

Before M.M. Kumar and A.N. Jindal, JJ.

RAVINDER KUMAR RAWAL,—Appellant

versus

V.K. SOOD AND OTHERS,—Respondents

LPA No. 68 of 2010 and

LPA No. 1617 of 2010

23rd May, 2011

Constitution of India, 1950—Art. 226—Haryana Municipal Election Rules, 1978—Rls. 71 and 76—Election to Municipal Council—Councillors elected—Election of President and Vice President of Council—Appellant declared elected as President having secured highest votes—Challenge thereto by respondent 1—RI. 71 of 1978 Rules requires to write ‘yes’ or ‘no’ ballot paper and Returning Officer requiring members to put a sign of ‘X’ on ballot papers—Whether violates RI. 71 of 1978 Rules and whether its violation materially affects result of election—Held, no—No prejudiced to any elector casting vote by marking of ‘X’—Respondent No. 1 accepting ballot paper, endorsing it for a particular candidate, accepting defeat without pointing out any breach of secrecy—No act of breach of secrecy proved—Appeals allowed, judgement of Single Judge as well as election petition set aside.

Held, that no election could be challenged on the ground of apprehended or anticipated breach of secrecy. No such act, of breach of secrecy has been pleaded or proved by evidence. If we go through the pleadings as set out by respondent No. 1 in his petition, there is nothing to disclose if at the time of preparation of the list, issuance of the ballots and polling of the votes, any ballot was leaked, which influenced, impressed, prejudiced to the elector to cast his vote in different manner than what he had thought. None of the electors has come forward to say that due to any such pressure on account of breach of secrecy, he had to change his mind or he was compelled by any of the candidates to cast his vote for a particular candidate. There are only vague pleadings that with the marking of the serial numbers, the electors would have felt that their ballot papers

were open to scrutiny and for the fear of reprisal, they may not have exercised their right to vote in a free and fair manner.

(Para 29)

Further held, that Sections 275 and 275 -A of the Act of 1973 refer to the maintenance of secrecy. Section 128 of the Act of 1951 and Rule 39 of the Rules of 1961 are para materia to the aforesaid provisions. In these Sections, it is specifically mentioned that while conducting election, no officials or employees engaged in election would reveal the secrecy of the ballot to anyone (except as required under the law) and if they willfully breach the secrecy, then it would be treated as an electoral offence punishable with fine or imprisonment under both the Acts. Secrecy of voting or secrecy of ballot means the fact to whom out of more than one contestant, an elector has cast his vote at a given election shall not be made known to the public. That is why Section 94 of the Act confers a privilege on a voter to refuse to testify to whom he has cast his ballot, and Section 128 prohibits the persons from making known any information calculated to violated such secrecy. Thus, on conspectus of the above discussion, it has become apparent that there was no breach of secrecy at any stage or time, which amounted to material irregularity materially affecting the election results. In any case, it is not the case of respondent No. 1 that printed serial number on the ballot paper or putting or said serial number on the separate sheet/register of voters constituted 'visible representation' by which the voter can be identified and, therefore, there was breach of secrecy warranting or justifying the setting aside of election.

(Para 31)

Further held, that in the absence of complete cause of action having been pleaded as to how the result of the election has been materially affected by not giving material facts in the election petition and that too by not stating who have voted for the petitioner as a result of this apprehended or anticipated breach of secrecy on the basis of which the election of the appellant was void, the election petition disclosed no triable issues. It is well settled that even if there is a violation/ non-compliance of the provisions of the Act and the Rules, though in the present case there is none, until and unless the party setting up any such plea succeeds to prove that on account of violation of such, the election of the returned candidate has been materially affected, the election of the returned candidate cannot be held void.

