only. On the conclusion of the count, the result of the election was declared on March 12, 1971, showing that the petitioner had secured 1,52,653 votes as against 1,47,277 votes polled by respondent No. 3. At the conclusion of the count and before the declaration of its result, the contesting respondent made an application (Annexure 'A' to the writ petition) to the Returning Officer wherein he prayed for a recount on various grounds. After hearing both sides, the application was rejected by the order of the Returning Officer (copy Annexure 'B') on the same day. Thereupon the petitioner was declared elected. On March 15, 1971, the contesting respondent made an application to the Election Commission (copy Annexure R—X to the return of the contesting respondent) wherein he prayed for being allowed inspection of all the ballot-papers in all the eight Assembly segments and other relevant election records which may be open to inspection in order to enable him to seek his legal remedy in the appropriate Court by way of an

election petition. He prayed for an immediate order being passed on the application to avoid any possible mischief. On that application, Shri S. P. Sen Varma, Election Commission, passed an order on the same day which is reproduced below:—

> "The allegations made in the application by S. Iqbal Singh, if true, are no doubt serious. I think an inspection of the documents mentioned in sub-rule (1) of rule 93 of the Conduct of Election Rules, 1961, may be allowed. In the first place, the used and unused ballot-papers may be inspected and after such inspection if the applicant demands an inspection of the marked copy of the electoral roll, then inspection of that document may also be allowed. A formal order may be drawn up in accordance with the proviso to rule 93(1) and detailed instructions and directions may be given to the District Election Officer.
>
> Under Secretary, Shri R. D. Sharma, who was sent as an observer from the Commission at the time of the counting of the ballot-papers in Fazilka Parliamentary Constituency may proceed to Ferozepore and remain present at the time of inspection."

(5) The above-quoted order was marked by Shri Varma to "D.E.C.(J)". Before, however, the papers could move from his office, Mr. Varma passed a further order on the application with the details of which we are not concerned as the purport of it was merely to substitute the name of Mr. K. V. Viswanathan, Under Secretary, in place of the name of Mr. R. D. Sharma, Under Secretary, given in the order passed in the first instance. The case was again marked to D. E. C. (J). Thereupon Mr. K. V. Viswanathan put up a draft of the formal order for approval to the Secretary of the Commission on March 16, 1971. The case then went to the D.E.C.(J) (through the Secretary) who made an order on the file to the effect that the draft was on the model approved by the Chief Election Commissioner in the case of Bihar (Monghyr). Thereupon the formal order, dated March 16, 1971 (Annexure 'D' to the writ petition) was communicated to the District Election Officer. The operative part of the order (besides reference to some previous decisions of the Allahabad High Court and besides citation relating to the making of the application by the respondent) was in the following terms :—

> "And whereas the applicant has stated that the inspection of these documents is necessary in order to enable him to

seek his legal remedy in the appropriate Court by an election petition;

And whereas in the said application, the applicant has specifically alleged that during the course of counting a large number of ballot-papers were found which did not bear any distinguishing mark or signature of the Presiding Officer as required under the law and that more than 6,000 valid votes have been wrongly rejected ;

Now, therefore, in pursuance of the provisions of sub-rule (1) of rule 93 of the Conduct of Election Rules, 1961, the Election Commission having been satisfied that the inspection as prayed for by the applicant is necessary to further the ends of justice without at the same time violating the secrecy of ballot .....

hereby directs that :—

(i) the District Election Officer of Ferozepore District in the State of Punjab shall open the sealed packets containing the unused ballot-papers and the votes polled in favour of all the contesting candidates other than those of Shri Iqbal Singh in respect of all eight Assembly segments of the said Fazilka Parliamentary Constituency and the packets containing the rejected votes and permit the applicant or his duly authorised agent to inspect them in his presence. If the returned candidate makes an application in writing to the District Election Officer for the simultaneous opening and inspection of the votes polled in favour of the applicant, it shall also be allowed ;

(ii) After such inspection as aforesaid is completed and the packets containing the ballot-papers used, tendered or rejected and the packets containing the unused ballot-papers are sealed and secured as directed in sub-paragraph (iv) hereinbelow, if the applicant demands an inspection of marked copy of the electoral roll in respect of any or all eight Assembly segments of the Fazilka Parliamentary Constituency then inspection of that document may also be allowed ;

(iii) That the District Election Officer shall give reasonable opportunity to other contesting candidates or their duly

authorised agents to be present at such opening and inspection. For this purpose due notice should be given in writing to each of the contesting candidates indicating the date, time and place where the inspection will take place. Each contesting candidate may be allowed to appoint only one duly authorised agent to be present at such opening and inspection. During the course of such inspection, no person shall be allowed to touch or handle ballot-paper, but the District Election Officer may permit any of the persons present to note down the numbers of ballot-papers which he considers to have been improperly accepted or improperly rejected. Sufficient security arrangements will also be provided by the District Election Officer at the time of such opening and inspection of the packets; and

(iv) after the inspection is over, all the ballot-papers used, tendered or rejected, the ballot-papers unused, and the marked copy of the electoral roll shall be replaced in the respective packets and such packets shall be sealed again with the seal of the District Election Officer in his presence and with the seal of such of the persons present at the time of inspection as may wish to affix them and also with the secret seal of the Election Commission. All the packets shall be then put into a steel box or other container which shall also be locked and sealed in the aforesaid manner and the same shall be kept in the Treasury for safe custody. In the course of this process the District Election Officer shall ensure that no document is tampered with by any person."

(6) It is the admitted case of both sides that the order of the Chief Election Commissioner was passed without any notice to the petitioner and that similarly the formal order (Annexure 'D') was drawn *ex parte* and sent to the District Election Officer for compliance. On receipt of notice of the date fixed by the District Election Officer for allowing the contesting respondent inspection of the ballot-papers etc. (March 31, 1971), the petitioner claims to have obtained a copy of the order of the Election Commission from the office of the Deputy Commissioner. He has filed its copy as Annexure 'D'. In the meantime, the petitioner had been sworn in as a Member of the Lok Sabha on March 17, 1971. After obtaining copy of the formal

order Annexure 'D', the petitioner filed this petition under Articles 226 and 227 of the Constitution of India praying for the records of the order passed by the Election Commission being produced in this Court and the order of the Election Commission (Annexure 'D') being quashed. It was further prayed that the records before the Returning Officer may also be called and the Election Commission as well as the Returning Officer be prohibited from making available to the contesting respondent the ballot-papers etc. for inspection. A specific prayer was made for quashing the impugned order of the Election Commission, and for prohibiting and restraining the respondents from complying with the order of the Election Commission. Interim stay of the implementation of the impugned order was also prayed for.

(7) The Motion Bench on March 30, 1971, observed while admitting the petition to a hearing that the matters in dispute were not covered by any direct authority and being of importance, the case may be heard by a Full Bench on April 5, 1971. An interim direction was issued to the Election Commission to withhold the inspection fixed for March 31, 1971. It was directed that if the petition failed, the inspection would take place on the day next to the date on which the High Court announced its decision. It was in pursuance of the above-mentioned order of the Motion Bench that this Full Bench of five Judges was constituted by my Lord, the Chief Justice.

(8) The first two respondents (the Election Commission and the District Election Officer) have neither entered appearance nor filed any return. The petition has been contested by Iqbal Singh respondent No. 3 alone. He filed his return with which he has submitted (as Annexure R-1) a copy of the statement made by the Law Minister on the floor of the House in the Lok Sabha on March 29, 1971, relating to recovery of some printed unused ballot-papers from a godown at Chandigarh; (as Annexure R-II), a copy of his telegram, dated March 11, 1971, to the Chief Election Commissioner and the Observer, and other authorities, and also copies of his various applications to the Chief Election Commissioner and Deputy Chief Election Commissioner (Anexures R-III to R-IX) submitted between February 20 to March 8, 1971. As Annexure R-X to the return, he has filed a copy of his application, dated March 15, 1971, on which the impugned order was passed. With the leave of the Court, the petitioner submitted his

replication in reply to the written statement wherein he took up some additional points which have also been covered in the enumeration of the submissions made on behalf of the petitioner given in the opening part of this judgment.

(9) At the commencement of the hearing of the petition, one of us (Gurdev Singh, J.) noticed and pointed out that the order Annexure 'D' could not be a true copy of the order of the Commission as it was shown to have been signed by the Secretary to the Commission not in his own right, but was expressed to be "by order", which meant that Annexure 'D' was possibly a copy of a mere formal order or communication drawn by the Secretary in pursuance of the order of the Commission. After a little discussion on the point, both sides (Mr. Hira Lal Sibal, Senior Advocate for the petitioner, and Mr. Ashok Sen, Senior Advocate for the contesting respondent) made a joint request for the record containing the original order of the Commission being called for. We accordingly directed the Commission to cause the production of the said record. In pursuance of that order, the file of the Commission containing the original application of the contesting respondent, dated March 15, 1971, with its Annexures and the original order of the Election Commission, and the noting to which reference has already been made (besides some correspondence between the District Election Officer and the Election Commission) was placed before us on April 16, 1971. Thereafter arguments were advanced by both sides on the basis that the real order of which validity has to be determined is that of the Chief Election Commissioner, dated March 15, 1971, Mr. Ashok Sen fairly and frankly stated that his case would either stand or fall with the upholding or otherwise of the order of Mr. S. P. Sen Varma, dated March 15, 1971. At a later stage Mr. Sibal went to the length of making even an oral prayer for leave to amend the petition so as to directly impugn the order of the Commission, dated March 15, 1971, instead of merely attacking the formal order Annexure 'D'. Mr. Sanghi, the learned counsel who was at that time appearing for the contesting respondent, however, made it clear that he did not count on any such technicality, and that we may pronounce on the contentions raised by the parties on the assumption that the original order of the Chief Election Commissioner as well as the formal order Annexure 'D' have been impugned in the writ petition. No necessity, therefore, arose for entertaining the request of Mr. Sibal to amend the petition in that behalf.

(10) Mention may also be made of another matter of a somewhat preliminary nature. Learned counsel for the contesting respondent sought to object to the petitioner being permitted to challenge the vires of rule 93 as no such specific ground had been mentioned in the writ petition. This objection was, however, not pressed when it was noticed that the point had been broadly raised in the replication, and when it was further pointed out that such points which go to the very root of the jurisdiction of the Commission could be taken up by the Court itself subject to opportunity being granted to the respondents to meet those points.

(11) The evolution of rule 93 as it now stands may be traced before dealing with the rival contentions of the parties. No provision in the Representation of the People Act (43 of 1951) (hereinafter called the 1951 Act) empowers any Court or authority to allow inspection of accepted and rejected ballot-papers or the marked copy of the electoral roll. On the other hand sections 94 and 128 of the 1951 Act relating to secrecy of voting *prima facie* appear to militate against such documents being permitted to be inspected by the returned or the defeated candidate. Rule 93 has been framed by the Central Government after consulting the Election Commission in exercise of the power vested in the Government under sub-section (1) and sub-section (2)(h) of section 169 of the 1951 Act. Sub-section (1) authorises the Central Government to make rules for carrying out the purposes of the Act. Clause (h) of sub-section (2) empowers the Government to provide by such rules for the following matters :—

> "The safe custody of ballot boxes, ballot-papers and other election papers, the period for which such papers shall be preserved and the inspection and production of such papers."

Rule 93(1) as it stood before March, 1962, was in the following terms :—

"*Production and inspection of election papers.*—

(1) While in the custody of the returning officer—

(a) the packets of unused ballot-papers ;

(b) the packets of used ballot papers whether valid, tendered or rejected ;

(c) the packets of the marked copy of the electoral roll or, as the case may be, the list maintained under sub-section (1) or sub-section (2) of section 152; and

(d) the packets of the declarations by electors and the attestation of their signatures; shall not be opened and their contents shall not be inspected by, or produced before, any person or authority except under the order of a competent Court or tribunal."

By notification, dated March 31, 1962, the "Election Commission" was added to the list of authorities (competent Court or tribunal) who could allow inspection under sub-rule (1) of rule 93. By notification, dated September 7, 1962, the following provisos were added to rule 93(1) :—

"Provided that —

(a) where any such order is made by the Election Commission, the Commission shall, before making the same, record in writing the reasons therefor; and

(b) no such packets shall be opened, nor shall their contents be inspected by, or produced before any person or authority under any such order of the Election Commission unless that person or authority has given reasonable opportunity to the candidates or their duly authorised agents to be present at such opening, inspection or production."

As a result of the amendments made up to December, 1966, the final shape in which the whole of rule 93 has now emerged (and was in force at the relevant time) is shown below :—

*"Production and inspection of election papers.*—

(1) While in the custody of the District Election Officer—

(a) the packets of unused ballot-papers;

(b) the packets of used ballot-papers whether valid, tendered or rejected ;

(c) the packets of the marked copy of the electoral roll or as the case may be, the list maintained under sub-section (1) or sub-section (2) of section 152; and

(d) the packets of the declarations by elections and the attestation of their signatures ;

shall not be opened and their contents shall not be inspected by, or produced before any person or authority except under the order of the Election Commission or of a competent Court or tribunal.

Provided that—

(a) where any such order is made by the Election Commission, the Commission shall, before making the same, record in writing the reasons therefor; and

(b) no such packets shall be opened nor shall their contents be inspected by, or produced before any person or authority under any such order of the Election Commission unless that person or authority has given reasonable opportunity to the candidates or their duly authorised agents to be present at such opening, inspection or production.

(2) All other papers relating to the election shall be open to public inspection subject to such conditions and to the payment of such fee, if any, as the Election Commission may direct.

(3) Copies of the returns by the District Election Officer forwarded under rule 64 or as the case may be, under sub-rule (3) of rule 84, shall be furnished by the Chief Electoral Officer of the State concerned on payment of a fee of two rupees for each such copy."

(12) Stage is now set for coming into grips with the various contentions raised by the counsel for the parties. In order to appreciate the first two contentions raised by Mr. Sibal, it is necessary to reproduce clause (1) of Article 324, Article 327 and Article 329 from Part XV of the Constitution (which Part relates to Elections):—

"324 (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).

327. Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

329. Notwithstanding anything in this Constitution—

(a) the validity of any law relating to the delimitation of constituencies, made or purporting to be made under article 327 or article 328, shall not be called in question in any court;

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature".

(13) The first submission of Mr. Sibal is that inasmuch as Article 327 is expressly made "subject to the provisions of this Constitution", the legislative power conferred by that Article on the Parliament is subject to Article 324. There appears to be no quarrel with this proposition of law. Dispute really arises with the corollary which Mr. Sibal wants to draw from the abovementioned legal position. He submits that inasmuch as the jurisdiction of the Commission under Article 324(1) is confined to the superintendence, direction and control (i) of the preparation of electoral rolls for the elections; and (ii) of the conduct of all elections to Parliament etc., the Election Commission cannot be lawfully vested with any task which relates to the post-election period. According to Mr. Sibal, the word "elections" occurring in Article 324 should be assigned the wider meaning attributed to that word by their Lordships of the Supreme Court in *N. P. Ponnuswami* v. *The Returning Officer, Namakkal Constituency, Namakkal, Salem District, and others* (1). It was contended that according to that meaning, parliamentary

(1) A.I.R. 1952 S.C. 64=(1952) S.C.R. 218.

election in its wider sense commences with the notification issued under section 14 of the 1951 Act, and comes to an end with the declaration of the result of the poll under rule 64 of the 1961 Rules. The argument is that the jurisdiction of the Commission under Article 324(1) being confined to the "conduct of the elections" culminating with the declaration of the result thereof, no law can be made by the Parliament, and no rules can be made by the Parliament, and no rules can be framed by the Central Government under Article 327 of the Constitution or section 169 of the 1951 Act vesting any jurisdiction in the Election Commission in connection with the elections subsequent to the stage mentioned in section 67. The conduct of election terminates with the Returning Officer making entries in a result-sheet in form 20 indicating its particulars. Thereafter the ballots are sealed and their custody passes from the Returning Officer to the District Election Officer.

(14) The conduct of election is said to come to an end with the culmination of the proceedings under Chapter V of Part V of the 1951 Act, i.e., with the publication of the result of the poll. Our attention was also invited to the scope of the word "election" which is defined in section 2(d) of the 1951 Act to mean "an election to fill a seat or seats in either House of Parliament....." It was argued that with the filling of the seat the process of election comes to an end, notwithstanding the proceedings for settling disputes in connection with the election being in the offing or being pending. Similarly, it was pointed out from the language of section 67A that the date of election of a candidate is the date on which he is declared by the Returning Officer to have been elected. For the purpose of deciding the point under consideration, I am prepared to assume that anything which happens in connection with the election after the declaration of the result of the poll may not strictly fall within the purview of the expression "conduct of election", but this does not solve the problem. The language of Article 327 is indeed very wide. The provision empowers the Parliament to make laws not only in respect of matters relating to the "preparation of electoral rolls" or matters relating to "the conduct of all elections to Parliament etc." (subject-matter of Article 324), but also to make any laws in respect of "all matters relating to" elections or "all matters in connection with" elections. It cannot be disputed that the matters covered by rule 93 do relate to the elections or the same have at

least some connection with the elections. The only extent to which Article 324 can be said to control the power under Article 327 is that no law made under the latter provision should impinge upon or in any manner whittle down the powers vested in the Election Commission by Article 324 (1) of the Constitution. The power of the Commission under Article 324(1) is made sacrosant, and is saved from any possible encroachment on it by the Parliament in exercise of its legislative functions under Article 327. Nothing contained in Article 324, however, stands in the way of some additional powers or functions being vested in or assigned to the Election Commission. There could be some strength in the argument of the petitioner in this behalf if Article 324 had stated that no other function shall be assigned to the Commission, and no other power shall be vested in it except those conferred on the Commission by the Article itself. It is impossible to spell out any such restriction from the language of either Article 324 or Article 327. I am, therefore, unable to find any substance in the first contention of Mr. Sibal and have no hesitation in holding that the impugned part of rule 93 is not in any way *ultra vires* Article 327 of the Constitution.

(15) The fate of the second point depends on the answer to the question whether a person can be deemed to have called an election in question within the meaning of Article 329(b) of the Constitution by merely making an application to the Election Commission for inspection of the documents referred to in rule 93(1) of the 1961 Rules. The application in the instant case related to an election to a seat in the House of Parliament. It was not made by way of an election petition. It was not presented to an authority competent to try an election petition and was not filed in the manner provided by sections 81 to 83 of the 1951 Act. All other conditions of clause (b) of Article 329 are not in dispute, except the question posed by me above. What then is the meaning of the expression "called in question" in Article 329(b) ? Great emphasis was laid by Mr. Sibal in this connection on the judgment of the Supreme Court in *N.P. Ponnuswami's case* (1) (Supra). A writ petition impugning the validity of an order of the Returning Officer rejecting the nomination papers of Ponnuswami was held by the Supreme Court to be barred by Article 329(b) on the ground that the said Article was "primarily intended to exclude or oust the jurisdiction of all Courts in regard to electoral matters and to lay down the only mode in which an election could be challenged" Polling had not

taken place when the writ petition was filed. It was held that the word "election" in Part XV of the Constitution had been used in broader sense and included within its scope all steps in the process of election and all stages in that process between the filing of the nomination papers and the declaration of the result of the poll. Mr. Sibal is, therefore, correct in submitting that the bar created by Article 329(b) is not confined to actions commenced or petitions or applications given after the declaration of the result of the poll. Any petition, application or action which comes within the scope of the Article would be barred whether it is commenced or submitted before or after the poll. "Calling in question the election" does not, therefore, necessarily mean praying for setting aside the result of the poll. The Supreme Court has authoritatively held (i) that Article 329 covers all electoral matters; and (ii) that any matter which has the effect of vitiating an election cannot be brought up before a Court otherwise than by way of election petition. The allegations made by the contesting respondent in his application for inspection are fully covered by section 100(1)(d)(iii) of the 1951 Act which enjoins on the High Court the duty to declare the election of the returned candidate to be void, if it is of the opinion that by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, the result of the election in so far as it concerns a returned candidate, has been materially effected. If the contested respondent had made an application to a competent Court or tribunal which could adjudicate upon or decide his complaint regarding the alleged improper reception or rejection of votes, he would indeed have called the election of the writ-petitioner in question. A significant question, however, arises as to whether merely questioning the election is barred by Article 329(b) or the bar is to the election being called in question only in such proceedings, the result of which may pre-judge what is ultimately to be found by the election petition Court in appropriate proceedings? Mr. Sibal pointed out to the verbal difference in the language adopted in clause (a) on the one hand and clause (b) on the other in Article 329 in so far as clause (a) bars the calling in question only "in any Court", but the words "in any Court" are conspicuous by their absence from clause (b). On that basis it was submitted that though the bar to the calling in question of the validity of any law etc. relating to delimitation of constituencies or allotment of seats is only to proceedings in any Court, the election itself (as defined by the Supreme Court) is not

allowed to be called in question even in proceedings other than those before any Court. In this connection it may be noticed that the Supreme Court made it clear in *Ponnuswami's case* (1) that clause (b) of Article 329 must be read as complementary to clause (a) of that Article. That can only mean the words "in any Court" have been omitted from clause (b) merely in order to avoid tautology, and that even without those words the intention is to bar the jurisdiction of Courts or tribunal competent to give decisions and not to stop the citizens or the candidate from questioning the election in private or public communications or even in applications and petitions made to authorities which neither can nor claim to decide any matter germane to the questioning of the election and which authorities may not even be asked to give any such decision. Notice has also to be taken of the pronouncement of the Supreme Court in *Hari Vishnu Kamath* v. *Ahmad Ishaque and others*, (2), to the effect that Article 329(b) is not necessarily limited in its operation to initiation of proceedings for setting aside an election. It envelopes within its scope even those proceedings which are not for setting aside an election. Learned counsel for the contesting respondent also invited our attention to the following observations in paragraph 426 at page 243 of Halsbury's Laws of England, Third Edition, Volume 14 (Simonds edition):—

> "No parliamentary election and no return to Parliament may be questioned except by a petition, termed a parliamentary election petition, complaining of an undue election or return which is presented in accordance with the statutory provisions,"

and submitted that section 80 of the 1951 Act, which is *pari materia* with Article 329(b) of the Constitution, is not intended to provide anything different. Referring to the English Ballot Act and the English Representation of the People Act, 1949, and the rules framed thereunder, Mr. Sanghi invited our attention to the passages in Parker's Election Agent and Returning Officer, fifth edition, at page 221 wherein it is stated that inspection of rejected ballot papers can be obtained by an order of the House of Commons as well as by the order of the High Court or a County Court and similarly orders for inspection of counted ballot papers can be obtained from the House

(2) A.I.R. 1955 S.C. 233.

of Commons or from a Court. It was argued that the vires or validity of the English rules had never been called in question though statutory provisions akin to Article 329(b) as well as laws relating to secrecy are the same in England as in India.

(16) A petition, application or proceedings would, in my opinion, be barred by clause (b) of Article 329 only if the following four conditions are fulfilled :—

(i) The application is other than an election petition, presented in the prescribed manner to the prescribed authority ;

(ii) The attack is made in the application on matters connected with the election proceedings ;

(iii) The attack is one on the decision of which the Court competent to try an election petition can set aside the election or declare it to be void; and

(iv) Adjudication of the authority or the tribunal on the matter connected with the election proceedings referred to in clause (iii) above is invoked by the applicant, notwithstanding the fact whether the authority is or is not empowered to adjudicate upon the matter.

(17) When the above principles are applied to the facts of this case, it is obvious that though the first three are satisfied, the fourth one is not fulfilled. Though a direct attack was made by the contesting respondent in his application for inspection which was covered by section 100(1)(i)(iii) of the 1951 Act, no prayer was either made to the Election Commission to give a decision regarding the correctness or otherwise of the allegations in that regard, nor could the Commission entertain any such prayer. It is significant that there is no bar to a candidate pronouncing by the beat of drum that corrupt practices have been committed in an election, nor is there any bar to such allegations being made in private or public communications, or even in newspapers within the bounds of law. The bar created by Article 329(b) is, therefore, not to the utterance or writing of something which may amount to a valid attack on the proof of which the election can be set aside by the petition Court, but the bar is only to claiming adjudication or a decision on any such question. We were referred to the dictionary meaning of the

phrase "call in question" as given at page 320 of Webster's New International Dictionary (Second Edition). It is stated there that "to call in question" means "to summon for trial or examination; hence specify, to challenge; to impeach; to cast doubt upon; to examine; to inquire into." Mr. Sibal said that the sense in which the expression has been used in Article 329 is "to cast doubt upon". On the other side it was suggested that out of the various alternative meanings given in the dictionary, the only appropriate meaning applicable to the phrase in the context in which it occurs is "to summon for trial." I think no one will be deemed to have called an election in question unless he prays for the returning candidate being summoned for trial of the issues, the decision of which may ultimately be relevant for impugning the result of the election. In so far as the contesting respondent did not claim any such decision from the Election Commission on the question of the validity of the election, the respondent cannot be said to have called the election of the petitioner in question. The impugned amendment of rule 93 does not empower the Election Commission to entertain any claim for adjudication or decision of any question or issue on the decision of which an election may be liable to be set aside or declared void. Nor does this provision empower anyone to claim any such adjudication or decision. It is, therefore, held that the impugned amendment of rule 93 empowering the Election Commission to allow inspection of documents without giving any decision on the merits of the allegations against the validity of the election, is not in any manner *ultra vires* Article 329(b) of the Constitution. The second contention of Mr. Sibal also, therefore, fails.

(18) This takes me to the scope of the power of the Election Commission under rule 93. The proposition canvassed before us by the learned counsel for the petitioner is that the said power can be exercised by the Commission only in the same manner and subject to the same limitations and safeguards as can be exercised by a Court or Tribunal under the same rule. In other words we are asked to hold that despite the vast and vital difference between the nature of the three functionaries named in rule 93, they must all act in an identical manner for deciding an application for inspection. Certain positive and negative tests have been laid down by their Lordships of the Supreme Court in the course of various cases to which detailed and repeated reference was made before us by the learned counsel for both sides, relating to the limitations on the

power of the Court to allow inspection under rule 93. There being no dispute as to what has been held by the Supreme Court in this behalf, I may merely enumerate the propositions of law which emerge from the decisions of their Lordships in *Jabar Singh* v. *Genda Lal*, (3), *Ram Sewak Yadav* v. *Hussain Kamil Kidwai and others*, (4), and *Jitendra Bahadur Singh* v. *Krishna Behari and others*, (5):—

(i) Even independently of rule 93 of the 1961 Rules, a Court or a tribunal has the power and jurisdiction to allow inspection of the documents in question in the course of the trial of an election petition. This jurisdiction of the Court is not confined to the narrow limits of Order XI of the Code of Civil Procedure ;

(ii) Irrespective of whether it is in exercise of the inherent power of the Court or in exercise of the jurisdiction vested in it by rule 93, the Court cannot allow inspection of the used ballot papers etc. as a matter of course. The mere fact that the ballot papers are available before the Court or have been produced before the Court by the officer having their custody, does not confer on any party the right to claim their inspection ;

(iii) Inspection can be allowed only if the election petition contains an adequate statement of the material facts on which the petitioner relies in support of his case; and inspection is necessary to enable the petitioner to prove those material facts after such inspection. Inspection cannot be granted to support vague pleas made in a petition not supported by material facts ;

(iv) Inspection of the documents referred to in sub-rule (1) of rule 93 cannot be allowed merely to fish out evidence to support vague pleas. The case of the petitioner must be set out with precision supported by averments of material facts. Mere allegation of the petitioner suspecting or believing that there has been improper reception, refusal or rejection of votes will not entitle the Court to allow inspection ;

(3) A.I.R. 1964 S.C. 1200=(1964) 6 S.C.R. 54.
(4) A.I.R. 1964 S.C. 1249=(1964) 6 S.C.R. 238.
(5) A.I.R. 1970 S.C. 276.

(v) Inspection can be allowed by Court only if it is satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary ;

(vi) In an application in connection with the allegation of illegal rejection of votes polled in favour of the unsuccessful candidate, it must be remembered that it is quite easy for the candidates or their election agents to note down the serial numbers of the concerned ballot papers. If, therefore, the election petition is silent as to the inspection of the ballot papers or whether the counting agents had noted down the serial numbers of those ballot papers, or whether those agents raised any objection relating to the validity of those ballot papers; if so who those agents are, and what are the serial numbers of the ballot papers to which each one of them advanced his objection, the material facts required to be stated are not satisfied, and hence scrutiny of ballot papers should not be ordered; and

(vii) The Court must have regard to the insistence of the law on secrecy of ballot papers (section 94 and 128 of the 1951 Act).

(19) The analysis of the law laid down by the Supreme Court in respect of the scope of limitations on the power of the Court to allow inspection shows that the Court is necessarily required to embark on some kind of preliminary enquiry on the basis of which it can come to a *prima facie* decision on certain points before allowing inspection. Mr. Sibal submitted that rule 93 has not made any distinction between the three functionaries named therein. The power of each one of them has been left by the rule to be equally untrammelled and unfettered. Neither the manner in which it is to be exercised nor the circumstances in which inspection has to be allowed is indicated in the rule. The power of the Court in this behalf having been defined by the Supreme Court, it is argued that we must necessarily apply the same law to the jurisdiction of the Election Commission under rule 93. Learned counsel for the petitioner vehemently argued on the basis of the observations in Craies on Statute Law (Fifth Edition) at page 161 that by not laying down any different rule for the exercise of the powers of the Commission under rule 93, 'the rule making authority is deemed to have lent

legislative recognition to the judicial interpretation of the power of inspection, and, therefore, we should hold that the Commission also cannot allow inspection unless all the conditions referred to above have been satisfied. I am unable to agree with this submission. The question of legislative recognition of judicial interpretation does not arise in this case as the rule was amended in 1962 to confer the power in question on the Election Commission, and the judicial pronouncements came much later between 1964 and 1970. I am also of the opinion that if the same power is conferred by the same rule on different functionaries, it does not by itself necessarily mean that the power is required to be exercised by each one of those authorities exactly in the same manner. For example when a new power is vested in a High Court it is always understood, without any specific provision being made in that behalf, that such new power would be exercised in the same manner, and subject to the same rules and limitations, as the other powers already being exercised by that Court. I am unable to ignore two basic and material differences between the exercise of power under rule 93 by a Court or tribunal on the one hand, and by the Election Commission on the other. The first difference lies in the nature of the two authorities. The Election Commission has two kinds of functions to perform, i.e., administrative and quasi-judicial. Assuming for the time being that its powers under rule 93 have to be exercised in a quasi-judicial manner, even then it is not required to act in the same manner as a Court. The essential characteristics of Court, as distinguished from a quasi-judicial tribunal, were pointed out by the Supreme Court in the following words in *Virindar Kumar Satyawadi* v. *The State of Punjab*, (6) :—

> "It may be stated broadly that what distinguishes a Court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declare the rights of parties in a definitive judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it.
>
> And it also imports an obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law. When a question

(6) A.I.R. 1956 S.C. 153.

therefore arises as to whether an authority created by an Act is a Court as distinguished from a quasi-judicial tribunal, what has to be decided is whether having regard to the provisions of the Act it possesses all the attributes of a Court."

Though a quasi-judicial tribunal may have the trappings of a Court, it cannot necessarily be credited with all the well-known attributes of a Court.

(20) The second difference lies in the nature of proceedings. Whereas the Court or tribunal is empowered to allow inspection for the purpose of giving a decision on matters in issue before it, no such consideration is relevant before the Election Commission. The Commission is neither empowered nor expected to give any decision on the merits of the controversy. It is apparent that though the power to be exercised under rule 93 is the same for the Court as well as the Election Commission, the function of considering and deciding an application for inspection need not necessarily be performed, and indeed cannot, in some cases, be performed in the same manner by the Commission as by the Court. Thirdly, though the power may be the same, the manner of its exercise varies with the essential characteristics of the functionary and the nature and aim of the proceedings in the course of which the power is to be exercised. The essential common ingredients and features of the exercise of the power in question by the Court as well as by the Commission are these :—

(i) An application under rule 93 can be allowed at the instance of only such a person who has vital interest in eliciting the information sought to be gathered by inspection;

(ii) Such an application cannot be allowed unless definite allegations are made therein on matters with which the Court or the Commission, as the case may be, is concerned ;

(iii) The application must be refused unless the Court or the Commission is satisfied that there is at least some *prima facie* truth in the material and relevant allegations ;

(iv) Judicial and objective approach has to be made by both the authorities in dealing with applications for inspection;

(v) Inspection cannot be allowed for merely fishing out evidence. Inspection can, however, be allowed for gathering evidence, information about which the applicant has to disclose in advance by stating as to what exactly he is going to look for in the secret papers ;

(vi) There must be satisfaction, supported by reasons, as to why is inspection considered to be in the interest of justice and being unavoidably essential in the circumstances of a given case ;

(vii) Inspection is not to be allowed as a matter of course ; and

(viii) No inspection can be allowed either by the Court or by the Commission in such a manner as to violate the secrecy of the ballot.

(21) On the other hand there are following salient differences between the exercise of this power by the Court and the Commission :—

(a) Courts cannot allow inspection except in the course of pending proceedings such as (i) an election petition, or (ii) a criminal prosecution. The Commission can allow inspection even if no proceeding is pending before it ;

(b) The necessary characteristics and attributes of a Court which carry with them the traditional way of coming to a definitive decision are wanting in the case of the Commission ;

(c) Whereas satisfaction of the Court will be acquired by legally admissible evidence in a regular manner, the Commission may satisfy itself about the existence of reasons for allowing inspection in any fair and just manner demanded by the circumstances of a case unfettered by rules of evidence and civil procedure ;

(d) Whereas the Court has inherent power to allow inspection even without invoking rule 93, the Commission has no such power and cannot allow inspection except under that rule.

(22) This analysis of the relevant legal situation shows that some of the principles governing the grant of permission to inspect

election records by a Court or tribunal on the one hand, and by the Election Commission on the other are not the same. It further shows that the power of the Election Commission to allow inspection is in a way wider than that of a Court or a tribunal, as it is not fettered by all the conditions laid down by the Supreme Court for the exercise of that power by a Court. I am, therefore, unable to agree with Mr. Sibal that the power of the Commission in this respect is exactly co-extensive and co-terminus with that of the Court, and is subject to all those limitations. This may not, however, be understood to suggest that the power vested in the Commission by rule 93 is either arbitrary or fanciful or absolutely unfettered. I will deal with this aspect of the matter while discussing the fourth and fifth arguments of Mr. Sibal. Subject to what is going to be stated in respect of those submissions, I hold that the impugned order of the Election Commission is not liable to be struck down merely on account of the power having been exercised by the Commission without strict compliance with the directions given by the Supreme Court in respect of the powers of a Court or a tribunal to allow inspections.

(23) There was hardly any controversy between the counsel for the parties on the basic point that the power conferred on the Election Commission by the purview of rule 93 cannot be lawfully exercised by that authority without compliance with the proviso to that rule. Mr. Ashok Sen conceded in so many words that an order of the Commission which is not supported by reasons cannot stand and must be struck down. Though Mr. Sanghi later tried to argue that the requirements of the proviso were merely directory and not mandatory, he made it clear that by saying so he did not suggest that an order of the Commission without any reasons could be supported in writ proceedings under Article 226. The question on which both sides had to argue at length was whether the impugned order of the Commission in this case does or does not satisfy the requirements of the proviso.

(24) A preliminary matter which requires consideration before dealing with the validity of the impugned order relates to the question whether the order of the Commission is that which was passed by the Chief Election Commissioner on March 15, 1971, or that which was signed by the Secretary "by order" of the Commission, and received by the District Election Officer. Whereas Mr. Ashok Sen had categorically submitted that it is the order of the Chief Election

Commissioner which is the real order which must satisfy the requirements of law and that for filling any lacuna left in that order, we cannot take the help of the formal order drawn by the office of the Commission and forwarded to the District Election Officer, Mr. Sanghi, who subsequently took up the chain of arguments on behalf of the contesting respondent, contended that though he did not want to retract from the position taken up by Mr. Sen in this respect, he would merely add that the formal order, dated March 16, 1971, should be treated as a part and parcel of the Chief Election Commissioner's order and should be deemed to have been engrafted therein. Detailed particulars of the manner in which the two orders were passed have already been given by me in an earlier part of this judgment while giving history of the case. Our attention was drawn to section 19A of the 1951 Act which authorises the Deputy Chief Election Commissioner, and the Secretary to the Commission also, to perform all or any functions of the Commission under the Constitution, the 1951 Act or under the 1961 Rules. It is clear from this provision that final order on the application of the contesting respondent could have been passed by any of the three authorities. I am, however, unable to spell out from section 19A any power in any of the three authorities to improve upon an order passed by the other of them, or to fill in any gaps left in the order passed by the Election Commission. The Chief Election Commissioner could have marked the application to the Deputy Chief Election Commissioner, or to the Secretary to the Commission, without passing any order of his own thereon. The authority to which the application was marked, could then have given his decision on it. Once, however, the Chief Election Commissioner had passed his own order on the application, the office could merely draft a formal order as directed in the order of the Chief Election Commissioner which could have contained detailed instructions of a routine type consequent upon the order of the Chief Election Commissioner. It is, however, inconceivable that the Chief Election Commissioner would pass the order and the Deputy Chief Election Commissioner or the Secretary would write down the reasons therefor. I have already referred to the agreement between the counsel on both sides to invite our decision on the validity of either or both of the orders without insisting on any formal amendment of the writ petition, directly and specifically impugning the original order of the Chief Election Commissioner which was naturally not within the knowledge of the petitioner at the time when the writ petition was filed. After

carefully considering all the aspects of the case, I am firmly of the opinion that the result of this petition would depend on the validity or otherwise of the original order of the Chief Election Commissioner, dated March, 15, 1971. I am further of the opinion that wherever and insofar as the formal order outsteps the original order in the matter of the permission for inspection, the formal order has to be ignored. A careful analysis of the two orders (the order of the Chief Election Commissioner dated March 15, 1971, and the formal order signed by the Secretary to the Commission, dated March 16, 1971) reveals the following salient points of distinction between them which also show that the formal order, dated March 16, 1971, did go beyond and overstep the order of the Chief Election Commissioner, dated March 15, 1971, in some respects :—

| Order of the Chief Election Commissioner, dated March 15, 1971. | Formal order signed by the Secretary on behalf of the Commission, dated March 16, 1971. |
|---|---|
| (i) Inspection was allowed "o the documents mentioned ir sub-rule (1) of rule 93" which necessarily included inspection of "the packets of declarations by electors and the attestation of their signatures" referred to ir item(d) of the purview of sub-rule (1) of rule 93 ; | Though reference is made in the order to the decision for allowing inspection—"as prayed for by the applicant"—while specifying documents of which inspection had actually to be allowed and the order in which it had to be allowed, no reference is made to the documents enumerated in rule 93(1)(d) and specific mention is made only of documents detailed in clauses (a) to (c) of sub-rule (1) of rule 93. |
| (ii) No order was passed permitting the returned candidate to inspect the votes polled in favour of Iqbal Singh respondent ; | It was directed that "if the returned candidate makes an application in writing to the District Election Officer for the simultaneous opening and inspection of the votes polled in favour of the applicant, it shall also be allowed." |

| | |
|---|---|
| (iii) Reference was made generally to seriousness of the allegations made by the respondent in his application for inspection without specific mention of any particular allegations ; | Specific allegations regarding (a) acceptance of ballot papers not bearing the distinguishing marks and not signed by the Returning Officer ; and (b) wrongful rejection of 6,000 ballot papers cast in favour of Iqbal Singh only were referred to in the order. |
| (iv) No reference was made to the alleged purpose of inspection for which the applicant approached the Commission ; | Reference to the purpose for which inspection had been claimed (to enable him to seek his legal remedy in the appropriate Court by an Election Petition) has been made. |
| (v) No specific direction for safeguarding the secrecy of the ballot was given while generally permitting the entire inspection prayed for ; | Overriding statutory condition of maintaining secrecy of the ballot was added. |
| (vi) The only possible reason given for allowing inspection was that the allegations made by the respondent were no doubt serious if proved. The Commission did not say that it was satisfied in any respect or that justice required inspection to be allowed. | It was specifically stated that the Election Commission was satisfied that the inspection was necessary "to further the ends of justice" and no mention at all was made about the allegations made by the respondent, if proved, being no doubt serious. |

The above mentioned analysis shows :—

(a) two independent different minds worked on the problem ;

(b) the orders are not identical in material particulars ;

(c) the formal order is not only at variance with the original order but outsteps it in some particulars ; and

(d) the Chief Election Commissioner passed the order in a mechanical manner without really bringing his mind to bear on the realities of the situation, on the distinct and different allegations made, on the relevancy of the allegations to the question to be decided, and merely as a matter of course.

(25) Each of these points has a bearing on the validity of the impugned order and I will refer to these aspects of the matter whenever and wherever it appears to me to be necessary to do so.

(26) This takes me to the question of the validity of the order of the Chief Election Commissioner. The order has already been reproduced. The only conceivable reason given in support of the order is that "the allegations made in the applications by S. Iqbal Singh, if true, are no doubt serious." We are called upon to decide whether the above quoted sentence in the impugned order satisfies the requirements of proviso (a) to rule 93 or not. In other words, the question is whether the mere seriousness of allegations about the truth or otherwise of which there is *ex facie* no attempt at even a *prima facie* satisfaction can at all be considered to be a reason in the eye of law for permitting inspection of the used and unused ballot papers and the marked copy of the electoral roll under rule 93. This issue has been debated by the parties under the following six heads :—

(i) What was the object of empowering in March, 1962, the Commission to allow inspection of the documents in question ;

(ii) What was the purpose and object of the amendment made in rule 93 in September, 1962, enjoining on the Commission the statutory duty of recording reasons as a condition precedent for the exercise of jurisdiction to allow inspection ;

(iii) Whether the requirement to proviso (a) to rule 93(1) is merely directory or mandatory ;

(iv) Whether the Commission while deciding an application under rule 93(1) is expected to act in a quasi-judicial or in a purely administrative manner ;

(v) Whether considerations of expediency or policy are good grounds for the Commission to allow inspection under rule 93(1) ? If not, what kind of conclusions would justify

an order for inspection and by what process is the Commission expected to arrive at those conclusions. In other words what kind of reasons can be considered to be germane to the object of the rule ;

(vi) Whether the solitary reason given in the impugned order of the Chief Election Commissioner ("allegations made in the application by S. Iqbal Singh, if true, are no doubt serious") satisfies the requirement of proviso (a) to rule 93(1).

I will now take up each of the above mentioned points one by one.

(27) As already noticed, rule 93 deals with two kinds of documents viz. (i) those mentioned in sub-rule (2) whose inspection can be had as a matter of course or as a matter of right, and (ii) those documents, the inspection of which is prohibited by sub-rule (1) except under orders of the named authorities. Neither we are concerned with the first category nor any question can arise in regard to them. Authority to allow inspection of the documents falling in the second category was originally vested only in Courts and tribunals. This power was conferred for the first time on the Election in March, 1962. At that time Election Petitions had to be filed with the Election Commission. The Commission had to scrutinise the petition and to reject it in certain eventualities. If a petition was not rejected, a tribunal had to be constituted by the Commission for trying it. The petition was sent to the tribunal after it was constituted. The constitution of the tribunal itself sometimes took months. The statutory period after which the prohibited documents had to be normally destroyed by the Returning Officer was one year (rule 94(b)). The Election Tribunal had the power to allow inspection after it was seized of the petition and an application was made to it for the purpose. The possibility of the documents having been destroyed by the time those could be required by the tribunal could not be ruled out. It has been suggested that it was to meet a situation of this type that the Commission was empowered to allow inspection even before the filing of a petition. The suggestion is plausible and is not without force.

(28) In the English Election Law (rule 40 of the rules contained in the First Schedule to the Ballot Act, 1872, and rule 57 of the

Parliamentary Election Rules contained in the Second Schedule to the Representation of the People Act, 1949) the objects of empowering the House of Commons and the superior Courts of that country are given in the relevant rule itself. Inspection of used ballot papers can be allowed in England if inspection is required (i) for the purpose of instituting or maintaining a prosecution for an offence in relation to the ballot papers ; or (ii) for the purpose of a petition questioning an election or a return, and for no other purpose. No indication at all has been given in our rule 93 about the purposes for which inspection can be allowed. So far as the Courts or Tribunals are concerned, the purpose is obvious. Inspection can be allowed by a criminal Court for instituting or maintaining a prosecution for an election offence. It can be allowed by the Court trying the election petition for the purpose of securing or checking up evidence in connection with any definite allegation made in the election petition. Following in points of distinction between the power of allowing inspection in England on the one hand and in India on the other are significant :—

(a) In England the Court can allow inspection for purposes of petition before filing the petition. It is not so in India.

(b) In England the power can be exercised only if and after the Court is satisfied by evidence on oath. There is no such statutory requirement in India; and

(c) In England the House of Commons has not to give any reason for allowing inspection. In India the Election Commission is bound to support its order with reasons.

Whereas Mr. Sibal argued that omission of any mention of the purposes of inspection in the Indian rule in the face of such specification in the English rule for a long time shows that inspection was not intended to be allowed by the Election Commission for purposes for which it was permitted in England, it was submitted by the learned counsel for the contesting respondent that the object of non-specification of the purposes in the Indian rule is not to restrict the scope of inspection to the specified purposes but to keep it as wide as possible. According to the respondent, non-specification does not restrict but enlarges the scope of the power conferred by rule 93. There seems to be substantial logic behind this submission of Mr. Ashok Sen. This is also consistent with the first suggestion made on behalf of the petitioner himself. If in 1962 the Commission was empowered to allow

inspection for the purpose of enabling a prospective election petitioner to scrutinise evidence before the ballot papers could cease to be available, there is no reason why that object came to an end after the amendment in the relevant provisions resulting in the requirement about the election petition being filed in the High Court and not before the Commission. Mr. Sibal contended that if the object was to allow collecting evidence for an election petition, the rule would have stated that such inspection could be allowed only for 45 days, i.e., confined to the period within which an election petition can be filed. Though the argument is attractive at the first sight, there is hardly any substance in it. This argument of Mr. Sibal would have been unassailable if the only object of permitting inspection was to gather evidence for an election petition. There is no doubt that the question of the Election Commission allowed inspection of the ballot papers after the filing of the election petition would not normally arise for the purposes of the election petition as the Court would be seized of the matter, and it is the Court alone to which an application for inspection would then be made. The Election Commission may however allow inspection even after the decision of the election petition. It may allow inspection for purposes other than those connected with the election petition even during the pendency of the election petition if inspection is not relevant to the matters in issue before the election petition Court.

(29) The argument of Mr. G. L. Sanghi, learned counsel for the contesting respondent, to the effect that the Election Commission was empowered to allow inspection to enable an election petitioner to get definite particulars of a relevant challenge to the election before filing the petition so as to save the time of the Court and the expense of the litigants, is also not without force. With the greatest respect to the learned Single Judge of the Allahabad High Court who decided *Raghubir Singh Yadava* v. *Gajendra Singh and others* (7), I am enable to agree that "the object of the rule is to enable inspection by a party with a view to satisfying himself about the fairness of the counting." In my opinion, the Election Commission has not been empowered to allow inspection meerly for satisfying a party to the election about the fairness of counting. I think the Election Commision has not been empowered to allow inspection to a party to the election for the purpose of hunting out and fishing out evidence so that he may file an

(7) E. P. No. 22 of 1969 decided by Allahabad High Court on 25th August 1969.

election petition on a ground relevant to inspection if he finds suitable material during the inspection. At the same time, the distinction between fishing or hunting evidence on the one hand and collecting or scrutinising evidence on the other is significant. In order to demonstrate the distinction between the two sets of cases, I may cite extreme examples. If an applicant were to tell the Election Commission that he wants to file an election petition and in order to enable him to find out whether he could possibly take some ground connected with the illegal rejection or acceptance of ballot papers he may be allowed inspection of all the ballots cast in favour of the returned candidate, he would be trying to fish out evidence. If on the other hand the defeated candidate were to write in his application to the Commission that his counting agents at specified stations had informed him that ballot papers bearing particular numbers cast in favour of the returned candidate had in fact the mark of the seal in the column against the defeated candidate's name, and the applicant wants to check up that fact by inspection as the number of such ballots was larger than the number of votes obtained by the returned candidate in excess of the votes counted for the applicant, it would not be case of fishing out evidence, but of scrutinising or gathering evidence. Whereas the application for inspection cannot be allowed in the first case, it may possibly be allowed in the second one, if the Commission is *prima facie* satisfied about the correctness of the allegations made in the application. I would, therefore, conclude that the object of empowering the Commission to allow inspection was (i) to meet the peculiar contingency of the possibility of the used ballots being destroyed before the Election Tribunal could possibly give a decision on an application for inspection; (ii) to enable a serious election-petitioner, normally a defeated candidate to check up the correctness of the evidence or information with him or to scrutinise the used ballots more carefully in order to be sure of the information already held by him and if necessary to obtain an exact count of the ballots which may be found to have been illegally accepted or rejected; (iii) to permit inspection of used ballot papers etc., if available by then even after the disposal of the election petition either for purposes of trial of election offences or for the purpose of departmental proceedings against the delinquent officials; and (iv) to give a wide power to the Commission to allow inspection in suitable cases, which power was later made subject to the solitary safeguard of being exercised in such a manner as would appear to be justified from the reasons recorded by the Commission.

(30) The objection of the amendment whereby proviso (a) was added to rule 93 is not far to seek. Though we do not have the requisite material before us which could show why the necessity of making the amendment in question arose within a few months after the Commission had been empowered, it seems to be beyond doubt that the object of requiring reasons to be recorded in the case of permission being granted (and not in case of inspection being refused) was to ensure that the power may not be exercised as a matter of course, and the Commission may continue to realise while dealing with each application that the case in which inspection had to be allowed had to be one of an exceptional nature. In *Bhagat Raja* v. *Union of India and others* (8), it was emphasised that the Supreme Court as well as the High Courts are placed under great disadvantage if no reasons are given in support of an order dismissing a revision petition under the Mineral Concession Rules, 1960.

(31) It is only when reasons are given that the appropriate Court may proceed to examine whether the reasons given are sufficient for the purpose of upholding the decision. It was observed that if the reasons given by the Government are scrappy or nebulous, the Court is handicapped in coming to a proper judgment. It was further held that if the State Government gives a number of reasons some of which are good and some are not, and the Central Government merely endorses the order of the State Government without specifying those reasons which according to it are sufficient to uphold the order of the State Government, the Supreme Court in appeal may find it difficult to ascertain which are the grounds which weighed with the Central Government in upholding the order of the State Government. The requirement of recording reasons is to enable Courts to find out *ex facie* from the order or the decision whether considerations extraneous or germane to the decision have weighed with the deciding authority. Reasons contained in an order also help in finding out whether the power to give the decision has been exercised with or without prior application of the mind.

(32) In *Messrs Travancore Rayons Limited* v. *The Union of India and others* (9), decided by their Lordships of the Supreme Court, it

(8) A.I.R. 1967 S.C. 1606.

(9) C.A. No. 2252 of 1966 decided by Supreme Court on 28th October, 1969.

was held that to enable the High Court or the Supreme Court to exercise its constitutional powers, not only the decision, but an adequate disclosure of materials justifying an inference that there has been a judicial consideration of the dispute by an authority competent in that behalf is necessary. Recording of reasons in support of a decision by any authority, on any claim of any kind ensures that the decision has been reached according to law and is not the result of caprice, whim, or fancy or on ground of mere policy or expediency or on any extraneous ground. It is a substantial safeguard against administrative excesses. Another object of providing reasons is to inspire confidence of candidates at the election in the Election Commission which is vested with such a drastic power, the scope of which has been held by me to be in a way wider than the jurisdiction of an ordinary Court. The order of the Commission is not subject to any appeal. It cannot be called in question during the trial of the election petition. The returned candidates who may be seriously affected by it is not necessarily allowed any opportunity by law to impugn the order with a view to find out whether it was passed in an arbitrary or mechanical manner, or after full application of the mind. The recording of reasons is the only protection which is afforded to the persons affected by the order to ensure that the reasons which impelled the Commission were those germane to the content and scope of the power vested in it. The judgment of the Supreme Court in *R. S. Seth Gopikisan Agarwal* v. *R. N. Sen, Assistant Collector of Customs and Central Excise Raipur and others* (10), on which Mr. Sanghi placed reliance in connection with the effect of requirement of giving reasons, has no direct bearing on the point before us, as the relevant provision in the Customs Act which was under consideration in *Gopikisan Agarwal's case* (10) did not require the recording of reasons, but merely grounds of belief. The two requirements do not appear to me to be identical. Reasonable grounds of belief may relate to statements of fact about the nature and source of information. Reasons in support of a decision are intended to disclose the matters considered, the conclusions reached, and the mental or logical process by which the conclusion is reached uninfluenced by considerations of policy or expediency. Since a wide power had been conferred on the Election Commission and it was possibly felt that the safeguards which exist automatically by vesting such a power in a Court or a Tribunal may not be applicable to the Commission, it was thought desirable to restrict the jurisdiction

(10) A.I.R. 1967 S.C. 1298.

of the Commission to pass orders permitting inspection only if such orders could *ex facie* be supported by reasons. These were, in my opinion, the objects of making the power conferred on the Commission by the purview of sub-rule (1) of rule 93 subject to the fulfilment of the condition precedent contained in proviso (a) added by the amendment.

(33) I have already briefly referred to the argument about the requirements of proviso (a) being directory or mandatory. Though the mere use of the word "shall" is not conclusive, the context in which the provision is made, the form in which it is put, the scheme of the statute or the rules in which the requirement is engrafted, and the legislative history of the provision can always point to the fact whether in a given case the requirement of recording reasons is merely directory or mandatory. I cannot lose sight of two facts which are significant in this connection. Firstly, the requirement of recording reasons has been introduced in the form of a proviso to sub-rule (1) (which sub-rule alone confers on the Commission the jurisdiction to allow inspection) thus cutting an inroad into the purview. In other words, orders which are not supported by reasons are taken out of the purview, and only such orders permitting inspection have been left within rule 93(1) as are duly supported by reasons. The power for allowing inspection has been made subject to and the recording of reasons power to allow inspection without recording reasons has been taken away by the proviso. Secondly, it has to be kept in mind that rule 93(1) prohibits the opening of the documents mentioned therein and their inspection by any person or production before any authority. This is the general rule. An exception is then carved out on the said prohibition to permit inspection, etc., only under orders of certain specified authorities. The prohibition is in consonance with and for ensuring compliance with the secrecy of ballots to which no exception is otherwise made. When the power of the Commission exercisable for bringing a case within the exception is made subject to the further safeguard of recording reasons, it cannot be said that the requirement is merely directory. After carefully considering all the pros and cons of the matter, I am firmly of the opinion that on the texture of the provision (the purview of and the proviso to rule 93 read together) and the scheme of the Act, and the rules and the overall consideration of secrecy of ballots, the recording of reasons is a condition precedent for the emergence of the power of the Election Commission to permit inspection under that sub-rule.

(34) In view of the trend of the latest pronouncements of the Supreme Court, it is really not very material to determine whether the power vested in the Commission to permit inspection under rule 93(1) is quasi-judicial or administrative. Nevertheless lengthy arguments having been addressed on this point, I would prefer to notice the same and record my decision on this point also. Whereas Mr. Sibal wanted to argue on the basis of certain observations made by me while writing the judgment of a Division Bench of this Court in the *Municipal Committee and others* v. *The State of Punjab* (11), that the requirement of recording reasons makes the order in question quasi-judicial, it was submitted by Mr. Ashok Sen on the authority of the observations made by the Supreme Court in *Collector of Monghyr and others* v. *Keshav Prasad Goenka and others, etc* (12), that the mere requirement of recording reasons does not by itself make an administrative order quasi-judicial. I do not consider anything stated by me in the *case of the Municipal Committee and others* (11) (*supra*) to be relevant for deciding this point. However, much different the *case of Collector of Monghyr and others* (12) (*supra*) may be from the case in hand (and Mr. Sibal took quite some time to point out the difference), it cannot be denied that the mere requirement of recording reasons would not by itself always prove conclusively that the order sought to be supported by reasons is a quasi-judicial one. Indeed a provision requiring recording of reasons goes a long way to suggest that the order may be quasi-judicial. This, however, is not a conclusive test of the matter. The relevance of this issue in the present case is confined to the consideration that whereas a quasi-judicial order is amenable to a writ of *certiorari*, an administrative order is not. But this is hardly material in a petition under Article 226 of the Constitution. The jurisdiction of the High Court under that provision is not confined to the issue of well-known high prerogative writs issued in England and America. High Courts in India are not restricted to issue writs of Certiorari, but can issue writs "in the nature of Certiorari". Again, the High Courts are specifically empowered to issue any such writs, orders or directions, other than the well-known writs of Mandamus, Prohibition, Quo-warranto and Certiorari as the circumstances of a case may justify. It is, therefore, hardly material whether the jurisdiction of the Election Commission under rule 93 is to be exercised in a quasi-judicial manner or merely by way of an administrative decision.

(11) 1966 Curr. L. J. 290.
(12) A.I.R. 1962 S.C. 1694.

(35) In *R.* v. *Manchester Legal Aid Committee,* (13), it was held that the duty to act judicially may arise in a widely different circumstances which it would be impossible and indeed inadvisable to attempt to define exhaustively. It was further held that "where the decision is that of a Court then, unless, as in the case, for instance, of justices "granting excise licences, it is acting in a purely ministerial capacity, it is clearly under a duty to act judicially. When, on the other hand, the decision is that of an administrative body and is actuated in whole or in part by questions of policy, the duty to act judicially may arise in the course of arriving at that decision."