(Para 33)

Further, held that the hyper technicalities should not be used to throttle the will of the people expressed through the ballot in an election held substantively in accordance with law, rules and procedure. An insignificant deviation of the rule without disturbing the substantial frame does not make any official act done by a public servant in discharge of his official duties as illegal rendering the whole process void, resulting into stalling of the business and the developmental activities, and the elected machinery working for the welfare of the public at large. A little go-bye to the procedural provisions, thus, can hardly render the whole process as void, unless, there is transgression to the fundamental provisions of the constitution. The petitioner (respondent No. 1 herein) while submitting to the whole process accepting the ballot paper, endorsing it for a particular candidate, accepting the defeat without challenging the proceedings at that time and without pointing out such breach of secrecy, which might have materially affected the result of elections, has challenged the election, but appears to have failed in his design. Both the Election Tribunal as well as Appellate Court have touched the core issues and disturbed the election result, while holding that the election was to result in expected breach of secrecy, as such, it amounted to illegality. But the Tribunal as well as the Appellate Court did not look into the fact, whether the breach of secrecy was a ground to set aside the election and whether there was any breach of secrecy and if there were sufficient pleadings in this regard. Thus, we do not hesitate to hold that the Tribunal as well as the Appellate Court also fell in error in appreciating the evidence and the law in prospective manner. Consequently, the verdict given by them through judgements are liable to be set aside. The judgment passed by the learned single Judge appears to have not touched the core issues who is swayed by some irregularities in the procedure, which are hardly sufficient to silence the voice of majority. Therefore, interference in the impugned judgment has become inevitable.

(Para 34)

Sanjay Bansal, Senior Advocate assisted by Amit Jhanji and Asha Chauhan, Advocates *for the appellant (in LPA No. 68 of 2010)*

Sukhbir Singh Mattewal, Advocate *for respondent No. 1.*

Aman Chaudhary, Additional Advocate General, Haryana.

A.N. JINDAL, J.

(1) This judgment shall dispose of two Appeals i.e. LPA No. 68 of 2010 filed by Ravinder Kumar Rawal and another LPA No. 1617 of 2010 filed by Deputy Commissioner, Panchkula and another, both arising out of the common judgment dated 8th January, 2010 passed by Single Bench of this Court. However, the facts are taken from LPA No. 68 of 2010 for adjudicating both the appeals.

(2) Having travelled through the hierarchy of Tribunals as set out under the Haryana Municipal Act, 1973 (herein referred as 'the Act of 1973') for challenging the election by an unsuccessful candidate for the Presidentship of the Municipal Council, Panchkula, the verdict has been recorded by the Election Tribunal and the Appellate Authority in favour of respondent No. 1—V. K. Sood. Consequently, the appellant—returned candidate, namely Ravinder Kumar Rawal (herein referred as 'the appellant') also lost before the Single Bench of this Court. His election was set aside on the following grounds :—

1. The procedure as followed by the Returning Officer in preparing the electoral rolls and marking of serial numbers on the ballot papers amounts to breach of secrecy, which was considered as material irregularity materially affecting the result of an election ;
2. The Returning Officer acted in violation of the Rules while directing the electors to mark 'X' on the ballot paper, which in is clear violation of Rule 71 of the Haryana Municipal Elections Rules, 1978 (herein referred as 'the Rules of 1978'), therefore, it amounts to illegal reception of votes, which is impermissible and a ground for setting aside the election as provided under Rule 85 (1)(d)(iii) of the Rules of 1978.

(3) The crucial questions to be determined before us may be summed up as under :—

- (i) Whether Rule 71 of the Rules of 1978 is directory or mandatory in nature and whether its violation materially affects the result of the election ?

- (ii) Whether the preparation of separate sheet of paper containing names of electors, their ward numbers and signatures as also serial number of the ballot papers (which is to be kept in a sealed cover by the Returning Officer) amounts to breach of secrecy materially affecting the election result ?
- (iii) Whether the election petition is in consonance with Rule 76 of the Rules of 1978 and as such, the election petition was bad for want of cause of action.

(4) The aforesaid posers have arisen from the facts as set in the pleadings of the parties. The election of the Municipal Council, Panchkula took place on 30th March, 2008 to elect 31 Municipal Councillors. Mr. Ravinder Kumar Rawal—appellant was declare elected from Ward No. 14, whereas, Mr. V. K. Sood—respondent No. 1 was elected as such from Ward No. 4. The total number of winning candidates party-wise is as follows : Congress—9; B.J.P.-8; INLD-6 and Independents-8.

(5) The meeting for the election of the President and Vice-President of the Council was convened on 14th May, 2008, wherein, the appellant Ravinder Kumar Rawal (a Congress candidate); respondent No. 1, V. K. Sood (a BJP Candidate) and one V. K. Kapoor (an INLD Candidate) contested for the office of the President. The whole election process was videographed. There was no objection raised at any stage and it had concluded peacefully. On counting, the appellant (from Congress) was declared as elected having secured 13 votes, whereas, respondent No. 1, V. K. Sood (from BJP) secured 10 votes and V. K. Kapoor (from INLD) secured 9 votes. In the same election, BJP candidate Shri Bharat Bhushan Singal was declared elected as the Vice President of the Council by securing 13 votes, whereas, Congress candidate secured 10 votes. Dissatisfied with the election of the President, respondent No. 1, filed an Election Petition on the following grounds :—

- (i) That respondent No. 3 completely deviated from the procedure as laid down in Rule 71 of the Rules of 1978, by requiring the members to put a sign of 'X' in the ballot paper instead of writing 'yes' or 'no'. Such a procedure adversely affected the voting pattern which materially affected the result of the election ;

- (ii) That respondent No. 3 prepared a separate sheet containing the signature of members, their ward numbers and their names. Surprisingly, the serial numbers of the ballot papers were also added against the names and ward numbers of the members on the sheet. The members present realized that their ballot papers were open to scrutiny by the concerned officials as they could easily decipher as to who had voted for whom in the election. For the fear of reprisal from the ruling party and the threat of being exposed as to for whom they had voted, the members could not exercise their right to vote in a free and fair manner. This affected the voting pattern and thus, the voting which was to be held in secret manner, became an open affair.

(6) The appellat, who was elected as the President of the Council contested the petition stating that there were total 32 members present in the meeting, including the local Member of Legislative Assembly. the election process was completely in consonance with the Act of 1973 and the Rules of 1978. Preparation of the electoral rolls does not amount to breach of secrecy or visible representation from which an elector could be identified. No objection to the preparation of electoral rolls was raised at the relevant time. The whole election process was completed peacefully. The appellant got 13 votes, whereas, respondent No. 1 secured 10 votes. By way of similar process, Bharat Bhushan Singal was elected as the Vice President of the Council while defeating Congress candidate who secured 10 votes. No objection was raised to his election as also to that of the Vice-President at the time of conduct of the election. the proceedings were recorded *qua* the manner in which the election was conducted and nobody raised any objection with regard to any breach of secrecy, pressure or undue influence at that time. The election was completed within one day. The ballot papers were prepared at the spot as per Rules of 1978. It was also denied that the memembrs present had realised that their ballot papers were open to scrutiny by the concerned officials. It has been categorically denied that a candidate could be identified as to who had voted for whom in the election. It was further explained that the election was conducted as per guidelines of the Haryana State Election Commission. It was also submitted in the written statement that respondent No. 1 admitted in his petition that BJP had total 8 elected members and in the election for the post of the President,

he had secured 10 votes and in case of the election of the Vice-Presidential candidate from BJP, namely Bharat Bhushan Singal got 13 votes, which are self-explanatory of free and fair election and that there was no pressure on any Member as alleged in the petition.

(7) From the pleadings of the parties, the following issues were framed :—

- “1. Whether the election of respondent No. 1 as President of Municipal Council, Panchkula is liable to be set aside ? OPP
2. Whether the petition is not maintainable in the present form ? OPR
3. Whether the petition has no *locus-standi* to file the petition ? OPR
4. Whether the petitioner has no cause of action for filing the petition ? OPR
5. Whether the petition is based on false and frivolous grounds ? OPR
6. Whether the petitioner has not come to the court with clean hands ? OPR
7. Whether this court has no jurisdiction to entertain and try the petition ? OPR
8. Relief.”

Though, no proper issues, which were essential to be framed, have been framed, yet we don't want to develop deep into this aspect as both the courts being alive of the real controversy involved in the case and the evidence led thereupon, have decided the matter.