(36) As pointed out by their Lordships of the Supreme Court in *A. K. Kraipak and others* v. *Union of India and others* (14), the concept of quasi-judicial power has, in recent years, been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial one. K. S. Hegde, J., who prepared the judgment of the Supreme Court in that case, observed that in order to prevent the abuse of the power of increasing administrative bodies and to see that the said power does not become a new despotism, the Courts are gradually evolving the principles to be observed while exercising even administrative functions. The learned Judge further held that public good is not advanced by rigid adherence to precedents in matters like this as new problems call for new solutions. It was authoritatively laid down by their Lordships that it is neither possible nor desirable to fix the limits of the quasi-judicial power. The Supreme Court also held in *A. K. Kraipak's case* (14), that since the aim of both quasi-judicial as well as administrative bodies is to arrive at a just decision, the rules of natural justice should apply to both. The question as to what particular rule of natural justice should apply to a given case, was left to be decided upon various factors relevant to the particular case. It was noticed that in a welfare State like India, which is regulated and controlled by the rule of law, it is inevitable that the jurisdiction of administrative bodies is increasing at a rapid rate. It was held that the concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. It was laid down that the requirement of acting judicially in essence is nothing but a requirement to act justly and

(13) (1952) 2 Q.B.D. 413.
(14) A.I.R. 1970 S.C. 150.

fairly and not arbitrarily or capriciously. No one can argue that the Election Commission is expected to act either unjustly, or unfairly, or arbitrarily or capriciously while deciding an application under rule 93 of the 1961 Rules. Once it is held that it has to act justly and fairly and not arbitrarily or capriciously, it means, according to the law laid down by the Supreme Court in *A. K. Kraipak's case* (14), that the Commission has to discharge its duty of giving decision on an application under rule 93 in accordance with the principles of natural justice.

(37) In *Chandra Bhawan Boarding and Lodging, Bangalore* v. *State of Mysore and another* (15), it was reiterated that the principles of natural justice apply to the exercise of the administrative powers as well, though those principles are not embodied rules. As to what particular rule of natural justice, if any, should apply to a given case must, it was held, depend to a great extent on the facts and circumstances of that case, the frame-work of the law under which the inquiry is held and the constitution of the tribunal or body of persons appointed for the purpose. The crux of the matter is that if an administrative authority is to act judicially, the order proposed by it is quasi-judicial, but if it has no such duty and is allowed by law to proceed on considerations of expediency or policy, the order is not quasi-judicial, but an administrative one.

(38) After a careful consideration of the entire matter and after applying the principles of law referred to above, I am of the opinion that the Election Commission, while giving its decision on an application under rule 93, is expected to act in a quasi-judicial manner as it cannot allow an application for inspection on consideration of expediency or policy, but must decide the same objectively on the material placed before it, and is bound to support the order with reasons.

(39) This takes me to sub-head No. (v) of the fourth main contention of Mr. Sibal. I have already held above that an order of the Commission under rule 93 permitting inspection would be without jurisdiction if it is not supported by reasons. It goes without saying that such reasons must be germane to the purpose of allowing the inspection. Extraneous reasons are no reasons in the eye of law. Similarly irrelevant and unintelligible reasons cannot be held to satisfy requirements of the proviso. Whenever

(15) A.I.R. 1970 S.C. 2042.

there is a statutory requirement to support an order of any authority with reasons, the same must appear *ex facie* from the order itself. At least a brief reference to the material on which the conclusion is reached and in respect of which material, reasons for supporting the order are given, must be available in the order itself. It was argued by the learned counsel for the respondent that it is difficult to define as to what is a good reason on which an order can be supported. In reply to this argument Mr. Sibal referred to the famous observations of Lord Reid in the judgment of the House of Lords in *Ridge* v. *Baldwin and others* (16), in connection with the difficulty to define 'natural justice'. It was oobserved :—

> "In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore, it does not exist."

Mr. Sibal further argued that merely giving the conclusions and not revealing the mental process by which the same have been arrived at, does not amount to giving reasons. He also invited our attention to the judgment of their Lordships of the Supreme Court in the *State of Gujarat* v. *Patel Raghav Natha and others* (17), wherein it was held that if after reciting the various contentions an authority baldly states his conclusions without disclosing his reasons, he does not fulfil the requirement of law. It has been repeatedly held by Courts that mere use of phrases like "it is expedient in the interest of justice" or "it would serve the ends of justice" are no reasons in the eye of law. It is also settled law that an order which is required to be supported by reasons must be quashed if it does not disclose the same *ex facie*. If the order is not supported by valid reasons, it is not for the High Court to substitute its own reasoning in order to sustain its validity. Our attention was invited in this connection to the judgment of the Supreme Court, in *Prag Das Umar Vaishya* v. *The Union of India and others* (18). Mr. Sibal is no doubt supported by the authoritative pronouncement of the Supreme Court in this regard.

(16) (1964) A.C. 40 at page 64.
(17) C.A. No. 723 of 1966 decided on 21st April, 1969.
(18) C.A. No. 657 of 1965 decided on 17th August, 1967.

(40) Another submission of Mr. Sibal which may be noticed at this very stage is that if a decision is administrative and is supported by more than one reason, the whole decision will be quashed if even one of those reasons is found to be irrelevent, but if the decision is quasi-judicial, even if one of the various reasons given in support thereof is found to be good, and the other reasons bad, the order would be sustained. These propositions were sought to be supported by the judgment of the Full Bench in *Sahela Ram* v. *The State of Punjab and another* (19).

(41) The last (the sixth) sub-head of the fourth contention involves exactly the same issue as is covered by the fifth main contention of the learned counsel for the petitioner. I, therefore, proceed to decide the fifth main submission of Mr. Sibal which is to the effect that the impugned order in the instant case is not supported by any reason in the eye of law. The first point that arises for consideration is as to what was the material available before the Chief Election Commissioner when he gave the impugned decision. The order does not refer to anything except to the application for inspection (Annexure R-X). The original record of the case which has been sent up by the Commission also does not contain anything except the application, the orders passed thereon, the office noting, the formal order signed by the Secretary, and subsequent telegraphic and postal correspondence between the Commission and the District Election Officer relating to the implementation of the order. In the course of arguments it was suggested by the learned counsel for the contesting respondent that we should presume that the Chief Election Commissioner also had before him at that time copies of the various communications (telegrams and letters) which had been sent by the respondent to the Commission during February to March 12, 1971. I am unable to agree with this contention. We have nothing on the record to show what possible material, except the allegations made in the application for inspection itself could have been considered by the Election Commission. The record returned by the Commission and the original order of the Chief Election Commissioner really indicate that there was nothing except the application for inspection, dated March 15, 1971, before the Chief Election Commissioner when he passed the impugned order on the same day. If, therefore, it could be presumed that the Election Commission did take into consideration some

(19) I.L.R. (1967) 1 Pb. & Hr. 260.

material before passing the order for inspection, it can at best be said that the Commission went through the application for inspection. The basis on which the order purports to have been passed could therefore only be "the allegations made in the application by S. Iqbal Singh". Now it will be seen that in the application for inspection (Annexure R-X), the following points had been raised in the form of allegations :—

(i) The Punjab Government machinery was set in motion to help Gurdas Singh Badal (the petitioner), the brother of Shri Parkash Singh Badal, Chief Minister of Punjab, in petitioner's election to the Lok Sabha by adopting all possible unfair means and also by illegally utilising the Government machinery which was at the disposal of the Chief Minister (paragraph 4);

(ii) Details of how the Punjab Government machinery was being utilized by the petitioner for his success in the election were given in the complaints, dated February 20, 1971, and February 27, 1971, of which copies were Annexures 'A' and 'B' to the application for inspection (paragraph 4);

(iii) The Chief Minister, Punjab, used all means at his disposal for the success of his brother in the election. The respondent made a complaint, dated February 28, 1971, to the Commission in that respect of which complaint copy was Annexure 'C' to the application (paragraph 5);

(iv) The Chief Minister, Punjab, did not leave any stone unturned to help his brother in the election for which the polling took place on March 5, 1971 (paragraph 6);

(v) On March 7, 1971, the contesting respondent made a complaint to the Deputy Election Commissioner to depute some senior official to supervise the counting so that the counting could take place according to the relevant rules. Similar representation was sent on the same day to the Election Commission. Copies of those complaints were attached as Annxure 'D' and 'E' to the application for inspection (Paragraph 7);

(vi) On March 8, 1971, a detailed letter was written to the Election Commission giving details of the alleged malpractices resorted to by the Chief Minister, Punjab, for helping the petitioner in the election. (It is significant that copy of the alleged complaint, dated March 8, 1971, does not even purport to have been attached to the application for inspection. We have seen the original record. No. copy of that complaint is on the record of the Commission also which has been sent to us). (Paragraph 8);

(vii) During the counting large number of ballot-papers were found which did not bear the signature of either the presiding or the polling officer and/or the stamp of the Assembly/polling station or its number. Such ballot-papers approximately numbered more than 15,000. Besides these, more than 6,000 valid votes cast in favour of the contesting respondent had been wrongly rejected. Despite the telegraphic intimation of this allegation to the Prime Minister, the Secretary, All-India Congress Committee and the Observer for the Fazilka Parliamentary Constituency, no action was taken on this complaint. Copies of the telegrams were marked Annexures 'F' and 'G' (paragraphs 9 and 12);

(viii) On March 12, 1971, a written petition was submitted to the Returning Officer under rules 63 and 64 of the 1961 Rules asking for a re-count, but the Returning Officer "without assigning any valid reasons" rejected the said petition of the contesting respondent (paragraph 9);

(ix) The Returning Officer did not accede to the request of the contesting respondent for a re-count as he was under the influence of the Chief Minister, Punjab, and in spite of the respondent having requested for a re-count, the petitioner was *mala fide* declared elected by a margin of 5,323 votes (paragraphs 10, 11 and 13); and ,

(x) The contesting respondent had a reasonable apprehension that the used and unused ballot-papers and the reports of the Presiding and Counting Supervisors and other papers relating to the election in question may not be tampered with.

(42) It will be noticed from the resume of the allegations made in the respondent's application for inspection that it contained ten allegations out of which only the last three could at best have some relevance with the prayer for inspection of the prohibited documents. The impugned order does not show whether the Chief Election Commissioner was thinking of only the relevant allegations or the relevant as well as the irrelevant allegations or only all the irrelevant allegations while recording his decision. If the impugned order is a purely administrative one, it is liable to be set aside on that short ground. If, however, it is a quasi-judicial order, as I have found it to be, the order would still be sustained if on the basis of even the relevant material some legal reason had been given for allowing the inspection. The allegations contained in paragraphs 4 to 8 of the application for inspection had no relevance to the matter of inspection. Arguments were advanced on behalf of the contesting respondent on the basis of what is alleged to have been contained in the respondent's application, dated March 8, 1971, to which reference has been made in paragraph 8 of the application for inspection. No copy of that application had, however, been either annexed to the application, or has otherwise been shown to have been available to the Chief Election Commissioner at the relevant time.

(43) Even if it could be assumed that the Chief Election Commissioner took into consideration only the relevant material and not the irrelevant material, it would make no difference to the decision of this case. It was argued by Mr. Sibal that the mere seriousness of allegations (even relevant ones) does not justify an order for inspection being passed. According to learned counsel there would be no justification for permitting inspection of the prohibited documents unless the Election Commission finds (i) that the allegations made before it are relevant for purposes of allowing inspection; and (ii) that the Commission is satisfied from the material placed before it that those allegations are *prima facie* correct and are not frivolous or baseless. The impugned order expressly shows that the Chief Election Commissioner did not apply his mind at all to the second necessary ingredient of the requirements of rule 93, i.e., about the satisfaction of *prima facie* truth in the relevant allegation. On the contrary, the Chief Election Commissioner has by implication stated in the order that he had not applied his mind to that aspect of the matter by saying that the allegations

would no doubt be serious only if they are found to be true. I may not be understood to suggest that the Election Commission is expected to record any definite finding about the truth or otherwise of allegations material to the trial of an election petition. All the same the safeguard of recording reasons would, in my opinion, become absolutely illusory and nebulous if the Commission allows inspection of the prohibited documents on allegations which may be *prima facie* false, frivolous or baseless, howsoever, serious those may be. Since it cannot even be argued that inspection can be allowed if the Commission is satisfied that the allegations are false or frivolous, it must be held that the satisfaction of the Commission about *prima facie* truth in the relevant allegations alone would qualify the Commisison to allow inspection. Extremely serious allegations may be made in an application for inspection which may be irrelevant or which cannot possibly be true. In either of the two eventualities inspection cannot be allowed.

(44) So far as the allegation of no action having been taken by the Observer on the complaint of the respondent is concerned, it is significant that the detailed report of the Observer, dated March 12, 1971 (copy Annexure 'C' to the writ petition), was not considered by the Chief Election Commissioner before passing the impugned order. In that report Mr. R. D. Sharma, Under-Secretary, Election Commission, observed that :—

(i) he had visited all the counting centres in the Constituency in question on the 10th and 11th of March, 1971 (the counting dates) and he had found that the counting was being carried out smoothly;

(ii) all the instructions given by him regarding the counting to the Assistant Returning Officers and Election Supervisors at almost all the places were rigidly followed;

(iii) he had particularly taken care to request the two main contestants (the petitioner and the contesting respondent) and their counting agents at every centre whether they had any sort of complaint, and no serious complaint had been made to him;

(iv) some ballot-papers for Lambi Constituency at Abohar were found not to have been signed by the Presiding Officer and, therefore, the Observer carefully checked

the bundle of the ballot-papers which was alleged to be full of ballots not signed by the Presiding Officer and found that there were hardly one or two such ballot-papers in the bundle;

(v) the Observer confirmed by looking at the serial numbers of the ballot papers in question that all the ballot papers were of the authorised series and the omission on one or two papers was not wilful and those ballots could not, therefore, be rejected according to the instructions given by the Commission ;

(vi) a minor complaint about the counting agents of Yogi Raj Surya Dev published in the Milap was also inquired into and it was found baseless; and

(vii) the only complaint made by S. Iqbal Singh (the contesting respondent) was verbal one at Muktsar on the 11th (of March, 1971) regarding Jalalabad Constituency at Fazilka. The Deputy Commissioner and the Observer immediately went to look into the matter and found that there was no substance in the complaint and when they reached the place, the counting was almost over.

(45) It is significant that the report of the Observer was made on March 12, 1971, that it was made when the counting was almost over, that the counting was finished on March 12, 1971, that 13th and 14th of March, 1971, were public holidays in Punjab due to second Saturday and Sunday that the office of the Election Commission reopened on the 15th of March, 1971, and the order of the Chief Election Commissioner appears to have been passed early in the day on the 15th as is apparent from the noting in the official file of the Commission. In the absence of any mention about the Observer's report having been made in the impugned order, I consider it quite safe in these circumstances to presume that the Chief Election Commissioner had no opportunity to see it before giving his decision on the respondent's application.

(46) The respondent had complained in his application that the District Election Officer had rejected his petition without assigning any valid reasons. A copy of the respondent's complaint to the District Election Officer (who was also the Returning Officer of the

Constituency) is Annexure 'A' to the petition. A copy of the detailed order which was passed by the District Election Officer on that very day on that complaint is Annexure 'B' to the petition. In that order the Returning Officer has written that he considered the various grounds given in the respondent's complaint in the presence of the petitioner, the contesting respondent and the Assistant Returning Officers of the various Assembly segments and in the presence of Shri R. D. Sharma, Under-Secretary, Election Commission. The presence of Shri K. S. Mann, Joint Chief Electoral Officer, Punjab, has also been noticed in the order. Copy of the observations made by Shri Sharma was referred to in the order and attached thereto. Notice was taken of the precise grounds urged in the complaint, and it was stated that the respondent was asked to quote any specific instances where the irregularities alleged by him might have been committed, but the respondent did not cite any specific instance. It was further observed in the order, that the contesting respondent was asked as to whether in any Assembly segment, he or any of his agents had asked for rechecking of the votes or pointed out any discrepancy in the figures before the Assistant Returning Officer or the Observer who visited the centres on the 10th and 11th of March, 1971, and that Iqbal Singh had failed to cite any such specific instance. Reply of Iqbal Singh reiterating for a total recount in reply to the Returning Officer's suggestion to recount the votes cast in any specific Assembly segment of the Parliamentary Constituency was also mentioned in the order. In regard to the allegation of improper sealing of the ballot boxes, the Returning Officer held that checking of the seals was the first operation in counting and that counting could not have started if any of the seals on the ballot boxes had been found to be not intact or found to be improper. It was stated that no such complaint had been made at any counting centre or to any Assistant Returning Officer, and that, therefore, there was no substance in that allegation. Notice was then taken about only one or two ballots having been found in a bundle which did not bear the signature or the seal of the Returning Officer, and about the Observer having confirmed from the serial numbers of the ballot-papers that they were authogiven to the Returning Officers to the effect that such balot-papers rised ones. Mention was made in the order about the instructions (which did not bear the seal and signature of the Returning Officer) shall not be rejected if the genuineness of the ballot-papers is itself not challenged. Specific mention was made of the fact that

no non-genuine ballot-paper was found in any centre. The allegation regarding the preparation of wrong returns was disposed of with the observation that no specific case had been cited to show that any return was wrongfully prepared by the Counting Supervisors or the Assistant Returning Officers. On the basis of the above findings it was held that the contesting respondent had not been able to make out a *prima facie* case which could necessitate recounting of all the votes cast in the Parliamentary Constituency. Reference was then made to certain observations in the judgment of the Andhra Pradesh High Court in *Chadalavada Subha Rao* v. *Kasu Brahmmananda Reddy and others* (20), on the basis of the English judgment in *Stepney's case* (21). It was held by the Returning Officer that it appeared to him that the intention of the contesting respondent was apparently to have a recount with a view to fish out some mistakes of any kind which could possibly benefit him and that this could not be allowed. The application for recount was accordingly rejected. I am of the view that if the Chief Election Commissioner had been taken into confidence in respect of the above-quoted detailed order of the District Election Officer (the Returning Officer), he might have either not permitted inspection or might have given reasons for differing from the view taken by the Returning Officer. It is not for me to suggest as to what view the Chief Election Commissioner could have formed after going through the contents of the Observer's report and the Returning Officer's order. It was up to him to allow inspection in spite of what had been stated in those documents. But the order must in that case have shown *ex facie* that he had taken that material into consideration and for reasons which he might have recorded, he still thought permitting of inspection to be necessary or proper.

(47) Though, it may not be necessary for the Commission to take evidence, an applicant for inspection is not barred from supporting his allegations by his affidavit or other documentary evidence. It is noteworthy that the application of the contesting respondent was not accompanied by any affidavit. Though it may be open to an authority to believe a person without his swearing to the fact alleged by him, and not to believe another in spite of his

(20) A.I.R. 1967 A.P. 155 at p. 176.
(21) (1886) O.M. & H. 34.

giving an affidavit, the importance of an applicant taking full responsibility for his allegations and incurring the risk of prosecution for making false allegations in an affidavit cannot be easily brushed aside. All these facts show that the impugned order was passed in a mechanical manner and without proper application of the mind of the Election Commission. Neither it is possible nor proper to prescribe any magic incantation for being repeated in valid orders permitting inspection. In the nature of things each case must depend on its own facts. No specific words need be present in an order permitting inspection. The order must nevertheless *ex facie* show the material considered, the *prima facie* satisfaction about the allegations which have been considered to justify permitting inspection and the reasons for such justification. Those reasons must be clearly and unambiguously decipherable from the order itself and not from any formal order which may subsequently be drawn on its basis or from any communication with which that order may be forwarded to some subordinate authority. If the reason of the kind given in the impugned order is considered to be a good reason, the statutory safeguard provided by the proviso to rule 93 for bringing the case within the exception to the prohibition of inspection of such documents would, in my opinion, be completely defeated. If the reason assigned in the instant case can be considered a good reason, all that an applicant for inspection has to do is to make serious allegations without being required to give even *prima facie* satisfaction as to there being any truth in those allegations. If this were the intention of the rule making authority, inspection of the prohibited documents also would have been allowed to prospective election-petitioners as a matter of course like the documents mentioned in sub-rule (2) of rule 93. An attempt was made at one stage to support the case of the respondent on this point by trying to equate an order for inspection passed by the Commission to an order passed by the Motion Bench of this Court at a preliminary hearing of a writ petition. It was suggested that we admit a writ petition to a hearing without calling upon the other side when serious allegations of *mala fides* etc. are made in the petition without supporting our decision to admit the petition with any reasons. This approach to the problem appears to me to be wholly fallacious. While admitting a writ petition to a hearing, this Court decides nothing except to proceed further with the matter. The Commission while allowing inspection finally disposes of the entire matter before it.

The very object of admitting a writ petition is to call upon the other side to appear and defend it. No such situation arises before the Election Commission in a petition under rule 93. We do not admit even a writ petition containing allegations of *mala fides* as a matter of course, but satisfy ourselves by reference to the averments in the affidavit of the petitioner and the documents if any submitted therewith of there being *prima facie* possibility of some truth in the allegations. Another distinction which in my opinion, overrides all other considerations, lies in the fact that the High Court is permitted by its relevant rules to summarily dismiss a writ petition in the same manner as the High Court can dismiss a Regular Second Appeal or a petition for revision by writing the solitary word—"dismissed" without supporting that order with any reasons. The distinction which has been pointed out by me between the functionaries (the High Court on the one hand and the Election Commission on the other) for the purpose of repelling the third main contention of Mr. Sibal cannot be lost sight of while judging the validity of the argument in hand which is sought to be advanced in support of the respondent's case.

(48) In view of what I have stated above, I am of the considered opinion that the impugned order of the Chief Election Commissioner, dated March 15, 1971, is not supported by any reasons and that mere statement of the allegations made in the application for inspection, if true, being serious, is no reason in the eye of law for allowing inspection under rule 93(1). From the circumstances of the case, to which reference has already been made, it also appears to me that the impugned order suffers from complete non-application of the mind of the Commission to the real matters in controversy. No distinction was drawn between the relevant and irrelevant allegations made in the application. As to which of the documents mentioned in clauses (a) to (d) of sub-rule (1) of rule 93 would be necessary to be opened and inspected for purposes relevant to the allegations made in the application, also does not appear to have been considered. If the Election Commission had applied its mind in this respect, inspection of challenged votes and declarations under rule 93 (1) (d) would not have been allowed. It was not even noticed that if inspection is allowed to the defeated candidate, it may in fairness be necessary to ask the returned candidate if he would like to inspect any ballots cast in favour of Iqbal Singh. From whatever

angle the matter may be considered, it appears to me that the order, dated March 15, 1971, was passed in a mechanical manner as if it was a matter of policy or expediency to allow or not to allow inspection in certain cases. It may be noticed at this stage that Mr. Sibal pointed out to us some newspaper reports based on the alleged information given by the Election Commission wherein it was stated that the Commission had adopted a uniform practice to permit inspection in cases where difference between the votes cast in favour of the returned candidate and the top most defeated candidate was less than 40,000 and that the Commission had consistently refused inspection in cases where the difference was larger. We were asked to take judicial notice of the newspaper reports. It appears to me to be unnecessary to travel into this controversy. It is, however, clear that if any such norm had been followed by the Election Commission, it would be another reasons for striking down the impugned order as applications under rule 93(1) cannot be disposed of merely on considerations of policy.

(49) Though I have held that the real and the only order of the Commission on the validity of which the fate of this case depends is the order of Mr. S. P. Sen Verma, dated March 15, 1971, I must also briefly deal with the question of the validity of the formal order, dated March 16, 1971, drawn by the Under-Secretary to the Commission signed by the Secretary "by order" of the Commission, as arguments in the alternative were addressed by both sides on that point too. The learned counsel for the respondent showed preference for calling the formal order as the order of the Commission as it contains specific reference to two allegations made in the application for inspection and also uses the following expression in its operative part:—

> "The Election Commission have been satisfied that the inspection as prayed for by the applicant is necessary to further the ends of justice."

I have already quoted the relevant part of the order verbatim in an earlier part of this judgment. From the first two paragraphs, it appears:—

(i) that a reference was made to the statement of the contesting respondent in the application for inspection about inspection being necessary "in order to enable him to seek

his legal remedy in the appropriate Court by an election petition; and

(ii) that significance was attached to the allegations (a) about the illegal acceptance of votes cast on ballots which did not bear the signature or seal of the Presiding Officer and (b) about the "wrong" rejection of about 6,000 ballot papers having been made specifically.

(50) It was not disputed that this order was drawn up by Mr. Wiswanathan in pursuance of Mr. S. P. Sen Verma's order. There is no provision in the Act authorising the authentication of the Commission's order by the Secretary. Though the Secretary could himself pass the order, he obviously did not do so in his personal capacity as Secretary, but expressly signed by it "by order" of the Commission. I have already indicated that it is no reason in the eye of law to merely state that inspection is necessary to further the ends of justice or is expedient or is in the interest of justice. The order shows that even the Secretary to the Commission, while approving of the draft order prepared by the Under Secretary, did not have before him any material other than the application of the respondent. The expression "formal order" appears to have been borrowed from the Privy Council practice and the relevant rules of the Supreme Court of India. The formal order can in other words be equated to a decree passed by a Court in terms of the operative part of the judgment pronounced by a Court. The formal order in this case went far beyond the original order in various material particulars which have already been indicated by me in an earlier part of this judgment. What appears to me to be topping is that the officer framing the formal order did not realise that the power to allow inspection to a returned candidate could not be delegated by the Commission to the District Returning Officer as was done in the instant case. The returned candidate could not be asked to make an application for inspecting the documents to the District Returning Officer as that officer's name does not appear in rule 93. The Election Commission does not appear to me to be empowered by any provision in the 1951 Act or the rules framed thereunder to abdicate its functions for allowing inspection, even as a recriminatory measure, or otherwise, to a District Returning Officer. Most of the other defects which have been pointed out by me in

connection with the order of the Chief Election Commissioner also exist in the formal order approved by the Secretary. Even if, therefore, the validity of the formal order (Annexure 'D' to the petition) alone were questioned, I would have held that it suffers from the same defect as the original order of the Chief Election Commissioner.

(51) I now come to the last ground urged by Mr. Sibal. Admittedly the petitioner was not impleaded as a party to the application for inspection. Indeed it might not have been necessary to do so. It is also not disputed that though allegations had been made against the petitioner, no notice of the application was sent to him by the Election Commission. In fact no opportunity of any kind was afforded to the petitioner to show-cause against the proposed order being made for allowing inspection of the ballots which had been cast in favour of the petitioner, and the other documents referred to in the impugned order. In this connection, it was argued by Mr. Sanghi that the provision made in proviso (b) to rule 93(1) for notice of the actual inspection being given to all other candidates at the election shows that the requirement of notice at the stage of allowing inspection has been impliedly excluded by the rule making authority. I am unable to agree with this submission of the learned counsel. The reasonable opportunity referred to in proviso (b) to rule 93(1) is expressly restricted to authorising the candidates or their duly authorised agents "to be present at such opening, inspection or production." It does not authorise the returned candidates or any other person likely to be affected by the inspection to challenge the factum, legality or validity of the order for inspection or any part thereof. Nor does proviso (b) authorise the returned candidate to object to any part of the process of inspection except probable adherence to the rule of secrecy. Lengthy arguments were addressed by both sides on the validity of the order of the Commission on the ground that it was likely to infringe the rule of secrecy. In view of the statutory provisions prohibiting such infringement and the specific mention of this direction in the formal order, we are not prepared to presume that secrecy would necessarily be infringed by the inspection of the documents in question. Since the inspection of the used ballot papers as well as that of the marked copy of the electoral roll has been allowed by the Commission, there is no doubt that any careless handling of the marked copy of the electoral roll, or permitting the contesting respondent or any of his representatives or anyone

else to look at the page number, the name or serial number of the elector whose ballot has already been inspected by such person, shall infringe the rule of secrecy. But we have to presume that if and when inspection has to be allowed by the appropriate authority, it will have to be allowed in such a manner as not to infringe the secrecy of the ballot.

(52) Having held that grant of opportunity to the returned candidate of being heard before inspection being allowed on the application of the defeated candidate, has not been impliedly excluded by anything contained in rule 93, or anywhere else, and there being no such express exclusion, two questions call for decision, viz., (i) whether rules of natural justice apply to proceedings under rule 93(1) and if so, (ii) what are the relevant rules applicable to proceedings under that rule. I have earlier held that the function of the Commission under rule 93 is *quasi-judicial.* If that finding is correct, it goes without saying that the well-known principle of *audi alteram partem* would apply and no decision given by the Commission without affording the returned candidate an opportunity of showing cause against the proposed order would be valid. With the greatest respect which I have and feel for those of my learned Brothers who are going to take a different view in the matter of the proceedings before the Commission being *quasi-judicial* or otherwise, it is necessary that I should advert to the grounds on which I consider grant of opportunity to the affected party being necessary even if the Commission is expected to decide the question of inspection in its administrative capacity.

(53) The earliest case on the subject to which our attention was invited by Mr. Sibal is the decision of the House of Lords in *Arthur John Spackman* v. *The Plumstead District Board of Works* (22). The relevant legal provision empowered the authority in question to "make an order in writing on such owner or occupier, building or person, directing the demolition of any such building or erection or so much thereof as may be beyond the said general line so fixed as aforesaid." Such general line of buildings had to be decided by the Superintending Architect to the Metropolitan Board of Works for the time being. Earl of Selborne, L. C., while referring to the man-

(22) L.R. 10 (1885) A.C. 229.

ner in which the architect should proceed for fixing the general line of buildings observed as follows:—

> "No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice. But it appear to me to be perfectly consistent with reason, that the statute may intentionally omitted to provide for form, because this is a matter not of a kind requiring form, not of a kind requiring litigation at all, but requiring only that the parties should have an opportunity of submitting to the person by whose decision they are to be bound such considerations as to in their judgment ought to be brought before him. When that is done, from the nature of the case, no further proceedings as to summoning the parties, or as to doing anything of that kind which a judge might have to do, is necessary."