(8) In order to substantiate the pleas as raised by respondent No. 1 for setting aside the election of the appellant, he himself appeared as PW1 and reiterated the facts as submitted by him in the petition. From his statement, it appears that the electoral roll prepared at the spot was sealed in a stout envelope, which was opened at the request of respondent No. 1 and was shown to him. Thereafter, it was re-sealed. During cross-

examination, he admitted that the election was videographed. He also admitted that all the votes were found valid and no vote was declared invalid. When the ballot papers were taken out for counting, they were tallied with the issue-list. He also admitted that all the members remained present in the office during the entire election process. He further said that Shri Chander Mohan belongs to Congress. It is correct that B.J.P. got more votes the post of Vice-President and President than the number of its elected members in the Council. It is correct that respondent No. 3 had informed at the time of election that mark 'X' was to be put against the name of the candidate in whose favour the elector wanted to cast the vote. He further admitted that respondent No. 1 did not complain about the process to the Haryana State Election Commission or held any personal conference with the Election Commission or the Deputy Commissioner or protested in any other manner.

(9) Vijay Kumar Kapoor (PW2), Municipal Councillor from Ward No. 6 also supported the case of the election petitioner-respondent No. 1. However, during cross-examination, he stated that he never made any correspondence regarding discrepancy in election process, which he had mentioned in his statement. He also mentioned that even illiterate person can contest the Municipal Election. He could not tell as to how many Councillors are literate and how many illiterate. He has also admitted that entire election process was video-graphed and all the members had legally marked 'X' against the name of the person, in whose favour the votes were to be polled as per direction of the SDO (Civil).

(10) To the contrary, the winning candidate-appellant examined B.R. Dhiman (DW1), Secretary, Municipal Council, Panchkula, who proved the record of the proceedings Ex.D1, D2 and D3, relating to the election of the President and the Vice-President. Ravinder Kumar Rawal (DW2)-(appellant) tendered his affidavit Ex.DA and was cross-examined at length. Maheshwar Sharma (DW3) an HCS officer posted as Secretary HUDA (Returning Officer at that time), stated that the election of Municipal Council, Panchkula for the offices of the President and the Vice-President was held on 14th May, 2008, and the proceedings pertaining to it (Ex.D3) were recorded in the Register. The whole proceedings were conducted as per the relevant rules and after the election process, the whole record was handed over to the office of Deputy Commissioner.

(11) On scrutiny of the aforesaid evidence, the Election Tribunal,—*vide* its judgment dated 4th May, 2009 (Annexure P-2) while deciding issue No. 1 observed that the State Election Commission had issued directions for using the mark 'X' in the election process to indicate the right exercised by the voter, therefore, there was no violation of Rule 71 of the Rules of 1978. No cross-objections qua the said finding were filed by respondent No. 1 and the Appellate Court,—*vide* judgment dated 8th June, 2009 (Annexure P-4) also affirmed the findings with the following observations :—

“The petitioner (respondent here) has also attacked the outcome of election on the ground that the SDO(Civil) contravened Rule 71 of the Election Rules whereby the members are required to vote by writing 'yes' or 'no' in the ballot paper at the time of election of the offices of President and Vice President. However, as per Ex. D4, the instructions (dt. 17.4.2003) issued by the State Election Commission, Haryana, the members were required to put a cross (X) against the candidate for whom he wished to vote. As such, the procedure adopted by the SDO (Civil) in this respect was in consonance with the directions of the Election Commission and hence the election cannot be set aside on that ground. That apart, the learned Tribunal has recorded a finding on that point against the petitioner and the petitioner has not filed any cross appeal challenging that finding.”

(12) Any way, learned senior counsel for the appellant has again stressed over his view point that the election, as stated by Maheshwar Sharma (DW3), was conducted as per the instructions dated 17th April, 2003 (Ex.D4) issued by the State Election Commission, Haryana. The amended instructions dated 20th June, 2003 were not part of the instructions Ex.D4, therefore, the election was conducted on the basis of instructions dated 17th April, 2003, which provided for marking 'X' against the candidate for whom one wished to vote. The Election Tribunal recorded the finding *qua* this aspect of the case against respondent No. 1 and the Appellate Authority, without any cross-appeal filed by respondent No. 1, again recorded a finding that there was no violation of Rule 71 of the Rules of 1978 and, thus, the election cannot be set aside on this ground.