(54) Surely the architect while fixing the general line of buildings was not doing anything *quasi-judicial*. The Lord Chancellor made it clear that though the architect was not a judge in the proper sense of the word, he must still give the parties an opportunity of being heard before him and of stating their case and their views. It was emphasised that this was not a matter of form, and, therefore, even if the statute is silent on the subject, parties must still have an opportunity of submitting to the person by whose decision they are to be bound.

(55) Counsel then referred to the well-known passage in the judgment of the House of Lords (Lord Loreburn, L. C.), in *Board of Education* v. *Rice and others* (23), wherein great emphasis was laid

(23) L.R. (1911) A.C. 179 at p. 182.

on the duty of everyone who is to decide anything to fairly listen to both sides in the following words:—

> "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

(56) In *New Prakash Transport Co. Ltd.* v. *New Suwarna Transport Co. Ltd.* (24), the above quoted passages from the judgments of the House of Lords in *Arthur John Spackman's case* (22), and in the *case of Board of Education* v. *Rice and others* (23), (supra), were cited by the Supreme Court with approval (at pages 109-110). In *Union of India* v. *Col. J. N. Sinha and another* (25), K. S. Hegde, J., while dealing with the question of application of the principles of natural justice to a decision under Fundamental Rule 56(j) which rule authorises the Government to retire after the age of 55 years any employee by giving him three months' notice in writing or three months' pay and allowances in lieu of such notice, observed as follows:—

> "Rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights. As observed by this Court in *Kraipak* v. *Union of India* (14),

(24) (1957) S.C.R. 98.
(25) A.I.R. 1971 S.C. 40.

'the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law but supplement it.' It is true that if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But, if on the other hand, a statutory provision either specifically or by necessary implication excludes the application of any or all the rules of principles of natural justice then the Court cannot ignore the mandate of the Legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power."

(57) The ratio of the authoritative pronouncement of the Supreme Court in the *case of J. N. Sinha and another* (25), (supra) is that if a statutory provision can be read consistently with the principles of natural justice, the Court should extend those principles to such provision because it must be presumed that the law making authority intended to act in accordance with the principles of natural justice. The only exception coined to that rule was of a case where a statutory provision either specifically or by necessary implication excludes the application of any or all the rules, or principles of natural justice. In the present case, as already held, there is no such exclusion. As already observed by me decision on an application under rule 93 is not to be given according to any policy or on account of any administrative expediency, but has to be given in each case on its own merits. As soon as it is clear that the decision has to be based on material and relevant facts, it becomes, in my opinion, necessary for the authority concerned to give an opportunity, howsoever brief it may be, to the person likely to be affected by the decision to demonstrate that the allegations on which the decision is sought are either baseless or non-existent or otherwise to show that it is not a fit case for grant of the prayer of the opposite

party. This is the bare minimum required for conforming to the principles of natural justice.

(58) *In Union of India and another* v. *P. K. Roy and others* (26), it was held that the extent and application of the doctrine of natural justice cannot be imprisoned within the straight jacket of a rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case. If nothing else, the judgment of the Supreme Court in *P. K. Roy's case* (26), (supra), is an authority for the proposition that principles of natural justice have application even to the decisions of administrative authorities. In *Barium Chemicals Ltd. and another* v. *Company Law Board and others* (27), it was held that though formation of an opinion may be a subjective process, but the existence of circumstances suggesting the relevant inference must be made out objectively.

(59) Learned counsel for the contesting respondent laid great stress on the law laid down by English Courts in the following three cases on the basis of which it was sought to be argued that where the relevant decision is to be given by an authority only on *prima facie* satisfaction of cerain facts or circumstances, it is not necessary to call the person likely to be affected by such decision:—

(1) *Wiseman and another* v. *Borneman and others* (28).

(2) *Parry-Jones* v. *The Law Society and others* (29).

(3) *Wiseman and another* v. *Borneman and others* (30).

(60) In Wiseman's case, (1967) 3 All E.R. 1045, which is the basic decision on the subject, the tribunal was to take into consideration the statutory declaration, the certificate and the counter-statement and to determine whether there was a *prima facie* case for proceeding in the matter or not. The claim of the plaintiffs to the

(26) A.I.R. 1968 S.C. 850.
(27) A.I.R. 1967 S.C. 295.
(28) (1967) 3 A.E.R. 1045.
(29) (1968) A.E.R. 177.
(30) (1969) 3 A.E.R. 275.

effect that the tribunal was bound to afford them an opportunity to adduce evidence and argue the matter before the tribunal came to a *prima facie* decision was repelled. It was held that where a tribunal had to determine only whether there was or was not a *prima facie* case "for a prospective defendant to answer", it was not necessary to give him an opportunity of hearing because the prospective defendant would have such an opportunity later to make out his case. It was added that in the case before the Court of Appeal, the statute had specified the materials on which the tribunal's primary decision should be reached and the Court should not imply obligation to take other matters into consideration. The distinction between *Wisewan's case* (28), and the case under rule 93 appears to me to be too obvious. Firstly, the statute there provided specifically as to what was to be taken into consideration for coming to a *prima facie* decision. There is no such indication in rule 93. Secondly, the tribunal in *Wiseman's case* (28) had merely to hold whether there was or was not a *prima facie* case for the prospective defendant to answer. On such opinion being formed, the defendant was to be called upon to answer and no step prejudicial to him would have been taken till then. In the present case, the decision regarding allowing inspection is to be reached finally by the Commission under rule 93(1). At no later stage in any proceedings is the returned candidate entitled to question the correctness of that decision, or to avoid the result and effect of inspection allowed behind his back. Thirdly, the Tribunal in Wiseman's case had merely to take into consideration the statutory declaration of Wiseman, etc., the certificate of the Commissioners and the counter-statement and to merely determine whether there was a *prima facie* case for proceeding in the matter. In so doing the Tribunal does not finally decide anything and does not pass any executable or operative order. A decision to allow inspection of prohibited documents under rule 93(1) is final and irrevocable and is likely to cause irreparable injury to a returned candidate if in a given case he is entitled to persuade the Commission not to allow the inspection.

(61) In *Parry-Jones' case* (29), (supra), the law laid down in *Wiseman's case* (28), was followed. The question before the Court of Appeal was whether the Law Society acting under rule 11 of the Solicitors' Accounts Rules was entitled to hear the solicitor before directing him to produce his books of account, etc. The solicitor had contended that the investigation accountant was not entitled to inspect certain documents and that the solicitor was entitled to see

the complaint lodged against him before producing the records because the inquiry being whether there was a *prima facie* case, the rules of natural justice did not apply so as to require notice of the complaint being given to the solicitor, and because the required inspection was not a judicial or *quasi-judicial* inquiry, but was an inquiry which the Council of the Law Society was entitled to make without any instigation. Once again the law laid down in *Parry-Jones' case* (29), is not at all relevant for our purposes. The books and records of the solicitor were entitled to be inspected under the Solicitors' Accounts Rules. That was more of a case like inspection of documents mentioned in rule 93(2). Moreover, the stage at which the books or documents were to be seen was that of investigation and in the absence of a special statutory provision to that effect, there is no bar to any material being collected by an official agency for any statutory action against any person.

(62) The third case was the decision of House of Lords on appeal against the judgment of the Court of Appeal in *Wiseman's case* (28). The decision of the Court of appeal was upheld with the observation that in following the procedure laid down by the Finance Act, 1960, and not extending it to give the tax-payers the right to see and answer the counter-statement, the tribunal was not acting unfairly or contrary to the rules of natural justice. It is not necessary to say anything further in regard to this case than what has already been observed by me in connection with the decision of the Court of Appeal in *Wiseman's case* (28). None of the three English cases is, therefore, of any avail to the respondent.

(63) It was then sought to be urged that there is no question of anybody being called who is not a party to the proceedings. If this were the law, it would be very easy to infringe the rules of natural justice by not impleading in a proceeding the party who is likely to be prejudicially affected by the decision therein. Even if a person is not a necessary party to a proceeding but is likely to be affected by the decision therein, in any manner whatsoever, the principles of natural justice would at once be attracted. A returned candidate is bound by the decision of the Election Commission to permit inspection of the ballots cast in his favour to anyone else. If he were not likely to be affected by such inspection, there would be no fun in allowing inspection for purposes of filing an election petition. The

moment it is established that he is likely to be affected by such decision and the decision has to be made on the basis of the allegations it becomes absolutely necessary to give the returned candidate an opportunity of being heard. Counsel for the contesting respondent urged that the principle of *audi alteram partem* has no application to a case in which there is no lis between two parties. This argument has to be negatived in view of the pronouncement of the Supreme Court in *P. L. Lakhanpal* v. *The Union of India* (31), wherein it was held that even if there is no lis *inter partes* and the contest is between the party pressing to do the act, and the other opposing it, the final determination of the authority will yet be a *quasi-judicial* act provided the authority is required to act judicially. The law laid down by the Supreme Court in *A. K. Kraipak's case* (14), on this subject is also relevant. Detailed reference to the same has already been made.

(64) In view of the law to which reference has been made by me above, I am of the opinion that it was the duty of the Commission to give an opportunity, howsoever, brief, to the petitioner to persuade it not to permit inspection of the prohibited documents either by showing that there was no *prima facie* truth in the allegations made by the contesting respondent or otherwise without having any right to claim any long drawn investigation into the matter. I am further of the opinion that even if the Commission is not bound as a matter of law, to give opportunity to the returned candidate or any other person likely to be directly affected by the order permitting inspection, it was the duty of the Commission in this case, and would be the duty of the Commission in other such cases where there is ample time to decide the matter, to give such opportunity to the returned candidate in order to fairly decide the question. I am fortified in this view of mine by a Full Bench judgment of this Court, to which three of my four learned Brothers in the present case were parties, in *The Regional Transport Authority, Patiala, and another* v. *Gurbachan Singh* (32). The question that had been referred to the Full Bench was whether a notice is required to be given to persons other than an applicant for a temporary stage carriage permit sought to be granted under section 62 of the Motor Vehicles Act (4 of 1939). The Full Bench (D. K. Mahajan, Gurdev Singh, Bal Raj Tuli and B. S.

(31) A.I.R. 1967 S.C. 1507.
(32) I.L.R. (1971) II Pb. & Hr. 94.

Dhillon, JJ., and myself), while returning a unanimous answer to the question in the negative, added as below:—

> "But this section (section 62 of the Motor Vehicles Act) does not preclude or forbid the Transport Authority from issuing a notice or considering representations, if any, are made by the interested parties. Considering, however, the fact that the proceedings relating to the grant of a permit are of *quasi-judicial* character and the same must be conducted in consonance with the rules of natural justice, which rules are not excluded by section 62, in cases where the temporary need is not immediate or of a pressing urgent nature and there is time to hear the persons already providing transport facilities along or near the route or area for which the temporary permit is intended to issue, it is not only expedient but proper that a notice should be issued to such persons so as to afford them an opportunity of making representations and a hearing for the consideration thereof, before the temporary permit is granted."

(65) On the authority of the abovementioned Full Bench judgment, I would hold that in cases where the necessity to allow inspection is not so immediate or of such a pressing and urgent nature as not to permit the returned candidate to be called or heard, and there is no such urgency as would defeat the purposes of inspection if opportunity were allowed to the returned candidate, it would not only be expedient but proper that a notice of the application for inspection should be issued to the returned candidate so as to afford him an opportunity of making representation and of being heard for the consideration of the point in issue before permission to inspect is granted. The case in hand is one which falls within that rule and does not fall within the exception thereto. Inspection was applied for March 15, 1971. The professed and admitted purpose of the inspection was to gather material for filing an election petition. The limitation for filing election petition was up to April 26, 1971. In fact the petition has been filed only on the last day of limitation. To serve a notice on the petitioner would not have taken more than a few days. No long drawn investigation was necessary. Mr. Sibal states that if the petitioner had been given an opportunity, he would have placed before the Commission copies of the orders of the Returning Officer, and of the Observer appointed

by the Commission and would have pointed out certain other facts in the course of about half an hour. That the petitioner has been deprived even of this kind of opportunity when there was ample time to decide, is to say the least a matter of regret.

(66) At one stage Mr. Sibal had argued that even if permission for inspection is granted by the Commission in a legal manner, but the inspection is, for whatever reason, not made before an election petition is filed, the order of the Commission becomes inexecutable, and the High Court being seized of the election petition, the matter of inspection has then to be left to the Court and the order of the Commission should be deemed to have abated. He also submitted that though there is no such express prohibition in rule 93, the Commission cannot allow inspection after an election petition has been filed. Not only did Mr. Sen not question the correctness of this submission, but he went to the length of submitting that allowing inspection after an election petition is pending would amount to contempt of the High Court. Though I may not be willing to go to that length without further and careful examination of this proposition, I would have considered the effect of the filing of the election petition before the implementation of the impugned order of the Commission if I had not otherwise held the order to be illegal and *non est*. Mr. Sibal submitted that the Commission cannot allow inspection after an election petition is filed. It is unnecessary to go into this academic matter in the present case.

(67) The only point now left for decision is the last argument advanced by Mr. Ashok Sen, the learned senior counsel for the contesting respondent, and reinforced by his successor Mr. G. L. Sanghi, Advocate. Both of them contended that even if it is found that the impugned order of the Commission is either not authorised by rule 93 or is otherwise invalid on account of its infringing any principle of natural justice or is found to be *non est* on account of its not being supported by reasons, no relief could still be granted to the petitioner as none of his legal rights has been infringed. It was further urged that even if everything is decided against the respondent and it is found that the petitioner is a person aggrieved by the order of the Commission, relief should still be refused to the petitioner as the order of inspection has not caused any injustice, much less manifest injustice to the petitioner. The first case to which Mr. Sanghi referred in this connection is the judgment of the Supreme

Court in the *State of Orissa* v. *Madan Gopal Rungta* (33). While dealing with the scope of Article 226 of the Constitution, Kania, C.J., (who prepared the judgment of the Court), observed that though besides issuing writs or directions based on fundamental rights, the High Court has also jurisdiction to issue writs or give similar directions for any other purpose; the concluding words of Article 226, have to be read in the context of what precedes the same; and, therefore, the existence of the right is the foundation of the exercise of jurisdiction of the Court under that Article.

(68) Reliance was next placed on the observations of the Supreme Court in *State of Orissa* v. *Ram Chandra Dev, etc.*, (34), to the effect that though the jurisdiction of the High Court under Article 226 is undoubtedly very wide and appropriate writs can be issued by the High Court under that Article even for purposes other than the enforcement of fundamental rights, and in that sense, a party who invokes the special jurisdiction of the High Court is not confined to cases of illegal invasion of his such rights alone, the concluding words of the Article indicate that before a writ or order can be issued in favour of a party, it must be established that the party has a right and the said right is illegally invaded or threatened. It was in that context that it was held that the existence of a right is the foundation of a petition under Article 226. Mr. Sanghi also invited our attention to the judgment of their Lordships of the Supreme Court in *Manganbhai Ishwarbhai Patel* v. *Union of India and another* (35). In that case, the Supreme Court was dealing with a petition under Article 32 of the Constitution. Naturally, therefore, it was held that the Supreme Court declines to issue a writ except at the instance of a party whose fundamental rights are directly and substantially invaded or are in the danger of being so invaded. It was further observed that mere apprehension of the writ-petitioners that they would be deprived of their fundamental rights in future is not enough to sustain a petition under Article 32. The case related to cession of land in the Kutch area to Pakistan in pursuance of the Arbitration Award given in the boundary dispute between the two coountries on the basis of an International Treaty. It is not necessary to deal with that case as there is vast difference in the scope of the jurisdiction of the Supreme Court under Article 32 on

(33) A.I.R. 1952 S.C. 12=(1952) S.C.R. 28.
(34) A.I.R. 1964 S.C. 685.
(35) A.I.R. 1969 S.C. 783.

the one hand and the much wider jurisdiction of the High Court under Article 226 of the other.

(69) Reference was also made to the decision of the Supreme Court in *Calcutta Gas Co. (Proprietary) Ltd.* v. *State of West Bengal and others* (36), wherein the question of jurisdiction of the High Court under Article 226 of the Constitution directly fell for consideration. It was held that the said Article confers a very wide power on the High Court to issue directions and writs for purposes other than the enforcement of fundamental rights also. It was further observed that the legal right that can be enforced under Article 226 must ordinarily be the right of the petitioner himself who complains of infraction of his right and approaches the Court for relief. In that connection it was held that "the right that can be enforced under Article 226 also shall ordinarily be the personal or individual right of the petitioner himself though in the case of some of the writs like *habeas corpus* or *Quo-warranto* this rule may have to be relaxed or modified." The deprivation of the petitioner's right (based on an agreement) by the enactment of a statute in that case was held to justify interference by the High Court under Article 226.

(70) The last judgment of the Supreme Court to which our attention was invited by Mr. Sanghi was *Dinabandhu Sahu* v. *Jadumoni Mangaraj and others* (37). Great stress was laid by Mr. Sanghi on this case because it has been held therein that the rights under litigation in election proceedings are not common law rights but rights which owe their existence to statutes and the extent of those rights must be determined by reference to the statutes which create them. The abovementioned observations do not, however, go against the petitioner as he has not claimed any common law rights but is merely claiming that the impugned order could not be passed by the Commission within the circumscribed limits of its jurisdiction under rule 93. His right to question the order flows from the statutory rule and not independently of it. So far as the requirement of the Commission serving a notice on the returned candidate before condoning the delay in filing the election petition (under the old procedure) is concerned, the dictum of the Supreme Court in *Dinabandhu Sahu's case* (37), is of no help to us as the

(36) A.I.R. 1962 S.C. 1044.
(37) (1955) S.C.R. 140.

matter was taken to the Supreme Court under Article 136 of the Constitution against the judgment of the Election Tribunal and no question of the rights or liabilities or *locus standi* of anyone under Article 226 of the Constitution arose therein.

(71) Nor are we able to find anything favourable to the respondent in the judgment of the Privy Council in *Alfred Thangarajah Durayappah of Chundikuly, Mayor of Jaffna* v. *W. J. Fernando and others* (38). On the contrary the following observations of their Lordships after reference to the case of *Ridge* v. *Baldwin* 16, (supra) are significant:—

> "In that case *Ridge* v. *Baldwin* (16), no attempt was made to give an exhaustive classification of the cases where the principle *audi alteram partem* should be applied. In their Lordships' opinion it would be wrong to do so. Outside well-known cases such as dismissal from office, deprivation of property and expulsion from clubs, there is a vast area where the principle can only be applied upon most general considerations.
>
> * * * * * *
> * * * * * *
> * * * * * *
>
> Outside the well-known classes of cases, no general rule can be laid down as to the application of the general principle in addition to the language of the provision. In their Lordships' opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are : first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined."

(38) (1967)2 A.C. 337.

Out of the three matters which their Lordships of the Privy Council directed to be borne in mind when considering whether the principle of *audi alteram partem* should be applied or not, at least two (second and third) apply in the instant case. Firstly, the petitioner would not be entitled to exercise any measure of control or entitled to intervene in the order for inspection at any subsequent stage. Secondly, the order is of a type which if not intercepted may cause irreparable injury to the returned candidate which it may not be possible to remedy subsequently even if it is found in some appropriate proceedings that the order could not be passed.

(72) On the basis of the observations of the Supreme Court in paragraph 12 of the judgment in *Adi Pherozshah Gandhi* v. *H. M. Seervai, Advocate-General of Maharashtra, Bombay* (39), it was urged that the petitioner might have been disappointed with the decision on the application for inspection, but he cannot be called "a person aggrieved" against that order as a person can be aggrieved only if he is disappointed of a benefit which he would have received if the order had gone the other way. This argument appears to me to be wholly without substance. If the inspection had not been allowed, the petitioner would indeed have had the benefit of not allowing the ballots cast in his favour being seen at all. It was then submitted that the order for inspection does not cause the petitioner a legal grievance as he has not been wrongfully deprived of anything. The petitioner has a right to continue as member of the Lok Sabha for five years after having been elected to that office unless his election is set aside by a competent Court in an election petition. By allowing inspection, the Commission is certainly jeopardising and threatening the peaceful enjoyment of that right. I cannot understand how it can be argued successfully that in spite of these facts, the petitioner is not a person aggrieved by the impugned order. On behalf of the respondent it was urged that the petitioner cannot be aggrieved in the same manner as a company or its directors cannot be aggrieved by the return submitted by it being inspected with the Registrar of Companies. This argument is fallacious for the simple reason that the documents which can be inspected as a matter of right under the Companies Act can only be equated to the documents mentioned in rule 93(2), and not to rule 93(1) which contains a general prohibition against inspection.

(39) A.I.R. 1971 S.C. 385.

(73) An argument was then advanced that no relief should be granted to the petitioner as the impugned order has not resulted in any manifest injustice. The respondent is probably thinking of cases for the grant of writs in the nature of Certiorari where observations have often been made that in order to entitle a petitioner to obtain relief from the High Court under Article 226, he must show that in addition to defect of jurisdiction or error apparent on the face of the record, the impugned order has resulted in injustice. The sole attack in this case is on the validity of the order on the ground that it has not been passed in accordance with law. It has been authoritatively laid down by their Lordships of the Supreme Court in *Joginder Singh and others* v. *The Deputy Custodian-General, Evacuee Property, Mussoorie and others* (40), that where an inferior tribunal acts beyond its jurisdiction its action necessarily results in injustice to the party against whom action has been taken, because justice has to be done according to law. Once it is found that the impugned order has not been passed in accordance with law, we must hold that injustice has thereby been caused to any person who is either affected thereby or aggrieved thereof. If we were to accept what Mr. Sanghi has said in this respect, the very object of making it obligatory on the Commission to record reasons for its decision for allowing inspection would be totally defeated as even a wholly illegal order passed under rule 93 would not be liable to be questioned in any proceedings under Article 226. When we put to the learned counsel for the contesting respondent if he would consider an order of the Commission allowing inspection and refusing to support it by reasons immune to an attack under Article 226 of the Constitution he naturally could not reply in the affirmative.

(74) The general rule is well-settled, as held in *Jagan Nath* v. *Jaswant Singh and others*, (41), that the statutory requirements of election law must be strictly observed and that an election contest is not a suit in equity but is a purely statutory proceeding unknown to the common law and that the Court possesses no common law power. Reference was also made by the Supreme Court in *Jagan Nath's case* (41), to the "well-settled sound principle of natural justice" that the success of a candidate who has won at an election

(40) C.A. No. 457 of 1958 decided on 26th March, 1962.
(41) A.I.R. 1954 S.C. 210.

should not be lightly interferred with and any proceeding commenced with a view to seek such interference must strictly conform to the requirements of the relevant statutory provisions. In *Union of India* v. *Indo-Afghan Agencies*, (42), their Lordships of the Supreme Court went to the length of holding that "the authority vested in the Textile Commissioner by the rules, even though executive in character was from its nature an authority to deal with the matter (of import quotas) in a manner consonant with the basic concept of justice and fair play," and that "if he made an order which was not consonant with the basic concept of justice and fair play, his proceeding was open to scrutiny and rectification by the Courts (High Courts under Article 226)." In the *Indo Afghan Agencies' case*, (42), it was further held that even if a power to be exercised by an authority was executive in character the High Courts have the power in appropriate cases to compel performance of the obligations imposed by the relevant rules (import schemes in that case) upon the departmental authorities.

(75) Rule 93 is part of the election law. The requirements of its proviso are mandatory and not giving of reasons strikes at the very root of the jurisdiction of the Commission to allow inspection under sub-rule (1). The statutory requirement must strictly be observed as held in *Jagan Nath's case* (41). Allowing inspection of prohibited documents as a matter of course would be to jeopardise in a manner not permitted by law the success of a candidate who has won at the election. Even if the order permitting inspection of the prohibited documents is an executive one, it will be the duty of the Court to strike it down (i) if it is lacking in strict adherence to the mandatory requirement of proviso (a) or (ii) if it has been passed in a manner which is not in consonance with the basic concept of justice and fair play, of which concept *audi alteram partem* is the elementary foundation. I am, therefore, unable to deny to this Court the extraordinary power vested in it under Article 226 of the Constitution on any of the grounds pressed by Mr. Sanghi.

(76) Mr. Sanghi next contended in a half-hearted manner that the petition should be dismissed as the petitioner has not impleaded other candidates at the election as respondents. Obviously other candidates at the election are neither necessary nor proper parties to this case. They have no interest in the result of this petition. This argument appears to be without any substance whatever.

(42) A.I.R. 1968 S.C. 718.

(77) Another submission made by Mr. Sanghi was that if we find that the order for allowing inspection of the marked copy of the electoral roll is likely to infringe the rule of secrecy, we should strike down only that part of the order as is severable from the rest of the order. In the view I have taken of the merits of the controversy, it is unnecessary to travel into this kind of a hypothetical proposition.

(78) Reference was also made in the passing to the passage in Judicial Review of Administrative Action by S.A. de Smith (Second Edition) at page 568 in support of the submission that even if we find that the impugned order is bad as it is not supported by reasons, we should follow the course suggested in that text book in the following words :—

> "Where the giving of reasons is required by statute, *mandamus* should lie to compel the tribunal to give adequately intelligible reasons."

It is unnecessary to issue any such *mandamus* because the impugned order is being quashed on account of want of being supported by legal reasons, and also on account of the same having been passed without affording the petitioner an opportunity of being heard.

(79) In view of the findings recorded by me on contentions Nos. (4), (5), and (6) advanced on behalf of the petitioner, I would allow this petition and quash the impugned order of the Commission though without any order as to costs.

*D. K. Mahajan, J.*

(80) I have had the advantage of going through the judgments prepared by my learned brethern Narula and Tuli, JJ., I entirely agree with the judgment prepared by Narula, J. With utmost respect to Tuli, J., I do not subscribe to the view that the Election Commission has given reasons as required by rule 93 of the Conduct of Election Rules, 1961. I also do not agree that the order of the Election Commission is purely administrative order.

*B. R. Tuli, J.*

(81) The Lok Sabha was dissolved in December, 1970, and fresh elections were ordered. The petitioner and respondent 3 contested

the election to the Lok Sabha from Fazilka parliamentary constituency along with some other candidates. The polling took place on March 5, 1971, the counting of votes started on March 10, 1971, and the results were declared on March 12, 1971. The petitioner was declared successful as he had secured 1,52,653 votes as against 1,47,277 votes obtained by respondent 3 who was his nearest rival. It may be mentioned here that the petitioner, the successful candidate, is a brother of the Chief Minister of Punjab, while respondent 3 was a Deputy Minister of the Government of India when he fought the election. Respondent 3 made various complaints to the Election Commission of India with regard to the malpractices alleged to have been indulged in by the petitioner in the course of election. The first such letter was written on February 20, 1971, and the last telegram was sent on March 11, 1971. In the letter, dated March 8, 1971, respondent 3 asked for the appointment of observers in his constituency in order to see that there was no malpractice and the procedure for counting, as laid down by the Election Commission, was strictly followed. On that day, he also wrote another letter enumerating some of the malpractices alleged to have been indulged in by the petitioner and the improper conduct of the various officers during the course of polling. On the request of respondent 3, the Election Commission of India appointed Shri R. D. Sharma as observer who visited various polling stations during the days when counting was going on. Before the declaration of the result, respondent 3 made an application to the Returning Officer for a recount which was disallowed on March 12, 1971. After the results were declared, respondent 3 made an application to the Chief Election Commisioner for inspection of the election papers relating to his parliamentary constituency on March 15, 1971, and on the same day Shri S. P. Sen Verma, the Election Commission, passed the following order thereon :—

> "The allegations made in the application by S. Iqbal Singh, if true, are no doubt serious. I think an inspection of the documents mentioned in sub-rule (1) of rule 93 of the Conduct of Elections Rules, 1961, may be allowed. In the first place, the used and unused ballot-papers may be inspected and after such inspection if the applicant demands an inspection of the marked copy of the electoral roll, then inspection of that document may also be allowed. A formal order may be drawn up in accordance with the proviso to rule 93(1) and detailed instructions

and directions may be given to the District Election Officer.

Under-Secretary, Shri R. D. Sharma, who was sent as an observer from the Commission at the time of the counting of the ballot-papers in Fazilka parliamentary constituency may proceed to Ferozepur and remain present at the time of inspection."

A little later he added :

"On further consideration I think that as Shri R. D. Sharma was present as an observer at the time of counting of votes, another officer from the Commission should be sent to Fazilka Parliamentary constituency as an observer at the time of inspection of the documents under rule 93. Shri K. V. Viswanathan, Under-Secretary, may, therefore, proceed to Ferozepur at the time of inspection of the documents by Sardar Iqbal Singh, the defeated candidate. Shri R. D. Sharma need not go. Both the officers may be informed accordingly."

A formal order was drawn up by Shri K. V. Viswanathan, an Under-Secretary working in the Department, which was approved by the Secretary to the Election Commission on March 16, 1971, and that order was conveyed to the District Election Officer, Ferozepore, for allowing inspection of the papers mentioned therein to respondent 3 in accordance with rule 93 of the Conduct of Elections Rules, 1961 (hereinafter referred to as the Rules). The District Election Officer fixed March 31, 1971, as the date for inspection and gave a notice of the same to all the candidates in order to enable them to be present at the time of the inspection, if they so desired. On coming to know of this order, the petitioner filed the present petition challenging the order of inspection passed by the Election Commission as conveyed to the District Election Officer. This petition came up for motion hearing before the Bench consisting of my Lord Mahajan, J., and Gopal Singh, J., on March 30, 1971, and was admitted to be heard by a Full Bench. That is how this petition has been placed for hearing before this Bench.

(82) The respondents to the petition are the Election Commission of India, the District Election Officer and Deputy Commissioner, Ferozepur and S. Iqbal Singh, the defeated candidate. No return has been filed by respondents 1 and 2 while respondent 3 has filed his return to which a replication has been filed by the petitioner.

(83) A preliminary objection has been raised by respondent 3 that the petition is not maintainable as none of the legal or fundamental rights of the petitioner has been infringed by the order of inspection. The learned counsel has relied on *The State of Orissa* v. *Madan Gopal Rungta* (33), wherein it was held that—

> "the issuing of writs or directions by the High Court is founded only on its decision that a right of the aggrieved party under Part III of the Constitution (Fundamental Rights) has been infringed. It can also issue writs or give similar directions for any other purpose. The concluding words of Article 226 have to be read in the context of what precedes the same. Therefore, the existence of the right is the foundation of the exercise of jurisdiction of the Court under this Article."

Another judgment of their Lordships of the Supreme Court strongly relied upon by the learned counsel for respondent 3 is *Calcutta Gas Company (Propreitary) Ltd.* v. *State of West Bengal and others* (36), wherein it was held—

> "Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore, clear that persons other than those claiming fundamental rights can also approach the Court seeking a relief thereunder. The Article in terms does not describe the classes of persons entitled to apply thereunder, but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right. In *State of Orissa* v. *Madan Gopal* (33), this Court has ruled that the existence of the right is the foundation of the exercise of jurisdiction of the Court under Article 226 of the Constitution. In

*Charanjit Lal Chowdhuri* v. *Union of India,* (43), it has been held by this Court that the legal right that can be enforced under Article 32 must ordinarily be the right of the petitioner himself who complains of infraction of such right and approaches the Court for relief. We do not see any reason why a different principle should apply in the case of a petitioner under Article 226 of the Constitution. The right that can be enforced under Article 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like *habeas corpus* or *quo warranto* this rule may have to be relaxed or modified."

The following observations of their Lordships of the Supreme Court in *State of Orissa* v. *Ram Chandra Dev,* (34), have also been relied upon :—

"Under Article 226 of the Constitution, the jurisdiction of the High Court is undoubtedly very wide. Appropriate writs can be issued by the High Court under the said Article 226 even for purposes other than the enforcement of the fundamental rights and in that sense, a party who invokes the special jurisdiction of the High Court under Article 226 is not confined to cases of illegal invasion of his fundamental rights alone. But though the jurisdiction of the High Court under Article 226 is wide in that sense, the concluding words of the Article clearly indicate that before a writ or an appropriate order can be issued in favour of a party, it must be established that the party has a right and the said right is illegally invaded or threatened. The existence of a right is thus the foundation of a petition under Article 226."

(84) The learned counsel has then brought to our notice a judgment of their Lordships of the Supreme Court in *Maganbhai Ishwarbhai Patel* v. *Union of India and another* (35), in which the following observations occur:—

"Before the hearing commenced, we questioned each petitioner as to the foundation of his claim. We discovered that most of the petitioners had no real or apparent stake in the

(43) A.I.R. 1951 S.C. 41=(1950) S.C.R. 869.

areas now declared to be Pakistan territory. These persons claim that they had and still have the fundamental rights guaranteed to them by Article 19(1)(d), (e) and (f), that is to say, the right to travel, to reside or settle down, or to acquire, and hold property in these areas. None of them has so far made any move in this direction but their apprehension is that they will be deprived of these rights in the future. This, in our judgment, is too tenuous a right to be noticed by the Court in administering the law and still less in enforcing fundamental rights. When we communicated our view at an earlier hearing, some more petitioners came forward. Mr. Madhu Limaye puts forward the supporting plea that he had attempted to penetrate this area to reconnoitre possibilities for settlement, but was turned back. In this way he claims that he had attempted to exercise his fundamental rights and they were infringed. Another party claims to have had a lease of grass lands some ten years ago in this area and he is now to be deprived of the right to obtain a similar lease. Lastly, one of the parties puts forward the plea that he lives in the adjoining territory and thus has interest in the territories proposed to be ceded to Pakistan. These petitioners too have very slender rights, if at all. The only person who can claim deprivation of fundamental rights is Mr. Madhu Limaye, although in his case also the connection was temporary and almost ephemeral. However, we decided to hear him and as we were to decide the question, we heard supplementary arguments from the others also to have as much assistance as possible. But we are not to be taken as establishing a precedent for this Court which declines to issue a writ of *mandamus* except at the instance of a party whose fundamental rights are directly and substantially invaded or are in imminent danger of being so invaded. From this point of view we would have been justified in dismissing all petitions except perhaps that of Mr. Madhu Limaye. We may now proceed to the consideration of the rival contentions."

This judgment does not help the learned counsel as the petitions for decision before their Lordships were under Article 32 of the

Constitution which only deals with the violation of fundamental rights.

(85) The judgment of their Lordships of the Supreme Court in *Dinabandhu Sahu* v. *Jadumoni Mongaraj and others* (37), cited by the learned counsel is of no help to him because this Judgment does not deal with this point. The learned counsel has lastly relied on a judgment of their Lordships of the Supreme Court in Adi Pherozshah *Gandhi* v. *H. M. Seervai Advocate-General of Maharashtra, Bombay* (39), wherein the meaning of the phrase 'aggrieved person' has been explained. In that case, the Advocate-General had filed an appeal against the order of the disciplinary committee of the Bar Council of the State of Maharashtra holding that the Advocate complained against was not guilty of professional or other misconduct. The appeal was filed under section 37 of the Advocates Act, 1961, under which the right of appeal has been allowed to a person aggrieved. It was in that context that their Lordship held that the Advocate-General of the State could not be said to be a 'person aggrieved' against the order of the disciplinary committee exonerating the Advocate complained against of the charge of professional misconduct. No such phrase is used in Article 226 of the Constitution. In order to decide whether the petitioner has the *locus standi* to file the petition, what has to be seen is whether any injury is likely to be caused to him as a result of the impugned order. It is evident that the purpose of inspection, as stated by respondent 3 in his application to the Election Commission, was to enable him to gather material from the ballot-papers in order to file an election petition for the setting aside of the election of the petitioner on the ground of improper rejection or acceptance of some ballot-papers which ground can be taken in an election petition as provided in section 100(1)(d)(iii) of the Representation of the People Act, 1951 (hereinafter called the Act). It is thus clear that if the inspection is allowed, respondent 3 will be able to collect the material, if it exists, which can be used to the detriment of the petitioner in an election petition and, therefore, in my opinion, the petitioner has a sufficient interest in filing this petition in order to get rid of the order of inspection. Moreover, the petitioner has challenged the *vires* of rule 93, under which the inspection has been allowed, on various grounds, *inter alia*, that it is violative of Articles 324, 327 and 329(b) of the Constitution of India and sections 94 and 128 of the Act in respect of maintenance of secrecy. It has also been

stated that the order is not in accordance with that rule inasmuch as no reasons have been recorded. The jurisdiction to allow inspection, vested in the Election Commission by this rule, has also been challenged as being contrary to the provisions of the Constitution and the Act. It is thus clear that the result of the order of inspection will be that respondent 3 will be enabled to gather material for challenging the election of the petitioner to the Lok Sabha and thus depriving him of the benefit of his success at the polls that he has achieved. There is thus a threatened injury to the right of the petitioner to continue as a member of the Lok Sabha during its life, of which he can be deprived only by means of an election petition filed in pursuance of the provisions contained in the Act. The requirement as to the recording of reasons before allowing inspection by the Election Commission in the proviso to rule 93 also indicates that the purpose of that requirement is that the reasons recorded by the Election Commission should be justiciable by this Court in case that order is challenged on the ground that the reasons are not germane to the provisions of the election law and that on the basis of those reasons, the inspection could not be granted. Under proviso (b) to rule 93(1) all the candidates or their duly authorised agents have to be given a reasonable opportunity to be present at the opening, inspection or production of the election papers before any person or authority which clearly means that the other candidates get a right from the order of inspection to be present at the time of inspection either personally or through their authorised agents. The only purpose of this provision seems to be to enable the other candidates to see that the inspection is held in accordance with the order of the Election Commission and the provisions of the Act as to secrecy and that no ballot-papers are tampered with or secreted away in any manner. The other candidates present at the time of inspection shall also be able to see all the papers of which the inspection has been sought by the applicant for inspection and will be able to make their own notes with regard to the ballot-papers which are likely to be objected to by the applicant for inspection. The order of inspection brings into existence the right of the other candidates to be present at the time of inspection and they can well complain that they should not be made to waste their time and incur expenditure in attending the inspection on the ground that the order of inspection is not valid or that it is not in accordance with the provisions of rule 93. It is thus inherent in rule 93 that

the returned candidate can mantain a petition under Article 226 of the Constitution challenging the order of inspection passed by the Election Commission on the ground of its invalidity or illegality. I, therefore, find no merit in the preliminary objection raised on behalf of respondent 3 and repel the same.

(86) Another preliminary objection raised is that the order for inspection passed by the Election Commission is an administrative order and cannot be challenged by means of a petition under Article 226 of the Constitution. This objection is again without any force. Under Article 226 any order passed by any authority can be challenged provided the petitioner is likely to suffer some injury as a result thereof. I have already held that the petitioner has a right to maintain this petition and for this reason even if the impugned order is an administrative one, the petition is maintainable.

(87) The learned counsel for the petitioner has vehemently argued that rule 93 is *ultra vires* the provisions of Articles 324, 327 and 329(b) of the Constitution. The argument is that under Article 324, the Election Commission can be vested with the power of superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under the Constitution, and no further powers can be vested in the Commission. I regret I cannot accept that argument. Article 324 creates an Election Commission who is to be in overall charge of the elections to the Parliament and the Legislatures of the States and has to exercise the powers of superintendence, direction and control of the preparation of the electoral rolls for and the conduct of all elections thereto. These powers have been vested by the Constitution in the Election Commission and cannot be vested in any other authority. This Article, however, does not prohibit the Parliament from vesting any other power in the Election Commission. The argument that the elections terminate with the declaration of the result and thereafter the Election Commission can have no control over the papers concerning the elections or the disputes with regard to the elections, etc., is devoid of any substance because the election papers mentioned

in rule 93 pertain to the election that has been conducted and proper orders have to be passed for thir custody, inspection and production and ultimately destruction. It is open to the Parliament to make provisions with respect to all matters relating to or in connection with elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses under Article 327 of the Constitution. Preparation of the electoral rolls is also mentioned in Article 324 and that power can be vested only in the Election Commission. In addition to that, any other power concerning the elections to either House of Parliament or the State Legislature can be conferred on the Election Commission if the Parliament so decides. There is no prohibition that no other power can be vested in the Election Commission except those mentioned in Article 324, Article 327 begins with the words "subject to the provisions of this Constitution", which mean that the powers specifically conferred on the Election Commission under Article 324 cannot be taken away or whittled down by any legislation made by the Parliament under Article 327 nor can a provision be made for the matters specified in Articles 325, 326 and 329 which may go counter to what is provided therein. The provisions of Articles 324 and 327 cannot be read to mean that no other powers can be conferred on the Election Commission except those specifically mentioned in Article 324. I, therefore, hold that rule 93, which confers the power on the Election Commission with regard to inspection and production of election papers mentioned therein, is not *ultra vires* Articles 324 or Article 327 of the Constitution.

(88) Rule 93 can also not be said to be *ultra vires* the provisions of Article 329(b) of the Constitution because an application for inspection does not call in question the election to either House of Parliament or to House or either House of a Legislature of a State which can be done only by an election petition presented to such authority in such manner as may be provided for by or under any law made by the appropriate Legislature as is provided in Article 329(b). When an application for inspection is made to the Election Commission, no adjudication is sought as to the validity or otherwise of the ballot-papers, whether accepted or rejected, or any other matters concerning the process of election. In *N. P. Ponnuswami* v. *Returning Officer, Namakkal Constituency and others* (1), their Lordships held that the word "election" has been used in

Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the Legislature, which means that the process starts with the notification calling upon the constituencies to elect their representatives and ends with the declaration of the result. Merely because allegations are made in the application for inspection with regard to the irregularities committed at the counting of the votes and the improper acceptance or rejection of the ballot papers, does not amount to calling in question the election of a returned candidate because the Election Commission cannot determine the truth or otherwise of the allegations made nor can grant any relief with regard to the election that has taken place or the votes that have been polled and counted or rejected while declaring the results. The only power that the Election Commission has is to allow inspection of the election papers mentioned in rule 93 after satisfying himself that a *prima facie* case has been made out by the applicant and has to record his reasons before allowing inspection. He is not concerned with the result of the inspection nor with the fact whether the applicant for inspection will be able to find any material to support the ground of attack to the election of the returned candidate under section 100(1)(d)(iii) of the Act or not. The inspection of the election papers will only enable him to find material in support of such a ground and it may be that after the inspection the applicant for inspection is satisfied that there is no substance in the ground that he porposes to take and may not take it as a ground in his election petition and thus save the time of the Court and expense to himself and the returned candidate in case he were to make an allegation with regard to the improper rejection or acceptance of ballot papers without inspecting them. The order of inspection, thus, has nothing to do with the process of election and it cannot, therefore, be said that the application for inspection of election papers mentioned in rule 93 amounts to calling in question the election of the returned candidate and is, for that reason barred, under Article 329(b) of the Constitution. Much reliance has been placed by the learned counsel for the petitioner on the judgment of their Lordships of the Supreme Court in *N. P. Ponnuswami's case* (1) (supra), in which the facts were that Ponnuswami filed his nomination papers for election to the Madras Legislative Assembly from the Namakkal Constituency in Salem district which were rejected by the Returning Officer. He then filed a petition under Article 226 of the Constitution in the

Madras High Court for a writ of *certiorari* to quash the order of the Returning Officer rejecting his nomination papers and to direct him to include his name in the list of valid nominations to be published. The High Court dismissed his petition on the ground that it had no jurisdiction to interfere with the order of the Returning Officer by reason of the provisions of Article 329(b) of the Constitution. Against that order, an appeal was filed in the Supreme Court. While dismissing the appeal, their Lordships observed:—

> "The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the Courts having been expressly excluded), and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, which, as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court. It seems to me that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329(b) was apparently enacted to prescribe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question, could be urged. I think it follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other Court. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like Article 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the Article would lead to

anomalies, which the Constitution could not have conplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent, body, at the stage when the matter is brought up before it."

From these observations, it is abundantly clear that their Lordships emphasised that any dispute with regard to the election, used in the wide sense, can be decided only by an election petition. It was because Ponnuswami asked for a relief for quashing or setting aside the order of the Returning Officer rejecting his nomination papers that their Lordships held that the petition under Article 226 of the Constitution was not competent. In that case, Ponnuswami prayed for an adjudication with regard to the validity of the order of the Returning Officer made in the course of election and a relief on the basis thereof. For this purpose, his petition was held not to be maintainable because of the provisions of Article 329(b) of the Constitution. It was held that the proper course was to file an election petition in accordance with the provisions of the Act as such a matter relating to the election could not be decided twice, once on an application under Article 226 of the Constitution and second time by the Election Tribunal on an election petition. If Ponnuswami had made an application to the Returning Officer for a certified copy of the order rejecting his nomination papers or for the inspection of the record in order to enable him to inspect the nomination paper and the order passed by the Returning Officer in order to enable him to file an election petition later on, it could surely not be said that by making that application he was calling in question the election to the 'Madras Legislative Assembly. The position is not different when an application for inspection of the election papers under rule 93 is made to the Election Commission, because, I emphasise, that the Election Commission cannot adjudicate on the validity or otherwise of the ballot papers or other election papers of which the inspection is allowed. Those matters will have to be agitated in an election petition, if any is filed, for having the election of the returned candidate declared void, in the Court competent to entertain the election petition. Mere recording of allegations with regard to the irregularities committed, while counting the ballot papers or about the improper rejection or acceptance of these ballot-papers in an application for inspection

cannot amount to calling in question the election of a returned candidate if the authority to which the application is made has no power to adjudicate on the truth or otherwise of those allegations nor can grant any relief with regard to the election to the applicant, which is the case when an application for inspection is made to the Election Commission under rule 93. To make it clear, I hold that the meaning of the phrase "call in question" is that an adjudication as to any matter relating to the election should be invited from the authority to which the application is made and a relief sought on that basis with regard to any process of election. It canont, therefore, be said that the order allowing inspection passed by the Election Commission has the effect of vitiating the election or that there is a possibility of conflicting views being expressed on the same matter by two different authorities at different stages. I, therefore, hoid that rule 93 is not *ultra vires Article* 329(b) of the Constitution.

(89) The learned counsel for the petitioner has contended that there is no provision in the Act investing the Election Commission with any power in respect of the inspection or production of election papers as mentioned in rule 93 and, therefore, it cannot be said that the said rule has been made to carry out the purposes of the Act. The power to make rules has been given to the Central Government by section 169 of the Act, the relevant portion of which reads as under :—

"169. **Power to make rules.**—

(1) The Central Government may, after consulting the Election Commission, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(a) * * * * * *

(b) * * * * * *

(c) * * * * * *

(d) * * * * * *

(e) * * * * * *

(f) * * * * * *

(g) * * * * * *

(h) the safe custody of ballot boxes, ballot papers and other election papers, the period for which such papers shall be preserved and the inspection and production of such papers ;

(i) * * * * * *

(3) Every rule made under this Act shall be laid as soon as may be after it is made before each House of Parliament, while it is in session, for a total period of thirty days, which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree that the rule should be either modified or annulled, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

This section particularly empowers the Central Government to frame rules with regard to the inspection and production of election papers and it is under this power that rule 93 has been made. The importance of laying the rules before each House of Parliament under subsection (3) of section 169 is that if rule is not modified or annulled within thirty days, it comes into force and has the same effect as if enacted in the Act itself. This rule framed in this manner has the same force as if it had been enacted in the Act itself by the Parliament. It cannot, therefore, be said that this rule has not been made to carry out the purposes of the Act when the Legislature itself mentioned the inspection and production of election papers as one of the purposes of the Act, to carry out which the rules can be made. I am also of the opinion that the safe custody of ballot boxes, ballot papers and other election papers, the period for which they are to be preserved and the inspection and production of such papers, have

intimate connection with the conduct of elections and the maintenance of the secrecy of ballot. The provision with regard to the destruction of these election papers also falls in the same category. In this view of the matter, I do not find any force in the submission of the learned counsel for respondent 3 that the **vires** of rule 93 cannot be challenged without challenging the **vires** of section 169 under which it has been made. I, consequently, hold that rule 93 is a valid rule which has been framed to carry out the purposes of the Act.

(90) The learned counsel for the petitioner has vehemently argued that rule 93 does not prescribe the purposes for which and the manner in which the Election Commission is to allow the inspection of the election papers mentioned in that rule. He, therefore, emphasises that the power of the Election Commission in this behalf cannot be wider than that of the Court or Tribunal to which this power had been given originally when the Rules were framed in 1961. This rule, as originally enacted in 1961, read as follows :—

"93. Production and inspection of election papers.—

(1) While in the custody of the Returning Officer—

(a) the packets of unused ballot papers;

(b) the packets of used ballot papers whether valid, tendered or rejected;

(c) the packets of the marked copy of the electoral roll or, as the case may be, the list maintained under sub-section (1) or sub-section (2) of section 122 ; and

(d) the packets of the declarations by electors and the attestation of their signatures;

shall not be opened and their contents shall not be inspected by, or produced before, any person or authority except under the order of a competent Court or Tribunal.

(2) All other papers relating to the election shall be open to public inspection subject to such conditions and to

the payment of such fee, if any, as the Election Commission may direct.

"(3) Copies of the returns by the Returning Officer forwarded under rule 64 or as the case may be, under sub-rule (3) of rule 84, shall be furnished by the Chief Electoral Officer of the State concerned on payment of a fee of two rupees for each such copy."

(A rule in identical terms previously existed in the Rules framed in 1951 and 1956).

On March 31, 1962, the words "of the Election Commission or of a competent Court or Tribunal" were substituted for the words "of a competent Court or Tribunal" in sub-rule (1). On September 7, 1962, the following proviso was added :—

"Provided that—

(a) where any such order is made by the Election Commission, the Commission shall, before making the same, record in writing the reasons therefore; and

(b) no such packets shall be opened, nor shall their contents be inspected by, or produced before, any person or authority under any such order of the Election Commission unless that person or authority has given reasonable opportunity to the candidates or their duly authorised agents to be present at such opening, inspection or production."

On December 15, 1966, the "District Election Officer" was substituted for the "Returning Officer" in some of the rules contained in Part VIII of the Rules including rule 93. It is thus evident from rule 93, as amended, that the Election Commission or a competent Court or Tribunal can direct the production and inspection of election papers only as long as they are in the custody of the District Election Officer, so that the time during which the inspection can be allowed is specified by this rule. This period is stated in rule 94, to be six months in respect of the packets of unused

ballot papers mentioned in clause (a) of sub-rule (1) of rule 93 and a period of one year for the election papers mentioned in clauses (b), (c) and (d) of sub-rule (1) of rule 93, if no contrary directions are issued by the Election Commission or by a competent Court or Tribunal. The inspection and Production of these papers can be for various purposes including election petitions and criminal prosecutions of delinquent officers, or voters, or candidates and their agents with regard to election offences alleged to have been committed by them. With regard to the election petitions, the power can be exercised by the competent Court hearing the election petition after that petition is filed and for the criminal prosecution or other such proceedings concerning the election offences, the jurisdiction of the competent Court or Tribunal dealing with those matters can be invoked only after the proceedings are started before it. As long as no proceedings are started in any court or tribunal, the Election Commission has been given the power to allow production and inspection of election papers. It cannot, therefore, be said that the power of the Election Commission is co-terminus with the power of the competent Court or Tribunal or is for the same purpose and hedged in by the same limitations. The extent and scope of the power of the Election Commission, or the competent Court or Tribunal, has necessarily to be determined on the basis of the functions and powers to be exercised by each of them. In other words, the power of allowing inspection and production of election papers is to take colour from the functions of the authority which is entrusted with that power. The circumstances in which that power will be exercised can also not be the same. I am, therefore, of the opinion that the writ-petitioner is not correct when he states that the power of the Election Commission to allow inspection and production of election papers is co-terminus with that of the competent Court or Tribunal and has to be exercised on the same principles.

(91) The learned counsel for the petitioner has referred to four judgments of their Lordships of the Supreme Court with regard to the power of Courts to allow inspection of the election papers and the manner of its exercise and has strongly urged that the Election Commission should also exercise the power of allowing or disallowing the inspection for the reasons and in the manner enumerated in those judgments. The first judgment brought to our notice is *Jabar*

*Singh* v. *Genda Lal*, (3). I have carefully gone through this judgment and find that the matter of inspection of election papers; as mentioned in rule 93; was not at all considered by their Lordships nor was it in question. This judgment is, therefore, not relevant.

(92) The second judgment brought to our notice is *Ram Sewak Yadav* v. *Hussain Kamil Kidwai and others*, (4), which deals with the matter and on which great reliance has been placed by the learned counsel. In that judgment, it was pointed out by their Lordships that rule 93 "makes a clear distinction between ballot papers and other election papers; ballot papers may be inspected only under the order of a competent Court or Tribunal, but other documents are, subject to certain conditions, open to public inspection". It was then observed :

> "An election petition must contain a concise statement of the material facts on which the petitioner relies in support of his case. If such material facts are set out, the Tribunal has undoubtedly the power to direct discovery and inspection of documents with which a civil Court is invested under the Code of Civil Procedure when trying a suit.* * * * * *
>
> * * * * * *
>
> * * * *. In a proper case where the interests of justice demand it, the Tribunal may call upon the Returning Officer to produce the ballot papers and may permit inspection by the parties before it of the ballot papers. That power is clearly implicit in sections 100(1)(d)(iii), 101, 102 and rule 93 of the Conduct of Election Rules, 1961. This power to order inspection of the ballot papers which is apart from Order 11, Code of Civil Procedure, may be exercised, subject to the statutory restrictions about the secrecy of the ballot papers prescribed by sections 94 and 128(1).
>
> An order for inspection may not be granted as a matter of course: having regard to the insistence upon the secrecy of the ballot papers, the Court would be justified in

granting an order for inspection provided two conditions are fulfilled :

(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case ; and

(ii) the Tribunal is *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary.

But an order for inspection ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection."

A little later, their Lordships observed :—

"There can, therefore, be no doubt that at every stage in the process of scrutiny and counting of votes the candidate or his agents have an opportunity of remaining present at the counting of votes, watching the proceedings of the Returning Officer, inspecting any rejected votes, and to demand a recount. Therefore, a candidate who seeks to challenge an election on the ground that there has been improper reception, refusal or rejection of votes at the time of counting, has ample opportunity of acquainting himself with the manner in which the ballot boxes were scrutinized and opened, and the votes were counted. He has also opportunity of inspecting rejected ballot papers, of demanding a re-count. It is in the light of the provisions of section 83(1), which require a concise statement of material facts on which the petitioner relies and to the opportunity which a defeated candidate had, at the time of counting, of watching and of claiming a recount that the application for inspection must be considered."

Their Lordships then considered the material allegations made in the election in support of the claim that there had been improper reception, refusal or rejection of votes and observed :—

> "These averments in the petition for setting aside the election on the ground of improper acceptance or rejection of votes were vague, and did not comply with the statutory requirements of section 83(1)(a). Paragraph 12 is deficient in the recital of material facts which must be deemed to be within the knowledge of the petitioner, and merely asserts that if the votes actually cast in favour of the petitioner are counted, the total number of valid votes found in his favour would exceed the number of votes received by Yadav. Having regard to this infirmity the Tribunal was justified in declining to make an order for inspection of the ballot papers unless a *prima facie* case was made out in support of the claim. The Tribunal has undoubtedly to exercise its discretion if it appears to be in the interests of justice, but the discretion has manifestly to be exercised having regard to the nature of the allegations made. The Tribunal would be justified in refusing an order where inspection is claimed with a view to fish out materials in support of a vague plea in the case set out in the petition."

The learned counsel for the petitioner has laid great emphasis on these observations which were made in relation to an election petition having regard to the provisions of section 83 of the Act which requires that the election petition is to contain a concise statement of the material facts on which the petitioner relies and full particulars of any corrupt practice, that the petitioner alleges, have to be set out. If a concise statement of material facts is not set out in the petition, the allegations are termed as vague and, as laid down by their Lordships, inspection cannot be allowed for fishing out material in support of vague allegations. But if material facts have been stated, the inspection can be allowed to enable the election-petitioner to prove the same by the production and inspection of the relevant ballot papers and other election papers. It was in this context that their Lordships pointed out that the defeated candidate and his agents had ample opportunity to be present during the process of counting and had ample opportunity to watch

the acceptance and rejection of the ballot papers, whether in his favour or against him. He was, therefore, expected to give the particulars of and material facts with regard to the improperly accepted or rejected ballot papers and if he failed to give the particulars or to state the material facts in respect thereof in the election petition, he could not be allowed to inspect the ballot-papers with a view to fish out evidence and then seek to challenge the election on the result of the evidence so gathered, in spite of the fact that the allegation made in the election petition was vague to which no satisfactory reply could be made by the returned candidate. From the observations of their Lordships, it is abundantly clear that if a *prima facie* case is made out to the satisfaction of the Court or the Tribunal and the concise statement of material facts has been given in the election petition, the inspection can be allowed. Even if this principle is to be observed by the Election Commission, all that he has to see is whether the material facts have been concisely stated in the application for inspection and in the light of those facts, a *prima facie* case had been made out for seeking inspection of the ballot papers and other election papers mentioned in rule 93. If that is done, the exercise of power by the Election Commission will be proper.

(93) The learned counsel then referred to *Dr. Jagjit Singh* v. *Giani Kartar Singh and others,* (44), in which the Tribunal had accepted the election petition after allowing the inspection of the ballot boxes and making a re-count. The order of the Tribunal was set aside by the High Court in appeal and their Lordships of the Supreme Court dismissed the appeal against the judgment of the High Court. The judgment of the Tribunal was set aside on the ground that the election-petitioner had not made out any case for the inspection of the ballot boxes and a re-count. The true legal position was reiterated by their Lordships as under :—

> "The true legal position in this matter is no longer in doubt. Section 92 of the Act which defines the powers of the Tribunal, in terms, confers on it, by clause (a), the powers which are vested in a Court under the Code of Civil Procedure when trying a suit, *inter alia*, in respect of discovery and inspection. Therefore, in a proper case, the Tribunal can order the inspection of the ballot boxes

(44) A.I.R. 1966 S.C. 773.

and may proceed to examine the objections raised by the parties in relation to the improper acceptance or rejection of the voting papers. But in exercising this power, the Tribunal has to bear in mind certain important considerations. Section 83(1)(a) of the Act requires that an election petition shall contain a concise statement of the material facts on which the petitioner relies; and in every case, where a prayer is made by a petitioner for the inspection of the ballot boxes, the Tribunal must enquire whether the application made by the petitioner in that behalf contains a concise statement of the material facts on which he relies. Vague or general allegations that valid votes were improperly rejected, or invalid votes were improperly accepted, would not serve the purpose which section 83(1)(a) has in mind. An application made for the inspection of ballot boxes must give material facts which would enable the Tribunal to consider whether in the interests of justice, the ballot boxes should be inspected or not. In dealing with the question, the importance of the secrecy of the ballot papers cannot be ignored, and it is always to be borne in mind that the statutory rules framed under the Act are intended to provide adequate safeguard for the examination of the validity or invalidity of votes and for their proper counting. It may be that in some cases, the ends of justice would make it necessary for the Tribunal to allow a party to inspect the ballot boxes and consider his objections about the improper acceptance or improper rejection of votes tendered by voters at any given election ; but in considering the requirements of justice, care must be taken to see that election petitioners do not get a chance to make a roving or fishing enquiry in the ballot boxes so as to justify their claim that the returned candidate's election is void. We do not propose to lay down any hard and fast rule in this matter; indeed to attempt to lay down such a rule would be inexpedient and unreasonable."