(13) To the contrary marathon arguments were advanced by the counsel for respondent No. 1 while rebutting the contentions as raised by the counsel for the appellant. He urged that if specific rules are framed for proceeding in a particular manner, then violation of such rules would certainly render such act as void. The Returning Officer was not authorised to direct the candidates to put mark 'X' when basic Rule 71 as enunciated in the Rules of 1978 and also as per the amended instructions dated 20th June, 2003 (Annexure 'A') issued by the State Election Commission, Haryana specifically providing for marking 'yes' or 'no' against the name of the candidate recorded on the ballot paper. He further submitted that marking of the serial number on the ballot paper was also in violation of the Rules and that amounts to visible representation leading to the anticipated breach of secrecy. Once, the ballot is opened, then from the serial number, it could easily be traced as to who voted for whom. Thus, the learned Single Judge was right in holding that the preparation of the electoral roll as well as marking of serial number over the ballot papers amounted to breach of secrecy, which could be treated as material irregularity materially affecting the election result.

(14) After hearing the learned counsel for the parties, we set to decide the questions in controversy as framed by us above.

Re. : Question No. 1

While touching the first question, we may observe that none of the electors raised any objection at the time of casting the votes to the writing of mark 'X' and none of them preferred to mark 'yes' or 'no'. The marking of 'X' did not in any manner prejudice the electors casting the vote, though the electors could have an apprehension of being identified in whose favour they have voted in case of marking 'yes' or 'no'-sometimes in small alphabets or capital alphabets, and by change of pen/pencil or ink, but the electors could not be identified by making a mark 'X'. It was not the choice of the winning candidate that mark 'X' should be written, but such a mark was put as per the directions of the Returning Officer, who in turn had complied with the instructions dated 17th April, 2003 (Ex.D4) issued by the State Election Commission, Haryana. Maheshwar Sharma (DW3) was not issued any amended instructions. In any case, it is well-settled that for the act done by a public servant/Returning Officer in discharge of his duties

in the ordinary course and as per instructions of the higher authority with which he was equipped with, he cannot be blamed and cannot be punished for any such act by the Election Commission. Reliance, if any, could be placed upon the case of **Mehla versus Roop Ram, (1) (para 6)** and **Meera Devi versus Bihar State Election Commission and others, (2) (paras 12 and 13)**.

(15) The learned Single Judge while recording a finding against the appellant *qua* this violation placed reliance on the judgment of this Court in case **Sudesh Kumar Aggarwal versus State of Punjab, (3)** but this judgment is not applicable to the facts of the present case, because in Sudesh Kumar Aggarwal's case (*supra*), the election was challenged on the ground that six members who had voted, had put both 'yes' and 'no' on the ballot papers instead of writing 'yes or 'no'. Though, such votes were liable to be declared invalid, but the Returning Officer had counted the same in favour of the winning candidate. On these facts, the High Court had reached the conclusion that proper procedure regarding the manner of voting was not followed. Certainly, writing 'yes' and 'no' has no meaning, rather the voter was to write 'yes' or 'no', but in the instant case only mark 'X' was to be put which never prejudiced the rights of the electors. Not even a single member had put any other mark except the mark 'X' against any other contesting candidates with a view to establish/show thier identity thereby causing breach of secrecy. Therefore, marking of ballot papers by the letter 'X' cannot be said to be such a material irregularity which materially affected the result of the election. It may be further mentioned that the judgment delivered in Sudesh Kumar Aggarwal's case (*supra*) was later on over-ruled by the Apex Court in Civil Appeal No. 7054 of 2001 decided on 23rd October, 2002 (**Ashok Kumar versus Sudesh kumar Aggarwal and others**).