(94) The last judgment of their Lordships of the Supreme Court on the point is *Jitendra Bahadur Singh* v. *Krishna Behari*

*and others,* (5), in which it was held that before an Election Tribunal can permit the inspection of ballot papers, the following basic requirements must be satisfied :—

"(1) That the petition for setting aside the election must contain an adequate statement of the material facts on which the petitioner relies in support of his case ;

(2) The Tribunal must be *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary."

It was held that no case for the inspection of ballot papers was made out by the election-petitioner as he did not state any fact on his personal knowledge and had only stated that he had learnt those facts from certain persons. In this situation it was held that the election-petitioner was not taking the responsibility for making those allegations and that the allegations made on mere hearsay did not amount to material facts on which the Court could act. This judgment does not add to what was held by their Lordships in *Ram Sewak Yadav's case* (supra) (4).

(95) As I have said above, the power of the Court hearing the election petition for seeking inspection and production of election papers under rule 93 is invoked after the election petition has been filed and before the Court allows the inspection, it has to be seen whether material facts have been stated and not that mere allegations have been made and whether in view of those facts, a *prima facie* case for the inspection of the said papers has been made out. When an application for inspection is made to the Election Commission, there is no election petition pending before him and, therefore, that requirement of section 83 of the Act is not attracted. The applicant for inspection has to state material facts in the application in order to persuade the Election Commission that he has a good *prima facie* case for seeking inspection of the election papers and the purpose of that inspection can be the filing of the election petition or taking criminal proceedings with regard to election offences committed by any of the officers or the candidates, their agents or voters. It is, therefore, permissible, in my opinion, for the Election Commission to allow inspection to the applicant if he is satisfied *prima facie* that the reception or the rejection of the votes was not proper or that the counting of votes had not been properly made. The rule requires him to record reasons before allowing inspection which

means that he has to apply his mind and pass the order judiciously. The power to be exercised by the Election Commission in this matter is administrative and not quasi-judicial which has to be exercised judiciously after recording reasons. The reasons, of course, have to be germane to the principles of election and the requirements of the election law. Since section 83 of the Act requires that a concise statement of material facts should be made in the election petition, it is a legitimate purpose for which an inspection can be sought in order to support the ground stated in section 100(1)(d)(iii) of the Act, namely, that the result of the election, in so far as it concerns the returned candidate, has been materially affected by the improper reception, refusal or rejection of any vote or the reception of any vote which is void. It will not amount to fishing out evidence in support of such a ground if the Election Commission, after being satisfied that a prima facie case for inspection has been made out, allows the inspection in order to enable the applicant to state with conciseness the particulars in support of such a ground in the election petition and even if it does, it is open to the Election Commission, in my opinion, to allow inspection in the interest of purity, fairness and impartiality of the elections which are invariably emphasised and in the interest of justice, as no person has any right to continue membership, of a house of Legislature on the basis of wrong counting of votes or improper rejection or reception of votes or reception of void votes. It is one of the grounds on which the election of a returned candidate can be called in question and, if proved, can be declared void and in a proper case, if the Election Commission is satisfied, he can permit the inspection to enable the applicant to take up that ground with precision in his election petition. It has to be remembered that while allowing inspection the Election Commission has to be satisfied on the nature and quality of the allegations made in the application and cannot call for proof in support thereof to determine whether they are true or not in view of the judgment in **Ponnuswami's case** (1) (supra).

(96) The learned counsel for respondent 3 has referred to rule 40 in the First Schedule to Ballot Act, 1872, which reads as under :—

> "40. No person shall be allowed to inspect any rejected ballot papers in the custody of the Clerk of the Crown in Chancery, except under the order of the House of Commons

or under the order of one of Her Majesty's Superior Courts, to be granted by such Court on being satisfied by evidence on oath that the inspection or production of such ballot papers is required for the purpose of instituting or maintaining a prosecution for an offence in relation to ballot papers, or for the purpose of a petition questioning an election or return; and any such order for the inspection or production of ballot papers may be made subject to such conditions as to persons, time, place, and mode of inspection or production as the House or Court making the same may think expedient, and shall be obeyed by the Clerk of the Crown in Chancery. Any power given to a Court by this rule may be exercised by any Judge of such Court at chambers."

The Ballot Act was repealed by the Representation of the People Act, 1949, and the Parliamentary Election Rules were contained in Second Schedule to that Act. The rule relating to the orders for production and inspection of documents is 57, which reads as under :—

"57.—(1) An order—

(a) for the inspection or production of any rejected ballot papers in the custody of the Clerk of the Crown; or

(b) for the opening of a sealed Packet of counterfoils and certificates as to employment on duty on the day of the poll or the inspection of any counted ballot papers in his custody.

may be made—

(i) by the House of Commons; or

(ii) if satisfied by evidence on oath that the order is required for the purpose of instituting or maintaining a prosecution for an offence in relation to ballot papers, or for the purpose of an election petition, by the High Court or a county Court.

(2) An order for the opening of a sealed packet of counterfoils and certificates or for the inspection of any counted

ballot papers in the said custody may be made by an election Court.

(3) An order under this rule may be made subject to such conditions as to persons, time, place and mode of inspection, production or opening as the House of Commons or Court making the order may think expedient :

Provided that it making and carrying into effect an order for the opening of a packet of counterfoils and certificates or for the inspection of counted ballot papers, care shall be taken that the way in which the vote of any particular elector has been given shall not be disclosed until it has been proved that his vote was given and that the vote has been declared by a competent Court to be invalid.

(4) An appeal shall lie to the High Court from any order of a county Court made under this rule.

(5) Any power given under this rule to the High Court or * * * * * to a county Court may be exercised by any Judge of the Court otherwise than in open Court.

* * * *

(6) Where an order is made for the production by the Clerk of the Crown of any document in his possession relating to any specified election, the production by him or his agent of the document ordered, in such manner as may be directed by that order shall be conclusive evidence that the document relates to the specified election; and any endorsement an any packet of ballot papers so produced shall be **prima facie** evidence that the ballot papers are what they are stated to be by the endorsement.

(7) The production from proper custody of ballot paper purporting to have been used at any election, and of a counterfoil marked with the same printed number and having a number marked thereon in writing, shall

be *prima facie* evidence that the elector whose vote was given by that ballot paper was the person who at the time of the election had affixed to his name in the register of electors the same number as the number written on the counterfoil.

(8) Save as by this rule provided, no person shall be allowed to inspect any rejected or counted ballot papers in the possession of the Clerk of the Crown or to open any sealed packets of counterfoils and certificates."

From these two rules, it is abundantly clear that the power to allow inspection of the rejected ballot papers or any counted ballot papers could be allowed by the House of Commons or by the High Court or a county Court for the purposes of an election petition. If this power was to be exercised by the High Court or the county Court, evidence on oath had to be tendered for its satisfaction, whereas no such requirement is there for the House of Commons to order inspection. The provision is, no doubt, stringent but it amply bears out that inspection for the purposes of an election petition can be allowed, that is, it is not a purpose extraneous to the election. I, therefore, hold that the Election Commission is entitled to allow inspection to enable the applicant for inspection to collect material in support of the ground mentioned in section 100(1)(d)(iii) of the Act, but he has to exercise this power after recording reasons which is a safeguard against the arbitrary exercise of power by him. He can, of course, allow inspection for any other good reason also. It may be pointed out that in England, under the Representation of the People Act, 1949, section 107, the election to Parliament can only be questioned by means of an election petition, complaining of an undue election or undue return, which has to be presented in accordance with the provisions of that Act, so that the requirement with regard to calling in question of an election by means of an election petition is common to both the Indian and the English statutes.

(97) The learned counsel for the petitioner then urges that since rule 93 does not mention the purpose for which or the manmaner in which the Election Commission has to exercise its power to allow inspection of the election papers mentioned therein, he must observe the principles of natural justice before passing an

order for inspection because the Rule does not expressly bar their application. In fact, the learned counsel goes to the extent of saying that the Election Commission should determine the facts in order to decide whether to allow or not to allow the inspection after notice to the returned candidate and holding some sort of inquiry to satisfy himself that a *prima facie* case for inspection has been made out. In support of this argument, the learned counsel has referred to the judgment of their Lordships of the Supreme Court in *Union of India* v. *J. N. Sinha and another* (25). In that case, rule 56(j) of the Fundamental Rules was under consideration which provides for compulsory retirement of a Government servant if the appropriate authority is of the opinion that it is in the public interest so to retire the Government servant after he has attained the age of 50 years in some cases and 55 years in other cases, by giving him notice of not less than three months in writing or three months' pay and allowances in lieu thereof. It was claimed by the respondent in that case that he should have been given a notice before retiring him compulsorily. That plea was negatived and the following observations were made with regard to the observance of rules of natural justice :—

> "Fundamental Rule 56(j) in terms does not require that an opportunity should be given to the concerned Government servant to show cause against his compulsory retirement. A Government servant serving under the Union of India holds his office at the pleasure of the President as provided in Article 310 of the Constitution. But this 'pleasure' doctrine is subject to the rules or law made under Article 309 as well as to the conditions prescribed under Article 311. Rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights. As observed by this Court in *Kraipak* v. *Union of India,* (14), 'the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law but supplement it.' It is true that if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so because it must be presumed that

> the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But, if on the other hand, a statutory provision either specifically or by necessary implication excludes the application of any or all the rules or principles of natural justice, then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power."

In my opinion, these observations instead of helping the petitioner go against him. The learned counsel relies strongly on the observation that "if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice" and contends that rule 93 does not expressly or by necessary implication exclude the application of any or all of the rules or principles of natural justice and, therefore, such rules or principles must be observed by the Election Commission. I regret my inability to agree to this submission. If the Legislature had intended that the Election Commission should observe the principles of natural justice, it would have made some provision to that effect when the proviso was added in September, 1962, requiring the Election Commission to record reasons before allowing the inspection and giving notice to all other candidates to be present at the time of inspection. From the language of this proviso, it is quite clear that the Legislature did not intend that the Election Commission should hear the returned candidate or any other candidate before passing an order for inspection but if he passed that order, the returned candidate and other candidates, who fought the election, were to be given notice to be present at the time of inspection, if they so liked. Where the presence of the returned candidate and the other candidates was found desirable, it was so specified, which necessarily leads to the conclusion that no hearing is to be afforded

to the returned candidate or other candidates before passing the order for inspection. At that stage, the matter is between the applicant for inspection and the Election Commission and no other person comes in. The Election Commission is not debarred from giving notice or hearing to the returned candidate or making some sort of inquiry if he so desires in order to satisfy himself that there is a *prima facie* case for allowing inspection because he has to record reasons in support thereof, but it cannot be laid down as a matter of law that he must, in all cases, give notice to the returned candidate or any other candidate and hear him or make some sort of inquiry before passing the order for inspection. In view of this conclusion, the other judgments relied upon by the learned counsel for the petitioner also do not help him. These judgments are :—

(1) *R. V. Manchester Legal Aid Committee, ex parte R. A.* Brand and Co., Ltd., (13),

(2) *New Prakash Transport Co., Ltd.* v. *New Suwarna Transport Co. Ltd.*, (24).

(3) *A. K. Kraipak and others* v. *Union of India and others,* (14), and

(4) *Chandra Bhawan Board and Lodging, Bangalore* v. *State of Mysore and another* (15).

(98) There is another principle of law which is by now well settled that it is not necessary to observe the rules of natural justice applicable to final determinations, whether subject to appeal or not, when preliminary decisions are made which are generally taken *ex parte.* I have already held that the Election Commission has no jurisdiction or power to express any opinion with regard to the validity or otherwise of the accepted or rejected ballot papers nor can he give any relief with regard thereto. The allowing of inspection, therefore, does not affect the election of the returned candidate nor does it decide any matter with regard to any part of the process of election which can be challenged only by means of an election petition and, therefore, the returned candidate or any other candidate has no right to claim that he must be heard before the order for inspection is made. If any material is collected as a result of the inspection of the election papers, it will have to be

adjudicated upon by the Court hearing the election petition, in case the election petition is filed containing that material and in that case the returned candidate shall have ample opportunity to controvert or rebut the same. He has no right to say that a certain mode of collecting evidence in support of the grounds in an election petition should not be allowed to the election-petitioner. All that he is entitled to is that before the matter with regard to his election is decided, he must be heard. That hearing he will get when an election petition is filed. The collection of evidence in the manner provided by the Rule cannot be said to prejudice the election of the returned candidate in any manner. Of course, if an order allowing inspection is not in confirmity with the provisions of rule 93, the returned candidate has a right to challenge that order, but he has no right to complain that that order was passed without notice to him. For this reason, too, I am of the opinion that the Election Commission is not under any obligation to issue notice to or hear the returned candidate or any other candidate before passing an order for inspection under rule 93.

(99) The learned counsel for respondent 3 referred to Wiseman and another v. *Borneman and others*, (28), wherein the following observations occur in the judgment of Diplock, L. J., at page 1048:—

> "I should, however, point out that the observations in the *Anisminic case* (45), were directed to the jurisdiction of a tribunal to make a determination whether a described situation existed or not; that determination when made, being final subject to any appeal that might be provided therefrom, the observations were in no way concerned with a preliminary decision whether a *prima facie* case had been made out that a described situation existed which merited further enquiry as to whether or not it did. Where such a jurisdiction is conferred by statute on a person or a tribunal, one must in my view look at the statute to see what are the materials on which that preliminary decision is to be based. There is no *prima facie* presumption that Parliament intended that the rules of natural justice applicable to final determinations, whether subject to

(45) (1967) 2 A.E.R. 986.

appeal or not, should be applied to this preliminary decision. Indeed, one does not have to look far in the practice of this Court to see that this kind of enquiry is deal with frequently ex parte, and I need only mention an application for leave to serve a writ out of the jurisdiction under R.S.C., Order 11, rule 4, or an application for leave to apply for an order of prohibition, mandamus or certiorari under R.S.C., Order 53, rule 1. All these and many similar ones are dealt with without hearing the other side at all on material which is produced by the applicant."

Against this judgment, an appeal was taken to the House of Lords which was dismissed and the judgment of the Court of Appeal was affirmed. That judgment is reported as Wiseman and another v. Borneman and others, (30).

(100) Another judgment of the Court of Appeal relied upon by the learned counsel for respondent 3 is *Parry-Jones* v. *The Law Society and others*, (29). In that case, the Law Society wrote to the plaintiff, a solicitor, requiring him to produce at this office his various books of account for the inspection of the Law Society's investigation Accountant. This action was taken by the Law Society on the basis of a complaint filed by a person to the effect that the solicitor was not keeping proper accounts of his clients. The solicitor urged that if the Law Society acted under rule 11(1)(c) of the Solicitors Accounts Rules, 1945, on a written complaint lodged by a third party, then that complaint should be shown to him and that he was entitled to know who was making the complaint and the nature of it. He submitted that this was required by natural justice. The learned Judges pointed out that under rule 11(4), it was provided that —

"before instituting an inspection on a written complaint lodged with them by a third party, the council shall require prima facie evidence that the ground of complaint exists....."

and observed :—

"That shows that the council have only to enquire whether there is prima facie evidence. As we held a few days

ago in the case of Wiseman v. Borneman (8), a prima facie case stands on a very different footing from an actual determination. Where the only enquiry is whether there is prima facie evidence, natural justice does not require that the party should be given notice of it. Nor do I think that the solicitor is entitled to know whether the council are acting under paras (a), (b) or (c) of rule 11(1). The rule does not require it. The council are entitled to send their accountant to make an investigation without disclosing on which ground they are acting. The solicitor is not entitled to be told the particulars of the complaint."

(101) The learned counsel has then relied on the judgment of their Lordships of the Supreme Court in *Dinabandhu Sahu* v. *Jadumoni Mangaraj and others*, (37), in which the Election Commission had exercised its power to condone the delay in filing the election petition without issuing notice to the returned candidate. In his written statement filed to the election petition before the Tribunal, the returned candidate raised the contention that as the petition was presented out of time, it was liable to be dismissed by the Election Commission under section 85 of the Act and that in consequence the Election Tribunal ought to dismiss it as not maintainable. The Election Tribunal did not agree with that objection and proceeded to hear the petition on merits. Ultimately, the Election Tribunal allowed the petition and set aside the election of the returned candidate who filed an appeal in the Supreme Court by special leave under Article 136 of the Constitution. In appeal it was contended that as the election petition was not presented within the time as required by section 81 of the Act, it was liable to be dismissed under the mandatory provision in section 85, and that when the matter came before the Election Tribunal, its jurisdiction was only to pass the order which the Election Commission ought to have passed, and that the petition should have been dismissed in limine as not maintainable. Their Lordships referred to the proviso to section 85 of the Act which runs as follows :—

"Provided that if a person making the petition satisfies the Election Commission that sufficient cause existed for his failure to present the petition within the period prescribed

therefor, the Election Commission may in its discretion condone such failure."

and observed :—

"It was in exercise of the discretion vested in it under this provision that the Election Commission condoned the delay by its order dated 2nd July, 1952. It is not disputed that if this order is valid, there can be no question of dismissing the petition on the ground of delay. The contention of Mr. Krishnaswami Ayyangar is that the order is not valid, because it was passed not on any application of the party praying that the delay might be excused but *suo motu*, and such an application, it is contended, is a condition to the exercise of jurisdiction under that proviso. Support for this contention was sought in the decisions under section 5 of the Limitation Act, holding that it was incumbent on the party praying that delay might be excused under that section to clearly allege and strictly prove the grounds therefor. We are not impressed by this contention. As was pointed out by this Court in *Jagan Nath* v. *Jaswant Singh*, (41), the rights under litigation in these proceedings are not common law rights but rights which owe their existence to statutes, and the extent of those rights must be determined by reference to the statutes which create them. The proviso to section 85 does not contemplate the Election Commission giving to the respondent notice of the petition for condonation of the delay, or the holding of an enquiry as to the sufficiency of the grounds in his presence before passing an order under it. The policy underlying the provision is to treat the question of delay as one between the Election Commission and the petitioner, and to make the decision of the Election Commission on the question final and not open to question at any later stage of the proceedings. Under section 90(4) of the Act, when the petition does not comply with the requirements of section 81, section 83 or section 117, the Election Tribunal has a discretion either to dismiss it or not, 'notwithstanding anything contained in section 85'. The scope of the power conferred on the Election Tribunal under section 90(4) is that it overrides

the power conferred on the Election Commission under section 85 to dismiss the petition. It does not extend further and include a power in the Election Tribunal to review any order passed by the Election Commission under section 85 of the Act. The words of section 90(4) are, it should be marked, 'notwithstanding anything contained in section 85', and not 'notwithstanding anything contained in section 85 or any order passed thereunder'. An order of the Election Commission under section 85 dismissing a petition as barred will, under the scheme of the Act, be final, and the same result must follow under section 90(4) when the order is one excusing the delay. Section 90(4) will be attracted only when the Election Commission passes the petition on to the Tribunal without passing any order under section 85. If the Election Commission can thus pass a final order condoning delay without notice to the respondent, there is no reason why it should not pass such an order *suo motu*. In this respect, the position under the proviso to section 85 is materially different from that under section 5 of the Limitation Act, under which an order excusing delay is not final and is liable to be questioned by the respondent at a later stage. (Vide the decision of the Privy Council in *Krishnaswami Panikondar* v. *Ramaswami Chettiar*, (46).

It was argued that in this view the respondent would be without remedy even if the Election Commission should choose to condone delay—it might be of years—and that that would result in great hardship. But the proviso advisedly confers on the Election Commission wide discretion in the matter, and the obvious intention of the Legislature was that it should be exercised with a view to do justice to all the parties. The Election Commission might, therefore, be trusted to pass the appropriate order when there is avoidable and unreasonable delay. That a power might be liable to be abused is no ground for denying it, when the statute confers it, and where there is an abuse of power by statutory bodies, the parties aggrieved are not without ample remedies under the law."

(46) 45 I.A. 25.

This judgment was followed and re-affirmed in *Bhikaji Keshao and another* v. *Brijlal Nandlal Biyani and others*, (47). From the observations of their Lordships, it is quite clear that unless the statute so require, it is not obligatory on the Election Commission to issue a notice to any other party which may be affected by his order. Their Lordships emphasised that the Election Commission might be trusted to pass appropriate orders in the cases coming before him. It cannot be presumed that the Election Commission, a high functionary of the Government, constituted under the Constitution, shall not follow the law or the right procedure. It is for him to adopt his own procedure while allowing or disallowing the applications for inspection. The observations made by their Lordships in respect of the powers of the Election Commission under section 85 of the Act apply with full force to the powers of the Election Commission under rule 93. I am, therefore, of the opinion that the petitioner cannot claim as a matter of right that the Election Commission should have given notice to him before allowing the application of respondent 3 for inspection of election papers.

(102) The learned counsel for the petitioner has greatly emphasised that where no procedure is prescribed and the rules of natural justice can be observed, the appropriate authority or tribunal should act in conformity with the rules of natural justice and in this case he emphasises that as the application for inspection was filed on March 15, 1971, and the period of limitation for filing an election petition was to expire on April 26, 1971, there was ample time for the Election Commission to give notice to the petitioner and hear him before making the order on the application for inspection. Their lordships of the Supreme Court observed in *Union of India and another* v. *P. K. Roy and others* (26), as under:—

> "Normally speaking, we should have thought that one opportunity for making a representation against the preliminary list published would have been sufficient to satisfy the requirements of law. But the extent and application of the doctrine of natural justice cannot be imprisoned within the straight jacket of a rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the

(47) A.I.R. 1955 S.C. 610.

scheme and policy of the statute and other relevant circumstances disclosed in the particular case."

In the light of these observations, I feel fortified in holding that the Election Commission is not obliged by any principle of natural justice to issue notice to other candidates including the returned candidate before deciding an application for inspection when such a right has not been conferred on them by proviso (*a*) to rule 93(1) of the Rules. Merely because there was enough time to issue a notice to the returned candidate before deciding the application for inspection is no ground to hold that the failure of the Election Commission to give a hearing to the petitioner before passing the order vitiates that order. It is for the Election Commission to devise his own procedure for these matters when no procedure is provided in the Rules and all that the rule requires is that he must state reasons for allowing the application for inspection. If that requirement is fulfilled, the order is immune from attack.

(103) There is another aspect of the matter which has been stressed by the learned counsel for the petitioner and that is, that there must be material in the form of facts before the Election Commission can pass an order for inspection. This argument is based on the judgments of their Lordships of the Supreme Court, referred to above, in reference to the power of the Court to allow inspection. It is stated that mere allegations are not facts and do not constitute the proper material for an order of inspection being passed without any further support by means of evidence or enquiry. The language of rule 93 shows that it depends on the subjective satisfaction of the Election Commission, that a case for inspection has been made out, that he can pass the order allowing inspection. When he has to form such an opinion, he is to consider the material placed before him, the allegations as to facts, if not disbelieved by him, can constitute proper material for deciding such an application. All that has to be seen is that the material that has been considered is relevant and germane to the order that is going to be passed. I may emphasise that once it is held that rule 93 is *intra vires* and the Election Commission has the power to allow inspection of election papers mentioned therein all that we have to see is whether the order allowing inspection passed by the Election Commission is in confirmity with that rule and no other question arises as to how he satisfied himself that a case for inspection had been made out. We are also not concerned with the other hypothetical questions raised by the learned

counsel for the petitioner as to the time during which the Election Commission can allow inspection, that the exercise of the power to allow inspection by the Election Commission will deprive the Election Court of that right or that what will happen if a person makes applications to both the Election Commission and the Court trying the election petition, etc. In the case in hand, the order has been passed before an election petition has been filed and it is not disputed even by the learned counsel for the petitioner that at this stage the Election Commission could allow inspection of the election papers under rule 93. It is stated in para 11 of the writ petition that—

> "if the respondent, Shri Iqbal Singh, has any grievance in respect of inspection, etc., the proper procedure would have been to apply to the Election Commission with specific facts to show the irregularities in respect of the counting or in respect of the acceptance or rejection of the ballot papers. The Election Commission was then duty bound in law to hear the petitioner and pass an appropriate order after applying its mind to the points raised and making out a speaking order. The Election Commission, however, on a general complaint of Shri Iqbal Singh has ordered the inspection of all the ballot papers of all other candidates excluding Shri Iqbal Singh."

By making this allegation the petitioner has admitted that the Election Commission had the power to allow inspection if proper material had been placed before him, but he should have passed the order after notice to the petitioner and hearing him. In view of this pleading, we have now to see whether there was material before the Election Commission to justify the passing of the order and whether the requirement as to recording of reasons has been satisfied.

(104) The material before the Election Commission consisted of the application made by respondent 3 on March 15, 1971, wherein reference had also been made to his previous communications to the Chief Election Commissioner. In that application, he had stated:—

(1) That the writ-petitioner is the brother of Shri Parkash Singh Badal, Chief Minister of Punjab, who had been set

up as a candidate on Akali ticket and eversince he came in the field to contest the election, the Punjab Government machinery was set in motion to help him by adopting all possible unfair means and also by illegally utilising the Government machinery which was at the disposal of the Chief Minister.

(2) That Shri Parkash Singh Badal, took every step to help his brother and used all means at his disposal for his success in the Lok Sabha contest from the said constituency by appointing such Polling and Presiding Officers of his choice, who could be at his back and call and would do anything as desired by Shri Parkash Singh Badal to help his brother to get into the Lok Sabha by fair or foul means.

(3) That in spite of the repeated complaints of respondent 3 to the Chief Election Commissioner from February 20, 1971, to February 28, 1971, Shri Parkash Singh Badal did not leave any stone unturned to help his brother in the said election to the Lok Sabha and polling took place on March 5, 1971, in the whole constituency under the said circumstances.

(4) That on March 7, 1971, respondent 3 made a complaint to the Deputy Election Commissioner of India requesting the Election Commission to depute some senior officials to supervise the counting so that the counting could take place according to the rules prescribed in the Conduct of Elections Rules, 1961, and the instructions issued by the Election Commission from time to time. On that application an observer was appointed.

(5) That on March 8, 1971, a detailed letter was written to the Chief Election Commissioner giving details of the malpractices resorted to by Shri Parkash Singh Badal, Chief Minister, Punjab, for the purpose of helping his brother Shri Gurdas Singh Badal for his return to the Lok Sabha from the said constituency under any circumstances.

(6) That during the counting it was revealed that in all the eight Assembly constituencies large number of ballot papers were found which did not bear the signature of

either the Presiding or Polling Officers, and/or the stamp of Assembly/Polling Station or its number. Such ballot papers approximately numbered more than 15,000. Besides this, more than 6,000 valid votes cast in favour of respondent 3 had been wrongly rejected and that this matter was telegraphically brought to the notice of the Election Commission and other authorities. This wrong reception of valid votes in favour of the writ-petitioner and the wrongful rejection of 6,000 votes cast in favour of respondent 3 had materially affected the result of the election.

(7) That on March 12, 1971, a written application was made to the Returning Officer under rules 63 and 64 of the Rules asking for a recount, but the Returning Officer rejected the said petition without assigning any valid reasons.

(8) That the petitioner was declared duly elected by a margin of 5,323 votes only.

(9) That the Returning Officer had acted with **mala fide** intentions in declaring the petitioner successful in order to curry favour with the Chief Minister of Punjab although he had not secured more valid votes than respondent 3 and that this fact would be amply clear from the scrutiny of the record and the ballot papers.

(10) That respondent 3 had reasonable apprehension that all the election papers, such as packets of unused ballot papers, packets or used ballot papers—whether valid, tendered or rejected, packets of marked copy of the electoral rolls and the records relating to the issue of ballot papers to various Polling Officers in all the eight Assembly constituencies and the reports of the Presiding and the Counting Supervisors and other papers and records relating to the said constituency may not be tempered with and necessary manipulations and changes made in order to cover the illegalities and irregularities committed by the officers concerned.

On the basis of these allegations of fact, it was prayed that—

(i) respondent 3 may be allowed inspection of all the ballot papers in all eight Assembly segments and other relevant records which are open to such inspection in order to enable him to seek his legal remedy in the appropriate Court by way of election petition ;

(ii) this inspection may kindly be done under the supervision of an officer of the Election Commission. After such inspection, the ballot papers and other documents relating to the election of Lok Sabha candidate from Fazilka Parliamentary constituency be got sealed, with the seal of an appropriate authority, the Election Commission and the candidates ;

(iii) these documents may be taken into custody by the Election Commission and deposited in a place under strict security arrangements till they are summoned by the appropriate Court; and

(iv) that immediate order be passed so that no mischief can be done in the meanwhile.

Thus the material before the Election Commission consisted of the allegations of fact made in the application for inspection filed on March 15, 1971, and the letters and telegrams previously sent by respondent 3 to the Chief Election Commissioner or any other authority in that office. It is also to be remembered that on the allegations made previously the Election Commission had appointed an observer to watch the counting of the votes. In the letter dated March 8, 1971, a copy of which has been filed as annexure 'R-IX,' respondent 3 had made serious allegations against the officers concerned in the election from Fazilka Parliamentary constituency, in paras 5, 7, 15, 16, 26 and 27, which are reproduced below :—

"(5) A major incident took place in village Danewala Polling Station in the Malout Assembly constituency. My polling agent was not allowed to sit in the Polling Booth even though he had submitted his nomination papers in the morning. He was pushed out of the Polling Booth by the Sarpanch and some villagers. This happened with the

connivance of the Presiding Officer. I personally had to visit the Polling Station and intervene. It was only then that the agent was allowed to stay there.

(7) In village Bam in the Malout Assembly constituency, the Akalis pushed our polling agent out of the Polling Station and they after marking the ballot papers themselves, put them in the box. The Harijans were threatened with dire consequences if they did not vote for the Akalis.

(15) In village Sikhwala in the Lambi Assembly constituency, the S.H.O. had threatened my polling agent with dire consequences. He had also done this at the Polling Stations of Khubas, Fatta Khera and Arniwala in the Lambi Assembly constituency.

(16) In Khudian Polling Station in the Lambi Assembly constituency my polling agents were prevented from entering the booth.

(26) In village Bangewala in the Muktsar Assembly constituency my polling agents were not allowed to function. Harijans were also prevented from voting.

(27) In village Bhagsingwala in the Faridkot Assembly constituency, my polling agent was pushed out at 9 a.m. but when he protested strongly, he was allowed entry into the booth at 1 p.m. By that time, a number of bogus votes were cast."

The facts stated in this letter were spoken to by respondent 3 from his personal knowledge. It is these allegations of fact which the Election Commission considered to be serious and it cannot be said that he was wrong in his estimation. The Election Commission knew that the petitioner is a brother of the Chief Minister and that having regard to the human nature, unless the relation between the brothers were strained, the Chief Minister would naturally have helped his brother in achieving success at the polls. It does not mean that the Chief Minister must have resorted to unfair means but it is not unnatural to assume that the officers functioning at various stages

of the election might have been imbued with the desire to help the brother of the Chief Minister as that would naturally have pleased the Chief Minister. In that back-ground, when the allegations were made that the polling agents of respondent 3 were either not admitted into certain polling stations or were pushed out of some of them during the course of polling, it could lead to the legitimate inference that some irregularities might have been committed at certain polling stations. It was also stated that 6,000 valid votes cast in favour of respondent 3 had been wrongly rejected by the Returning Officer while 12,000 invalid votes cast in favour of the petitioner were wrongly accepted and counted in favour of the petitioner. Respondent 3 also made it clear in his application that he wanted to file the election petition to challenge the election of the petitioner. If, on this material, the Election Commission felt satisfied that a case for the inspection of the ballot papers and other election papers had been made out by respondent 3, it cannot be said that his satisfaction was based on no material. I am, therefore, satisfied that the Election Commission had passed the order allowing inspection to respondent 3 after applying his judicious mind to the facts and circumstances of the case having regard to the material that had been placed before him by respondent 3. He was not called upon at that stage to determine whether the allegations of fact made by respondent 3 in his application for inspection and in previous communications were true or false. All that he had to determine was whether, on the basis of those allegations, he was justified in allowing inspection that is, whether those allegations of fact *prima facie* satisfied him that a case for inspection had been made out. As I have said above, the Election Commission was right in forming the opinion that a case for inspection had in fact been made out by respondent 3.

(105) It has now to be considered whether the order of the Election Commission contains any reasons for allowing inspection and thus complies with the requirement of proviso (a) to rule 93(1). The Election Commission gave the reason that the allegations made by respondent 3 were, if true, no doubt serious and, therefore, he was of the opinion that the inspection should be allowed. He directed that a formal order should be drawn up. A formal order was drawn up which was communicated to the District Election Officer, Ferozepore, on March 16, 1971, for allowing inspection to respondent 3 and it is that order which was challenged by the petitioner in his writ petition

when it was filed. It is, therefore, proper to set out that order. It runs as under :—

"Whereas a representation has been received by the Election Commission from Shri Iqbal Singh, a candidate who contested from the 1-Fazilka Parliamentary constituency in the State of Punjab in the General Election to the Lok Sabha held on the 5th March, 1971, for the inspection of sealed packets containing the documents mentioned in rule 93 of the Conduct, of Elections Rules, 1961, including the ballot papers used in all the eight Assembly segments of the said constituency.

And whereas the applicant has stated that the inspection of these documents is necessary in order to enable him to seek his legal remedy in the appropriate Court by an election petition.

And whereas in the said application, the applicant has specifically alleged that during the course of counting a large number of ballot papers were found which did not bear any distinguishing mark or signature of the Presiding Officer as required under the law and that more than, 6,000 valid votes have been wrongly rejected.

Now, therefore, in pursuance of the provisions of sub-rule (1) of rule 93 of the Conduct of Elections Rules, 1961, the Election Commission having been satisfied that the inspection as prayed for by the applicant is necessary to further the ends of justice without at the same time violating the secrecy of ballot as has been held by the Allahabad High Court in the order in *Shri S. C. Dutta* v. *Shri Krishna Bajpai and others* (48) and in the order in *Raghubir Singh Yadava* v. *Gajendra Singh and others* (7), hereby directs that—

(i) The District Election Officer of Ferozepur district in the State of Punjab shall open the sealed packets containing the unused ballot papers and the votes polled in favour of all the contesting candidates other than

(48) E.P. No. 7 of 1969 decided by Allahabad High Court on 11th August, 1969.

those of Shri Iqbal Singh in respect of all eight Assembly segments of the said Fazilka Parliamentary constituency and the packets containing the rejected votes and permit the applicant or his duly authorised agent to inspect them in his presence. If the returned candidate makes an application in writing to the District Election Officer for the simultaneous opening and inspection of the votes polled in favour of the applicant, it shall also be allowed.

(ii) After such inspection as aforesaid is completed and the packets containing the ballot papers used, tendered or rejected and the packets containing the unused ballot papers are sealed and secured as directed in sub-para (iv) herein below, if the applicant demands an inspection of marked copy of the electoral roll in respect of any or all eight Assembly segments of the Fazilka Parliamentary constituency, then inspection of that document may also be allowed.

(iii) That the District Election Officer shall give reasonable opportunity to other contesting candidates or their duly authorised agents to be present at such opening and inspection. For this purpose due notice should be given in writing to each of the contesting candidates indicating the date, time and place where the inspection will take place. Each contesting candidates may be allowed to appoint only one duly authorised agent to be present at such opening and inspection. During the course of such inspection, no person shall be allowed to touch or handle a ballot paper, but the District Election Officer may permit any of the persons present to note down the numbers of ballot papers which he considers to have been improperly accepted or improperly rejected. Sufficient security arrangements will also be provided by the District Election Officer at the time of such opening and inspection of the packets and after the inspection is over, all the ballot papers used, tendered or rejected, the ballot papers unused and the marked copy of the electoral roll shall be replaced in the respective packets and such packets

shall be sealed again with the seal of the District Election Officer in his presence and with the seal of such of the persons present at the time of inspection as may wish to affix them and also with the secret seal of the Election Commission. All the packets shall be then put into a steel box or other container which shall also be locked and sealed in the aforesaid manner and the same shall be kept in the Treasury for safe custody. In the course of this process the District Election Officer shall ensure that no documents is tampered with by any person.

By order,

Sd/-

(A. N. Sen).

Secretary to the Election
Commission of India."

When the petition was being argued; we noticed that the said order concluded with the words—

" By order;

Sd/-
(A. N. Sen)

Secretary to the Election
Commission of India."

from which it was inferred that this order was passed by some authority other than the Secretary to the Election Commission who only communicated it to the District Election Officer. At the instance of the learned counsel for both the parties, we sent for the record from the Election Commission and therein found the order of the Election Commission dated March 15, 1971, which has been set out in an earlier part of this judgment. The question has been raised as to which of

the two orders is to be considered as the order of the Election Commission. The learned counsel for the petitioner has vehemently urged that the order of the Election Commission is the one passed by him on March 15, 1971, and the order communicated to the District Election Officer, Ferozepur, on March 16, 1971, by the Secretary to the Election Commission; only conveyed that order and was not an order passed by him as Election Commission and, for this reason, cannot be considered to be an order passed by the Election Commission. On the other hand, the learned counsel for respondent 3 has contended that under section 19A of the Act, the Secretary to the Election Commission is empowered to perform the functions of the Election Commission under the Constitution, the Representation of the People Act, 1950, the Act and the Rules made thereunder. For this reason, the order dated March 16, 1971 should also be considered as an order passed by the Election Commission being complementary to the one passed on March 15, 1971. In my opinion; the correct position is that the order passed by the Election Commission on March 15, 1971; was the substantive order which had to be implemented by the office. The order dated March 16, 1971 communicated to the District Election Officer by the Secretary to the Election Commission was a complete order which had been drawn up in accordance with the directions of the Election Commission contained in his order dated March 15, 1971. In this order, the reasons which led the Election Commission to allow the inspection were stated in the preamble of the order and are the same as recorded by the Election Commission in his order dated March 15, 1971; if we read that order in conjunction with the the material that had been placed before him for consideration and on the basis of which that order was passed as has been explained above. The order dated March 16, 1971, was in confirmity with the earlier order of the Election Commission dated March 15, 1971, and did not go beyond it. For all intents and purposes, therefore, the order dated March 16, 1971, is to be considered the operative order. This order is clearly in accordance with the requirements of rule 93 and sets out the reasons for allowing inspection as well as the manner of inspection. Both these orders, therefore, are in order and are not liable to be quashed on the ground that no reasons are recorded therein.

(106) The learned counsel for the petitioner has, however, submitted that the allegations which were considered to be serious by the Election Commission should have been set out in his order

dated March 15, 1971, so that the order should have been a self-contained order and that order alone **ex facie** should have shown why and which of the allegations made by respondents 3 were considered by the Election Commission to be serious. In my opinion, this is not the requirement of an administrative order like the one passed by the Election Commission in this case. Merely because the statute prescribed a requirement as to the recording of reasons, the order to be passed giving reasons does not become quasi-judicial. It was so held by their Lordships of the Supreme Court in *Collector of Monghyr and others* v. *Keshav Prasad Goenka and others* (12). At the time when the application for inspection is considered by the Election Commission, the only party before him is the applicant for inspection and it is a matter between him and the Election Commission. The Election Commission has to be satisfied with regard to a *prima facie* case for inspection which satisfaction is subjective. The Election Commission is an administrative authority under the Constitution, the Act and the Rules and has been vested with this power under rule 93. His order is, therefore, administrative in character and does not become quasi-judicial merely because the rule requires him to record his reasons for allowing inspection. I, therefore, hold that the order of the Election Commission cannot be impugned on the ground that it does not set out the allegations of fact made by respondent 3 which were considered to be serious and on the faith of which he had satisfied himself that a *prima facie* case for allowing inspection of the election papers sought by respondent 3 had been made out. In this connection, reference may be made to the judgment of a Full Bench of this Court, consisting of five Judges, in *The State of Punjab* v. *Bhagat Ram Patanga* (49). The order impugned in that case ran as follows :—

> "Whereas the Governor of Punjab after giving an opportunity to Shri Bhagat Ram Patanga, Member, Municipal Committee, Phagwara, of tendering an explanation under the proviso to section 16 of the Punjab Municipal Act, 1911, is satisfied that the said Shri Bhagat Ram Patanga has flagrantly abused his position as a member of the aforesaid Committee :
>
> Now, therefore, in exercise of the powers vested in him under clause (e) of sub-section (1) of section 16 *ibid*, the Governor of Punjab is pleased to remove the said Shri Bhagat

(49) I.L.R. (1969) 2 Pb. & Hr. 347.

Ram Patanga, from the membership of the Municipal Committee, Phagwara, from the date of publication of this notification in the official gazette and is further pleased to disqualify the said Shri Bhagat Ram Patanga for a period of three years from the aforementioned date under sub-section (2) of secton 16 *ibid.*"

It was urged in appeal before the Bench, that the order passed by the Government was a quasi-judicial one and reasons had to be stated in the order for the decision made and that the order did not contain any reasons for removing Shri Bhagat Ram Patanga, from the membership of the Phagwara Municipal Committee and imposing disqualification on him. It was held by the Bench, that the order passed by the Government was a quasi-judicial one and had to be a speaking order, but that it contained reasons and was, therefore, in order. While coming to that conclusion, the Bench looked into the file produced by the Government and came to the conclusion that the matter had been considered by the Home Minister who was the Minister in-charge of the portfolio and the Chief Minister and they applied their minds to the case against the respondent. The advice of the Legal Remembrancer was also sought and although the allegations against the respondent had not been set out in the order, it was held that the outline of the process of reasoning by which the Home Minister reached his decision with regard to the respondent was to be found in the executive file. The impugned order was held to be valid. On the parity of reasoning, a reference to the file in the present case discloses the material that was before the Election Commission on which he felt satisfied that a case for allowing inspection had been made out and passed the order to that effect. He was not at that time called upon or authorised to determine whether the votes cast in favour of respondent 3, which were rejected by the Returning Officer, or the votes counted in favour of the petitioner which were alleged to be invalid were really so, as alleged by respondent 3. He felt satisfied that in the interest of justice and purity of elections, the matter required further looking into and, therefore, inspection was not only desirable but was justified. It has been contended by the learned counsel for the petitioner that in order to verify the correctness of the allegations made by respondent 3 in his application, the Election Commission should have called for the ballot papers and inspected them himself before allowing inspection to respondent 3. In my opinion, if this course had been adopted by the Election Commission, it would have been an exercise in futility

because after looking at the ballot papers he could not give his verdict one way or the other, in view of the judgment in *Ponnuswami's case* (1). At that stage he had to confine himself to the allegations made in the application for inspection and could not make any further inquiry into the matter. He could only make up his mind on the nature, substance and quality of the allegations and pass his order on the basis thereof. The reason for allowing inspection had perforce to refer to the seriousness or otherwise of the allegations made and that is exactly the reason stated in the order of the Election Commission. One fails to understand any other reason that the Election Commission could record in this case without expressing his opinion as to the correctness or otherwise of the allegations made. The order clearly indicates that he applied his mind to the facts of the case and the order passed was not made arbitrarily without there being any material on the record in support of it.

(107) The learned counsel further submits that it was necessary for the Election Commission to pass a self-contained order to enable the petitioner to file an appeal in the Supreme Court under Article 136 of the Constitution or a writ petition in this Court challenging that order under Article 226 of the Constitution as, unless the order is self-contained, he is handicapped in challenging the same. It is not for me to speculate how their Lordships of the Supreme Court will react to such an order if an application for special leave under Article 136 of the Constitution is filed, but as far as this Court is concerned, it is bound to call for the record of the case in order to issue the writ of *certiorari* which has been prayed for and can look into the record to determine whether there was material in support of the impugned order. As I have said above, the order that was originally impugned in this case was the order, dated March 16, 1971, and that order complies with the requirements of rule 93 in full. The learned counsel for respondent 3 brought to our notice two judgments of the Allahabad High Court which have been referred to in the order, dated March 16, 1971, set out above. In both these cases, the impugned order was like the order, dated March 16, 1971, in this case and the preamble of those orders was in identical terms except for the name of constituency. One of those orders is, therefore, set out below:—

> "And whereas the applicant has stated that he intends to file an election petition against the election of the elected candidate from the said Bidhuna Assembly Constituency ;
>
> And whereas the margin of difference of votes between the returned candidate and the candidate who has secured next

largest number of votes in the said constituency is very small and without inspection of the ballot papers a proper petition cannot be filed."

These orders were held to be in accord with the provisions of rule 93 and hence valid. These judgments support the view taken by me above on various points.

(108) It may not be out of place to mention here that there Lordships of the Supreme Court have insisted in many cases that where *mala fides* are alleged against high officers of the Government, the writ petitions should not be dismissed *in limine*, but should be admitted and the matter should be probed into. Some writ petitions were dismissed by this Court *in limine* although they contained allegations of *mala fides* and in appeal under Article 136 of the Constitution, their Lordships remanded those cases to this Court for being admitted and decided on merits after hearing both the parties. on parity of reasoning, it is legitimate to hold that when allegations of partiality or mal-practices were made against the officers concerned with the election, who were all employees of the Punjab Government, and the name of the Chief Minister had also been involved, the Election Commission thought it proper to allow the inspection of the election papers in order to find out whether the allegations made by respondent 3 were correct or not in the interest of purity, fairness and impartial conduct of the elections for which he is solely responsible. The reason recorded by him is, no doubt, very brief and is pithily expressed, but in the context it speaks volumes. It cannot, therefore, be said that the said order does not contain any reason. This Court is not called upon to determine whether the reasons recorded by the Election Commission are adequate or not. It may be that they could be expressed in better language or in more details but on that ground the impugned order cannot be set aside unless it is found that there is no material to support it. I, therefore, hold that the orders of the Election Commission, dated March 15, 1971, and March 16, 1971; cannot be quashed on the ground that they do not contain reasons.

(109) It was held by their Lordships of the Supreme Court in *G. Veerappa Pillai* v. *Raman and Raman Ltd.* (50), with reference to the writs under Article 226 of the Constitution that—

"Such writs as are referred to in Article 226 are obviously intended to enable the High Court to issue them in grave

(50) A.I.R. 1952 S.C. 192.

cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, *and such act, omission, error or excess has resulted in manifest injustice.* However, extensive the jurisdiction may be, it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decisions impugned and decide what is the proper view to be taken or the order to be made."

(Emphasis mine).

As far as I know, these observations have been reiterated by their Lordships in various judgments rendered thereafter and have not been dissented from. There is no allegation in the writ petition that the petitioner has suffered any injustice much less a manifest injustice as a result of the impugned order. A paragraph to this effect is usually found in every writ petition, but it is significantly absent in the present writ petition so that even if the impugned order does not strictly or literally comply with the requirement of rule 93 as to the recording of reasons, the order cannot be set aside on that ground in the absence of the petitioner having suffered a manifest injustice as a result thereof. The Election Commission has the jurisdiction to allow inspection and, therefore, the impugned order cannot be said to have been passed either without jurisdiction or in excess of it. When we put this aspect to the learned counsel for the petitioner, he vehemently urged that manifest injustice has been done to the petitioner as his ballot papers will be looked into. It is a misnomer for the petitioner to call the votes polled in his favour as his ballot papers. No candidate can claim that the votes cast in his favour are his property and should not be looked into. The ballot papers and other election papers from the record of election conducted by the Election Commission and are in his custody through the officers nominated by him or stated in the Rules. It is the policy of the Act to maintain secrecy of the ballot as emphasised in sections 94 and 128, but no candidate or voter has the right to say that the ballot papers should not be looked into and if they are looked into, it will violate any right of his. Under rule 93, the ballot papers and other election papers cannot be inspected or produced before any person or authority without an order of the Election Commission or competent Court or Tribunal, which clearly

means that no person has the right to inspect those papers or to urge that they should not be inspected. This responsibility lies on the Election Commission or the competent Court or the Tribunal. While passing an order allowing inspection, the Election Commission, the competent Court or the Tribunal have to bear in mind the overall principle of maintenance of secrecy of the ballot and the inspection has to be allowed subject to that condition. It is further urged by the learned counsel for the petitioner that the inspection of the counted and rejected ballot papers and of the marked copy of the electoral roll has been allowed and if these papers are inspected together. the secrecy of the ballot will be violated. I regret, I cannot agree with that submission. The District Election Officer will not allow inspection of any of the election papers if the secrecy of the ballot cannot be maintained. An express direction in this behalf is contained in the order, dated March 16, 1971, communicated to the District Election Officer. It was demonstrated in Court that the secrecy could be maintained if the ballot papers were allowed to be inspected. According to the order, a marked copy of the electoral roll is to be inspected after the ballot papers have been inspected and sealed, so that there is no simultaneous inspection of the ballot papers as well as the marked copy of the electoral roll. While allowing the inspections of the ballot papers, the District Election Officer can show the number of the ballot papers and the endorsement of the Presiding Officer on its back without showing the mark which has been put in favour of any candidate on the ballot paper. It will thus not be divulged in whose favour the particular vote was cast. Similarly, in the marked copy of the electoral roll, after concealing every thing else, the number of the ballot paper issued to an elector can be shown without disclosing to whom it was issued. The serial number and the name of the voter can be concealed and the number of the ballot paper issued alone can be shown. The allegation of respondent 3 is that about 15,000 ballot papers were not issued to the voters, but have been polled by some Akalis after marking them. In order to verify the correctness of that allegation what is necessary to be shown from the marked copy of the electoral roll is that the ballot papers found in the ballot boxes were in fact issued to the electors and that can be done by allowing inspection in the manner just stated. No successful candidate has the right to maintain that the ballot papers cast in his favour should not be inspected even if they were invalid or void and had been wrongly accepted because he has no right to maintain that he is entitled to remain elected even if the election had not been fairly conducted. An

order allowing inspection. therefore, *proprio vigore* does not in any way injure any rights or interests of the returned candidate having regard to the fair and impartial conduct of the elections. Apart from the arguments referred to above, the learned counsel for the petitioner has not been able to show what legal right of the petitioner has ben violated by the impugned order. I am, therefore, of the opinion that the petitioner is not entitled to the relief prayed for by him even if on some technical grounds it may be said that the impugned order does not strictly comply with the provisions of rule 93. I am, however, of the opinion that the impugned order satisfies all the requirements of rule 93 and is, therefore, valid.

(110) For the reasons given above, this petition is dismissed, but without any order as to costs in view of the complexity and difficult nature of the questions of law involved in the case which necessitated lengthy arguments on both sides.

P. C. PANDIT, J.

(111) I have gone through the two judgments prepared by Narula J., and Tuli J., I fully agree with Tuli J., that the writ petition should be dismissed, but with no order as to costs. However, I wish to add a few words on the two main points, on which considerable arguments were addressed to us.

(112) The first point is whether the order of the Election Commission is an administrative or quasi-judicial one. The order for inspection or production of election papers mentioned in Rule 93 of the Conduct of Elections Rules, 1961, passed by the Election Commission does not determine the rights of any party, because neither anyone has the right to claim inspection or production of these papers and nor do the said papers belong to any person. The Commission has no authority to pronounce on the validity or otherwise of the ballot papers. All that he can do is to permit the respondent to have a look and inspect them. By Article 324 of the Constitution, the Election Commission has been constituted the sole authority to conduct all elections to Parliament and he is to see that they are held in a fair and impartial manner. If a complaint is made to him that mal-practices were committed during the polling or counting of votes which would be evident from the inspection of ballot papers, both used and unused, and the marked copy of the electoral roll, it is he who has to decide whether inspection should be allowed or not. No duty has been cast on him to issue notice to any party or

hear any person before coming to his decision. No enquiry as such is also prescribed by Rule 93. His order at that stage can well be compared to the sanction that has to be accorded by the appropriate Government under section 197 or 197-A of the Code of Criminal Procedure or section 6 of the Prevention of Corruption Act and no one has yet suggested that the order sanctioning prosecution of the delinquent public servant or Indian Ruler is a quasi-judicial one which must be passed after notice to the person against whom prosecution is proposed to be launched. The mere requirement as to recording of reasons does not lead to the conclusion that the order to be made by the Election Commission allowing inspection of the election papers is a quasi-judicial one and must be passed after following the rules of natural justice or a procedure usually required to make a quasi-judicial order. Moreover, when there is the question of only *prima facie* satisfaction of the Election Commission, his order cannot be termed quasi-judicial. The order being not quasi-judicial, there is no requirement of any notice. I am of the view that the Commission is not under any duty to issue notice to the returned candidate or other candidates with a view to affording them an opportunity of showing cause against allowing inspection.

(113) The matter can be considered in another way. It is agreed that the inspection of the election papers can be allowed by the Election Commission for the purposes of investigation or trial of election offences. Can it be said that before allowing inspection to an Investigating Officer, the Commission should issue notice or hear the offender, or that the said order allowing inspection will be a quasi-judicial one ? How can it then be termed differently, because the object of the inspection is to gather material for an election petition? It is no function of the Election Commission to settle the parties' disputes. As the Commission does not decide any point in issue between the parties, no notice is necessary to the returned candidate. I am, therefore, of the view that the order allowing inspection passed by the Election Commission is of an administrative character and it is not a quasi-judicial one and no notice need be given to the returned candidate or any other candidate before passing it. The standards applicable to a quasi-judicial Tribunal are not applicable to the Commission, when he passes an order under Rule 93. Just as the order sanctioning prosecution can be challenged in appropriate proceedings, similarly the order allowing inspection may also be challenged. But that, however, does not mean that the returned candidate can claim the right of a hearing before the

order is made or that the order becomes illegal or vitiated because opportunity of hearing was not afforded to him.

(114) On the point of notice or opportunity of hearing, there is another consideration as well which militates against it. In election to the Lok Sabha and the Vidhan Sabhas of the various State Legislatures, it can reasonably be expected that applications for inspection will be received from a fairly large number of defeated candidates and if those applications were to be decided after notice to the other candidates as suggested, it would take a very long time and might even frustrate the object of inspection. If the newspaper reports are to be believed, then in the mid-term poll held this year, a large number of applications for inspection were in fact received and all of them were disposed of without notice to any other person. It is not the case of the petitioner that notice was issued in some cases, while it was not so done in others. The Election Commission followed a uniform procedure of not sending a notice or affording an opportunity of hearig to any other candidate.

(115) The other question is whether the order of the Election Commission in the instant case contains reasons and thus satisfies the mandatory requirements of proviso (a) to Rule 93(3). Since the order is an administrative one, it need not state the material on the consideration of which it has been passed. For this purpose the record can be seen as was done by a Bench of five Judges of this Court in *The State of Punjab* v. *Bhagat Ram Patanga* (49), in order to find out whether there has been a proper application of mind by the Commission and that the order has not been passed arbitrarily. The requirement of recording reasons has been prescribed presumably to rule out arbitrary exercise of power vested in the Election Commission. Reading the order in the light and background of the allegations made in the application or inspection, it is quite evident that the Commission did apply his mind and did not find the allegations to be false or frivolous and, therefore, decided to allow inspection. He, it appears, purposely used guarded language. because he was neither called upon nor authorised to decide whether the allegations made were true or false. The order of the Returning Officer disallowing recount was specifically mentioned by the applicant in his application for inspection and *mala fides* were alleged by the latter against the former. The later addition to the order also

indicates that the report of the Observer had also been brought to his notice and on the basis of which he changed the order with regard to the officer, who was to be present at the inspection. The order of the Election Commission has undoubtedly to be interpreted along with the application on the basis of which the same was made. In the present case there was enough material before him at the time when the impugned order was passed. Even the report of the Observer in a way supported the allegations of respondent No. 3 that there were some spurious votes in the bundle of 50 ballot papers checked by the former on the last day of counting, because he said that *there were* one or two such votes in one bundle. All the telegrams and representations sent by respondent No. 3, before the application, on which the order in dispute was passed, were before the Commission. Reading all the documents together, there was ample material to justify the order of inspection. The reason stated in the order of the Election Commission, in my opinion, fully complies with the requirements of the abovementioned proviso and the order cannot be held to be illegal or without jurisdiction on the ground that it does not record reasons. What else could the Commission say? When he had not to decide whether the allegations made by respondent No. 3 were true or not, there was no point in his instituting an enquiry and taking evidence regarding them.

(116) The Central Government did not mention any purpose for making the amendment in Rule 93 by which the Election Commission was empowered to allow inspection. The object seems to avoid frivolous election petitions and allow only a serious election petitioner to gather material for filing the election petition and thus save time and expense. The Commission has the authority to order inspection in the interest of purity of election. If on the facts placed before him, he is satisfied that such inspection is necessary to enable the applicant to agitate serious matters concerning the purity of elections before a competent Court or to further the ends of justice, he has the power to do so. All that is needed is that his order should not be arbitrary or based on irrelevant considerations. Such is not the position in the instant case.

(117) In a matter like the present one, I am of the view that this Court should not exercise its discretion under Article 226 of the Constitution and thereby prevent the impurity of election from being brought to light. I am further of the view that even if this Court decides to quash the impugned order, it should either issue

a mandamus to the Election Commission to supply reasons or leave it open to him to pass a fresh order which may be supported by reasons.

GURDEV SINGH, J.

(118) I have carefully gone through the opinions recorded above by my learned brothers, but regret my inability to concur with P. C. Pandit and B. R. Tuli JJ. in the dismissal of the petition. On the contrary, I agree with Narula J. with, whom Mahajan J., has concurred, that the impugned order of the Election Commission of India does not contain reasons therefor and thus being in contravention of the mandatory requirement of proviso (a) to rule 93 of the Conduct of Election Rules, 1961, is patently illegal and must be quashed. In fact, I am further of the opinion that the Commission exceeded its jurisdiction in allowing inspection of the ballot papers and marked copy of the electoral rolls "to enable Shri Iqbal Singh to seek his legal remedy in a proper Court by an election petition", the purpose stated in the formal order, dated 16th March, 1971 (annexure D to the petition) on which considerable reliance has been placed by the respondent's learned counsel in support of his contention that the order has been made for valid and adequate reasons. In this connection, I would like to say a few words with regard to the scope and extent of the powers vesting in the Election Commission under the relevant provision.

(119) Under rule 93, as it stands today, the power to order the opening, inspection and production of packets of ballot papers and marked copy of the electoral rolls and other documents specified in clauses (a) to (d) of its sub-rule (1) has been conferred not only on the Election Commission, but on a competent Court and Tribunal as well. As originally framed, this power to allow inspection of ballot papers etc., vested only in a competent Court or Tribunal. The expression "a competent Court or Tribunal" is not confined to an Election Tribunal or Court trying an election petition, but includes even Courts trying an election offence. Under the Representation of People Act, 1951, as originally enacted, an election petition was to be tried by an Election Tribunal. The scope and extent of the powers enjoyed by an Election Tribunal (now by the High Court) to allow inspection while trying an election petition, have been considered by their Lordships of the Supreme Court in several cases. In first of

these cases, *Ram Sewak Yadav* v. *Hussain Kamil Kidwai and others* (4), it was observed as follows:—

> "An order for inspection may not be granted as a matter of course: having regard to the insistence upon the secrecy of the ballot papers, the Court would be justified in granting an order for inspection provided two conditions are fulfilled:
>
> (i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and
>
> (ii) the Tribunal is *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary.
>
> But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts. *To establish a case so pleaded* an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection."

In taking this view their Lordships referred to the various opportunities at every stage that a candidate or his agent has, in the process of scrutiny and counting of votes, to know what has been happening. The same rule was reiterated recently in *Jitendra Bahadur Singh* v. *Krishan Behari and others* (5), in which it was emphasised that the Tribunal must *prima facie* be satisfied that in order to decide the election dispute and to do complete justice between the parties, inspection of the ballot papers is necessary. Thus, so far as a Tribunal or Court trying an election petition is concerned, it stands authoritatively settled that it cannot allow inspection to fish out evidence or with a view to add to the material facts which an election petition is required to contain under section 83 of the Act.

(120) It is true that the situations in which the Election Commission, a Court of Tribunal may be called upon to deal with

the question of inspection will be different, and thus the scope of their authority to allow inspection and the purposes for which such an order can be made by these authorities may not be identical, but from this we cannot jump to the conclusion that since the Election Commission may be called upon to deal with the question of inspection of ballot papers, etc., when no election petition has been instituted or is pending, its powers are wider than those of a Court or Tribunal and it can allow inspection for collecting material and fishing out evidence for an election petition, the purpose from which, as settled by the Supreme Court, a Court or Tribunal dealing with an election petition cannot allow inspection.

(121) It has been argued on behalf of the respondent that this restriction on the power of a Court dealing with an election petition is engrafted in view of the requirement of section 83 of the Representation of People Act, that an election petition must contain a concise statement of material facts, and if material facts are not set out the Court will not permit inspection with a view to add to them to make them precise, whereas before an election petition is filed the Election Commission by allowing inspection would be merely affording an opportunity to the petitioner to collect the material facts for the purpose of incorporating the same in his election petition. This argument, in my opinion, is not tenable. If a person, who wishes to challenge an election is entitled under rule 93 to collect material for his election petition by inspecting the ballot papers, marked copy of electoral rolls, etc., I fail to see why such an inspection should not be allowed to him when the Election Court finds that the material facts given by him in his election petition are either not precise or insufficient. Should an election-petitioner suffer and he be denied an opportunity to gather on inspection the necessary material for the purpose of his election petition merely because before knocking the door of the election Court he had omitted to approach the Election Commission for inspection of the ballot papers, etc.? If he had the right to inspect the ballot papers, etc., for the purpose of collecting material for an election petition, surely that right cannot be defeated or lost on the making of the petition. On Principle it will be unreasonable to deny an election petitioner an opportunity to inspect the relevant ballot papers, etc., during the pendency of the election petition if he had such a right prior to the institution of the proceedings.

(122) It has been argued that the power to allow inspection to enable a person to collect material for an election petition is not something new but has been known to law for long. Reference in this connection is made to the provisions of the English law contained in rule 40 occurring in the First Schedule to the Ballot Act 1872, and rule 57 of the Parliamentary Election Rules contained in the Second Schedule of the Representation of People Act, 1948. Under the former inspection or production of ballot papers could be allowed if it was required "for the purpose of instituting or maintaining a prosecution for an offence in relation to ballot papers or for the purpose of petition questioning an election or return." Under rule 57 of the Parliamentary Election Rules, which has been reproduced *in extenso* by my learned brother Tuli J., the High Court or a County Court is authorized to allow inspection "if satisfied by evidence on oath that the order is required for the purpose of instituting or maintaining a prosecution for an offence in relation to ballot papers or for the purpose of an election petition."

(123) These provisions of the English Law, in my opinion, far from advancing the argument raised on behalf of the respondent, go against it. It is apparent that as far back as the year 1875 in English law provision was made for allowing inspection for the purpose of an election petition, and since then this power has continued to vest in the High Court and County Courts. Despite this, when the Representation of People Act was enacted by our Parliament in 1951 and Rules under it were framed, no such specific provision was made for allowing inspection of ballot papers, etc., for the purpose of an election petition, and rule 93 simply empowered a competent Court or Tribunal to allow inspection without indicating the purpose for which the inspection was to be allowed. The argument that the purpose for which this power could be exercised was deliberately not mentioned in this provision so as to make it of wide amplitude and to confer power more extensive than that enjoyed by a High Court or County Court under the English Law, is not tenable. If rule 93 was intended to confer powers wider than those of the High Court or County Courts in English, surely the Supreme Court, while dealing with such powers vesting in the Election Tribunal, would not have whittled them down and held that inspection could not be allowed by an Election Tribunal to fish out evidence.

(124) Secrecy of voting is enjoined by the Statute itself. Section 128 of the Representation of People Act, 1951, makes it obligatory on

the pain of punishment for every officer, clerk, agent or other person who performs any duty in connection with the recording or counting of votes at an election, to maintain secrecy of voting and prohibits communication to any person of any information which violates such secrecy except for the purposes authorized by or under any law. Rule 93, which provides for production and inspection of certain election papers, itself lays down that the packets of used and unused ballot papers, marked copy of electoral rolls and packets of the declaration by electors shall not be opened and their contents inspected or produced before any person or authority except under the orders of the Election Commission or a competent Court or Tribunal. Since the authority to allow opening, inspection and production of ballot papers, etc., is conferred on the Election Commission, a competent Court and Tribunal by the same provision without specifying the stage and the manner in which these authorities have to exercise that power, in accordance with the rule of interpretation stated at page 161 of Craise on Statute Law (5th edition), the scope of the powers enjoyed by these authorities must be taken to be identical. It is true that the proceedings of the circumstances in which these three authorities may be called upon to permit inspection or production of ballot papers, etc., would be different, but that would not justify the assumption that the power of the Election Commission to allow production and inspection of documents, etc., is wider than that vesting in a competent Court or Tribunal. In my opinion, the correct interpretation of rule 93(1) is that the principle and the purposes for which these three authorities named in this rule, viz., Election Commission, Court or Tribunal, are to exercise their power to allow inspection and production of ballot papers, etc., would depend upon the nature of the proceedings in which they are approached to make such an order. It has not been contended before us by learned counsel for any of the parties that a Court or Tribunal is competent to allow inspection of ballot papers. etc., when no proceeding arising out of an election is pending before it, and learned counsel for both the sides agreed that it is only when some matter in connection with the election comes up before a Court or Tribunal that such an authority will be competent to exercise its power of production and inspection of ballot papers, etc., under rule 93(1). If that is so, it is unreasonable to contend that the Election Commission can exercise its power to order production and inspection of ballot papers, etc., when no proceeding in which scrutiny of such papers is necessary is pending before it and at any time whether it is before the election petition is instituted or after it has been disposed of. I see no escape from the conclusion that

since it is by the same provision that the Election Commission, Tribunal and Courts are empowered to allow opening production and inspection of ballot papers, and such power cannot be exercised by Tribunal or Court when no proceedings are pending before them, the Election Commission has no wider power to allow inspection at any time it likes, but it can do so only when some proceeding is pending before it and in relation to it.

(125) In dealing with this matter, it is important to keep in mind that originally the power to allow inspection and production of ballot papers, etc., vested only in a competent Court or Tribunal, and it was only by an amendment effected on 31st March, 1962; that the "Election Commission" was added in rule 93 so as to confer on it the same powers of inspection, etc. Since the amendment was made by a Statutory order, it is not possible to ascertain what necessitated this amendment or conferment of power of inspection, etc., on the Election Commission. It may, however, be pointed out that at the time this amendment was effected in March 1962; election petitions were required to be instituted before the Election Commission, who had the power *inter alia* to reject the same in certain circumstances. At that time the election petitions were triable by Election Tribunals and by the very nature of things some time had to elapse before election petitions presented to the Election Commission could be taken up for trial by such Tribunals. Since the Election Tribunals could entertain application for inspection and production of ballot papers, etc., only after the election petitions reached them, no order of inspection could be obtained for inspection or production of ballot papers before the election petition actually reached the Tribunal. It appears to me that it was to provide for this interregnum between the presentation of the election petition to the Election Commission and its cognizance by the Election Tribunal that the amendment of the rule 93 by adding "Election Commission" to the authorities competent to allow inspection etc., was made. It was later in December, 1966, that Representation of People Act, 1951, was amended and a provision was made in section 80 of the Act that the election petitions shall be tried by the High Court and under section 81 petitions calling in question any election shall be presented directly to the High Court and not to the Election Commission.

(126) It was in the year 1964, that the Supreme Court was called upon to deal with the scope and the extent of the powers of

inspection and production of documents contained in rule 93 of the Representation of People Act in *Ram Sewak Yadav* v. *Hussain Kamil Kidwai and others* (4), and *Jabar Singh* v. *Genda Lal* (3). It is true that in both these cases the question that arose related to the powers of the Election Tribunal conducting the trial of an election petition to order the production of the ballot papers, etc., yet their Lordships interpreted the rule 93(1), under which on that day Election Commission also enjoyed the same power, and laid down that inspection cannot be allowed for the purpose of fishing out evidence or making a roving enquiry.

(127) Though the nature of the proceedings in which a Court, Tribunal or Election Commission may be approached to allow inspection or production of documents, etc., would be different, this basic rule laid down by their Lordships of the Supreme Court that inspection was not to be allowed for fishing out evidence or making a roving enquiry for the purpose of an election petition has to be observed by all the three authorities, namely, the Election Commission, the Court and the Tribunal, while dealing with a petition for inspection of ballot papers, etc. Unless this rule is observed, the mischief which follows on ordering a roving enquiry or fishing out evidence would be done. On giving my earnest and careful consideration to the matter, I find—

(1) that an order of inspection and production of documents can be made only if a proceeding arising out of an election or relating to it is pending before the authority concerned, and

(2) that the rule laid down by their Lordships of the Supreme Court in *Ram Sewak Yadav's case* (4), that inspection is not to be allowed for fishing out evidence and making roving enquiry is to be observed not only by the Court dealing with an election petition, but by other Courts, Tribunal or Election Commission dealing with any matter arising out of election, such as an election offence and disqualification. ... ...

(128) In fact, I find no support for the contention raised on behalf of the contesting respondent Shri Iqbal Singh, that inspection of ballot papers, etc., with a view to collect evidence and material for making an election petition has been known to the election law

for long, and unless there was any prohibition against adoption of such a course, the right of an aggrieved person to challenge the election of a successful candidate after inspection of ballot papers should not be interfered with. No authority, except the two unreported Single Bench decisions of Allahabad High Court could be cited in support of this proposition, but reliance has been placed on the English Law of Election as contained in rule 40 framed under the Ballot Act, 1875, and rule 57 under the Representation of People Act, 1948, a reference to which has been made earlier. On careful perusal of these provisions, I, however, find that the language of these rules does not support the contention that inspection of ballot papers can be allowed to collect material for instituting an election petition. So far as this matter is concerned, the purpose for which inspection and production of ballot papers can be allowed is the same in both these rules, and it will suffice to refer to rule 57 of the Parliamentary Election Rules contained in Second Schedule to the Representation of People Act, 1948. The relevant part of this rule provides that an order of inspection may be made by the High Court or a competent Court.

> "If it is satisfied by evidence on oath that the order is required or the purpose of instituting or maintaining a prosecution for an offence in relation to ballot papers, or for the purpose of an election petition."

(129) The argument that inspection under this provision of English Law can be ordered by the High Court or a County Court for the purpose of collecting material for making an election petition, proceeds on the use of the expression "for the purpose of election petition" which occurs in this rule. The fallacy in this argument at once becomes obvious when we read what precedes it. According to this provision, inspection can be ordered by the High Court or a County Court only for two purposes, which are stated to be :

(i) for the purpose of instituting or maintaining a prosecution in relation to ballot papers, and

(ii) for the purpose of an election petition.

(130) The two expressions used in describing the purposes for which inspection can be allowed by the High Court or a County Court are not only not identical but quite different. According to

its express language, so far as an offence in relation to ballot papers is concerned, inspection can be allowed not only to furnish evidence of the offence, but for the purpose of instituting and maintaining the prosecution, but while dealing with the petition to allow inspection in connection with an election petition, the words "for the purpose of instituting and maintaining" are not used, and instead the expression "for the purpose of election petition" is used. The use of these two different expressions in the same provision clearly indicates that the scope of the power to allow inspection in connection with the prosecution of an offence is not the same as the power to allow inspection in connection with an election petition. Had it been intended that inspection of ballot papers be allowed to collect material for instituting an election petition and its subsequent use in trial of the election petition, the words "for the purpose of election petition" would not have been there, and it would have sufficed to add "or an election petition" after the expression "in relation to ballot papers". In that case the relevant part of rule 57 would have read as under:—

> "If satisfied by evidence on oath that the order is reacquired for the purpose of instituting or maintaining an election petition or a prosecution for an offence in relation to ballot papers, by the High Court or the County Court."

(131) It thus follows that the expression "for the purpose of election petition" cannot be read to mean the same thing as "for the purpose of instituting or maintaining an election petition." The correct interpretation, in my opinion, of this rule is that if inspection is required in connection with an offence committed in relation to ballot papers, it can be allowed to enable to the party concerned not only for maintaining the prosecution, but for instituting it as well, but so far as an election petition is concered, it is to be allowed by the High Court or the County Court only when the election petition is pending and the allegations contained therein require the production or inspection of ballot papers, counterfoils, etc., so as to dispose of the matters arising in the election petition. No authority on this provision of law has been cited before us in which inspection for the purpose of collecting material to institute an election petition may have been allowed. Notwithstanding the respect in which I hold my learned brothers R. S. Narula and B. R. Tuli, JJ., I do not find it possible to agree with them that under rule 93 of the

Representation of People Act, 1951, Election Commission can allow inspection of ballot papers, etc., to enable a person to collect material for instituting an election petition. As I read the provision in the light of the relevant decision of their Lordships of the Supreme Court, to which reference has been made earlier, neither a competent Court or Tribunal nor the Election Commission has the authority to allow inspection merely to enable a person to collect material for an election petition, but on the other hand, inspection is to be allowed only for the purpose of proving or disproving the material facts that had already been set out in the pleadings and to the extent to which ballot papers, etc., metioned in clauses (a) to (d) of rule 93(1) are relevant to the proceedings pending before the authority concerned.

(132) The same conclusion is reached if we examine the matter from another angle. The interpretation with regard to the scope of the power of inspection and production of ballot papers, etc., under rule 93(1) was considered and laid down by their Lordships of the Supreme Court as far back as the year 1964. About two years later, the original rule which gave such power only to competent Courts and Tribunals had been amended, and the Election Commission was included in that provision thus conferring upon him the same authority as enjoyed by Competent Court and Tribunal. Despite the wide language that has been used in the relevant provision, the Supreme Court, while dealing with the powers of election Tribunal had held that it had to be exercised within narrow limits. Despite this restricted interpretation, no attempt has been made during all these years to amend rule 93 with a view to make it clear and place it beyond the pale of controversy that the power vesting in the Election Commission is unrestricted and wider than that of the Court and the Tribunal, nor to enable High Court to exercise that power to allow inspection even before it is seized of the election petition. From this it can be validly inferred that the interpretation placed by their Lordships of the Supreme Court on this rule is in accord with the intention with which this rule was framed.

(133) Had it been intended to authorize the Election Commission to allow inspection to enable a person to collect material for an election petition, one fails to see why the Court or Tribunal dealing with an election petition would be debarred from granting inspection to enable an election-petitioner to collect further particulars

which despite his best efforts he could not obtain by the time he instituted the election petition.

(134) The election law as noticed earlier was amended in the year 1966, but still no effort was made to amend rule 93 so as to confer on an election Court the power to allow inspection for the purpose of obtaining further material to question the election of a successful candidate and thereby enable him to take additional grounds in support of his petition.

(135) In ruling that inspection cannot be allowed by an Election Tribunal to fish out evidence, Shah J., (as he then was) after examining the process of election in *Ram Sewak Yadav's case* (4), (supra) observed as follows :—

> "There can, therefore, be no doubt that at every stage in the process of scrutiny and counting of votes the candidate or his agents have an opportunity of remaining present at the counting of votes, watching the proceedings of the returning officer, inspecting any rejected votes, and to demand a recount. Therefore, a candidate, who seeks to challenge an election on the ground that there has been improper reception, refusal or rejection of votes at the time of counting, has ample opportunity of acquainting himself with the manner in which the ballot boxes were scrutinized and opened, and the votes were counted. He has also opportunity of inspecting rejected ballot papers, and of demanding a recount. It is in the light of the provisions of section 83(1) which requires a concise statement of material facts on which the petitioner relies and to the opportunity which a defeated candidate had at the time of counting, of watching and of claiming a re-count that the application for inspection must be considered."

(136) Again, in *Dr. Jagjit Singh* v. *Giani Kartar Singh and others* (44), their Lordships emphasized that in the course of the election, candidates have ample opportunity to examine the voting papers and to know what had actually happened at the polling, and said:—

> "The election petitioner, who is a defeated candidate, has ample opportunity to examine the voting papers before they are counted, and in case the objections raised by him or his election agent have been improperly overruled, he knows

precisely the nature of the objections raised by him and the voting papers to which these objections related."

(137) These observations are fully applicable even to an application for inspection made to the Election Commission, and on the same reasoning the prayer of the respondent, Shri Iqbal Singh, for inspection of ballot papers and marked copy of electoral rolls should not have been granted.

(138) In the course of arguments, respondent's learned counsel, Mr. G. L. Sanghi, relied upon two unreported Single Bench decisions of the Allahabad High Court in *Shri S. C. Dutta* v. *Shri Krishna Rajpal and others* (48), and in *Raghubir Singh Yadava* v. *Gajendra Singh and others* (7), wherein the authority of the Election Commission to allow inspection of ballot papers for the purpose of collecting material for an election petition has been upheld. In both these cases, this question came up for consideration when the learned Judges were trying the election petitions and an objection had been taken that the material collected by the petitioners on inspection of ballot papers, etc., under rule 93 prior to the institution of the election petition could not be used as the Election Commission was not competent to allow inspection for such a purpose and his order was bad. In *S. C. Dutta's case* (48), W. Broome J., while holding that the Election Commission had jurisdiction to allow inspection and his order was valid, did not go into the question that the material so collected on inspection could be incorporated in the election petition. In the other case (*Raghubir Singh Yadava's case* (47), B. N. Lokur J., summed up his conclusions on a preliminary issue regarding inspection raised before him in these words:—

"The permission to be given by the Election Commission for inspection of the ballot papers is discretionary and the order granting permission is exective in nature, nevertheless the order can be challenged on the ground that the express provisions of rule 93 are not complied with. In the present case, the inspection given to the petitioner is perfectly legal and valid. The information collected as a result of the inspection granted by the Election Commission under rule 93 can be utilized in an election petition challenging the election, irrespective of the question whether the inspection granted by the Election Commission was legal or illegal."

(139) The opinion expressed by the two learned Judges of the Allahabad High Court regarding the powers of the Election Commission under rule 93 to allow inspection certainly supports the respondent's plea that the Election Commission is competent to permit inspection to collect material for an election petition, but it must be remembered that this question came up before their Lordships while trying election petitions. Since no appeal is provided against an order of the Election Commission allowing or disallowing an application for inspetion under rule 93, with respect to the learned Judges concerned, I doubt very much if they were competent to go into the validity or otherwise of the order of the Election Commission made under rule 93. Moreover, the order had already been carried out, and there was nothing which the Court trying the election petition could do about it. The validity of an order made by the Election Commission under rule 93 could only be gone into had the jurisdiction of the High Court under Article 226 of the Constitution been invoked. In any case, for the reasons recorded by me earlier, I respectfully disagree with the view taken by them.

(140) Rule 93 does not specify the time or the stage at which inspection is to be allowed by the various authorities mentioned therein or the purpose for which such an order can be made. Once it is held that under this rule inspection can be allowed to enable a party to collect material for an election petition, it will follow that not only the Election Commission, but a Court that has jurisdiction to try such an election petition will also have the authority to allow such an inspection. This is, however, clearly untenable in view of the dictum of their Lordships of the Supreme Court in *Ram Sewak Yadav's case* (4), that under rule 93 an Election Tribunal cannot allow inspection to enable a party to fish out evidence.

(141) Let us examine the question from another angle. A defeated candidate wishes to file an election petition and applies to the Election Commission for inspection of ballot papers under rule 93. Permission is not granted to him and thus forced to rely only upon the information that is already in his possession, he institutes an election petition. When the High Court is seized of the election petition, the returned candidate applies to it for inspection of ballot papers to enable him to put up proper defence and together material for a notice of recrimination, which under sub-section (2) of section 97 has to be accompanied by the statement and particulars required by

section 83 of the Representation of People Act in the case of an election petiton. In view of the dictum of their Lordships of the Supreme Court in *Ram Sewak Yadav's case* (4), (supra), that inspection under rule 93 cannot be allowed for fishing out material, it is obvious that the High Court as a Court dealing with an election petition will not be competent to grant such an application for inspection. If the contention that the Election Commission has wider powers and is competent to allow inspection even together material for an election petition is accepted, then even after the rejection of his application for inspection by the High Court, the respondent-returned candidate, whose application for inspection has been delined by the Court will be entitled to approach the Election Commission and obtain inspection thereby stultifying the reasoning on which the powers of the Court have been held to be circumscribed. It will create an anomalous situation if the person wishing to institute an election petition is permitted to inspect the ballot papers to collect material for that purpose, whereas the application of a successful candidate for inspection is rejected by the Court and *vice versa.*

(142) As a result of the foregoing discussion, I find that the scope of the powers of the Election Commission to allow inspection under rule 93 is not wider than that of a competent Court or Tribunal under the same provision, and the Election Commission cannot allow inspection to fish out evidence and to collect material for an election petition. It has been argued that no elected candidate has a right to retain his seat if he has been returned on invalid votes or by resort to corrupt practices. It is no doubt true that the success of democracy would always depend on the purity of the procedure for election and integrity of the election machinery, but according to law as it stands today, a returned candidate has the right to retain his seat, and he cannot be prevented from enjoying all the benefits and privileges attaching to the membership of the legislature to which he has been elected, so long as no election petition calling his election to question is made and his election is not set aside by competent Court. However, undesirable be the means that a returned candidate may have applied to secure his success, he will retain his seat and nobody can dislodge him if no petition questioning his election in accordance with law is made.

(143) It was not seriously challenged before us that the direction contained in proviso (a) to rule 93 is mandatory and the

Election Commission has to record reasons if he allows an application for inspection. Since the inspection was allowed by the Election Commission, it is to the order recorded by him on 15th March, 1971, that we must turn to find out if the inspection has been allowed for valid reasons. His order has been reproduced *in extenso* by my learned brothers, and on its perusal there can be no escape from the conclusion that it does not disclose any reason for granting the inspection. It is on the opening sentence of this order that the respondent's learned counsel has solely relied as containing the statement of reasons for the order. It reads:—

> "The allegations made in the application made by S. Iqbal Singh, if true, are no doubt serious. I think an inspection of the documents mentioned in sub-rule (1) of rule 93 of the Conduct of Election Rules, 1961, may be allowed."

(144) I have no hesitation in agreeing with my learned brother, R. S. Narula, J., that the averment that the allegations made by S. Iqbal Singh are serious is merely a statement of fact and not a reason in support of the order allowing inspection, especially when the use of the expression "if true" in the opening sentence of the order clearly indicates that the Election Commission had not applied his mind even to find out if they were *prima facie* correct or false. Apart from it the gravity of the allegations by itself does not constitute a relevant reason for allowing inspection. Otherwise all that a person seeking permission to inspect ballot papers, etc., has to do is to merely make reckless allegations especially when he knows, as was contended on behalf of the contesting respondent, that the falsity or otherwise of the allegations is not to be gone into by the Election Commission. Since the proviso (a) to sub-rule (1) of rule 93 requires the Election Commission to record reasons if he grants a prayer for inspection, and it is well-settled that inspection is not to be allowed as a matter of course or in routine, it follows that the Election Commission has to apply his mind to the allegations made by the applicant and at least to satisfy himself that *prima facie* there is substance in them. Though I agree with the respondent's learned counsel that for that purpose it is not necessary for him to embark upon an elaborate enquiry, yet for proper discharge of the function entrusted to him and in view of the policy of the the law enjoining utmost secrecy of voting, the Election Commission is expected to take steps to satisfy himself that the applicant has a *prima facie* case

before he grants his prayer for inspection. It is true that where allegations are made by a respectable and well-placed person, the authority concerned may in a particular situation consider his affidavit or statement on oath enough to hold that *prima facie* case has been made out, but where the party concerned has a paramount interest in the matter, the authority may hesitate to act upon his statement alone and seek assurance from some other material. In this case Shri R. D. Sharma, an official of the Election Commission itself, was present as an Observer at the counting of votes. The Joint Chief Electoral Officer was also present and the application for re-count had already been rejected by the returning Officer. The report of the Observer and the order of the Returning Officer rejecting the application made by Shri Iqbal Singh, for re-count could be adverted to by the Election Commission with advantage as none of these officers had any interest in the election of any particular candidate. The suggestion that since one of the candidates was the brother of the Chief Minister, Punjab, it could be presumed that the officials concerned with the election would be acting in his interest cannot be accepted. Apart from the fact that all official acts are presumed to have been performed in a regular manner unless there is indication to the contrary it must not be forgotten that both the parties locked in contest were highly influential: whereas on one side there was a brother of the Chief Minister of Punjab, on the other his nearest rival S. Iqbal Singh respondent held the important office of the Deputy Minister in the Union Government, and he was still holding the same not only on the day of the polling, but also when the application for inspection was made and for several days thereafter.

(145) My learned brother, Narula J., has taken the view that before granting the prayer for inspection it was necessary in law for the Election Commission to issue notice of the application and afford a hearing to the petitioner being the successful candidate. I however, regret my inability to entirely agree with him on this point. The Rule 93 does not enjoin upon the Election Commission to give notice of the application for inspection to the returned or any other candidate. Thus, there is no obligation as a matter of law to issue notice to the opposite party, but in accordance with the rule recently laid down by a Full Bench of this Court in, *The Regional Transport Authority* v. *Gurbachan Singh* (32), decided on 12th February, 1971, where there is time to issue such notice to interested

parties, especially the returned or defeated candidates, other than the applicant, the rules of natural justice required that such notice be issued and the party concerned heard before the order of inspection is made. This is all the more necessary in view of the fact that unlike the provision in the English Law no appeal against an order under rule 93, permitting inspection is provided, and once the order granting inspection is communicated to the officer concerned and he allows inspection, the opposing candidate, even though present at the time of the inspection, will have neither opportunity nor *locus standi to object,* with the result that the mischief that follows an illegal order of inspection would be done. Again, since the Election Commission is required to record reasons if he allows inspection, it will be conducive to proper exercise of such power if he gives a hearing to other candidates where there is time to inform them.

(146) The provision contained in proviso (b) to rule 93 for affording opportunity to the candidates to be present at the time of inspection is no substitute for notice as a candidate would have no time even to object to a patently illegal order at the time the inspection is commenced as the officer directed to allow inspection would in all probability refuse to stay inspection.

(147) In view of what I have said above, there can be no escape from the conclusion that the impugned order of the Election Commission must be quashed and the petition accepted. The suggestion that a mandamus may issue to the Election Commission to supply reasons leaving it open to him to pass a fresh order cannot be entertained, especially when an election petition has already been instituted and the Court is seized of the matter and has the authority to deal with the prayer for inspection of ballot-papers, etc.

ORDER OF THE COURT

(148) In view of the majority decision, this petition is allowed and the impugned order of the Election Commission is quashed with no order as to costs.

2944 ILR –Govt. Press, Chd.