(16) The learned Single Judge appears to have not properly interpreted the rules while treating Rule 71 as mandatory. Whether a statutory provision is mandatory or directory in nature, depends upon the intention of the Legislature or the rule making authority. The intention of the authority making the law or the rule can best be gathered from the context

(1) 1998 (3) P.L.R. 781

(2) AIR 2008 Patna 83

(3) 2001 (3) R.C.R. (Civil) 454

in which the particular provision is made. In the absence of expressly providing for consequences which may flow from the breach of the rule, must be regarded as directory. In other words, the rule does not indicate that non-compliance of it, shall render the vote invalid. Therefore, it has to be considered directory. Similar rule fell for interpretation in **Bihari Lall and others** versus **Bindeshwari Prasad and others**, (4). The said judgment involves the election of Mayor and Deputy Mayor of a Municipal Corporation in State of Bihar, wherein, it was held as under :—

“Of these rules, Rule 6 prescribes the method of taking a poll by ballot. Clause (b) of Rule 6 is as follows :

- (b) *Every Councillor (including the president) desiring to vote shall then proceed to record his vote by placing a cross mark against the name of the candidate for each office for whom he wishes to vote, but shall not sign, or make any mark on the ballot paper and shall, one after the other, place the marked ballot paper in the ballot box provided for the purpose within specified time. If a Councillor votes for more candidates than the number of vacancies, signs the ballot paper or make any other mark on it, his ballot paper shall be deemed to be invalid.”*

To the contrary, Rule 71 of the Rules of 1978 reads as under :—

“71. Ballot to be taken and result thereof—[(1) if only one candidate each for the offices of the President or Vice-President is proposed, such candidate shall be declared to have been duly elected. If the number of proposed candidates is more than one for each office, the voting shall be by ballot. The members present shall be required to vote by writing ‘yes’ or ‘no’ on the ballot paper. The candidate getting the maximum number of votes shall be declared to have been elected. Special ballot-paper shall be used for such voting, each bearing an official mark to be placed thereon by the Deputy Commissioner.”

In the light of the aforesaid Rule of Municipal Conduct of Business (Elections of Mayor an Deputy Mayor) Rules (1959) prevailing in Patna, if compared

with Rule 71 of the Rules of 1978, it could be observed that Rule 6(b) was mandatory and non-compliance of it expressly shall render the vote as invalid, whereas, Rule 71 of the rules of 1978 does not contain any such clause, therefore, the rule could be said to be directory, because the breach of this Rule will not invalidate the voting process. At the same time, it is not each and every technical violation or an insignificant infraction of a procedure, which may essentially invalidate the election, unless the breach of such rule materially affects the election result. The framers of the Rules appear to have the intention that an election once held would not be set aside, unless the error, illegality or irregularity is of substantial character materially affecting the result of the election. The Full Bench of this Court in case **Bhoop Singh versus Bar Council of Punjab and Haryana through its Secretary and others**, (5) took very serious exception to set aside the election on the minor defect in the procedure observing that every procedural provision in the election law cannot be raised to such a high pedestal that its violation should *ipso facto* topple the verdict of the electorate. The relevant observations made by the Full Bench in paragraph 20 are reproduced as under :—

“...A bare reference to the basic election statute in the country, namely the Representation of the People Act, 1951, would show that it is only in the case of such fundamental infirmities like the commission of a corrupt practice, the improper rejection of nomination papers, lack of adequate legal qualification in the candidate or the basic error in the electoral roll itself, that an election would be declared void. It is obvious that these are matters which either go to the very root of the election process, or involve its very purity because of actions involving moral turpitude. Therefore, in such cases, the whole election is voided without redence to its effect on the result. On the other hand, so far the mere non-compliance with the provisions of an Act or a rule made thereunder is concerned, the principle is that the election petitioner must show that the result has been materially affected. This applied not only to a mere infraction of a statutory provision, but even to the infraction of the supreme law of the land, namely, the Constitution itself. The Representation of the

People Act apart, the whole gambit of other electoral laws, to which detailed reference at this place is unnecessary, would highlight the salient principle that the verdict of the electorate is lightly to be set aside (except in the cases specifically laid down by the statute) unless it is clear that the result of the election has been materially affected. No principle or precedent has been cited on behalf of the election petitioner to support the overly stringent rule which is canvassed on his behalf that every isolated violation of a statutory rule should *ipso facto* void the whole election. I am of the view that every procedural provision in the election law cannot be raised to such a high pedestal that its violation should *ipso facto* topple the verdict of the electorate.”

Though, the aforesaid judgment of the Full Bench was over-ruled on a different point, but the aforesaid observations were never set aside in case of **Bar Council of Delhi and another (etc. etc.) versus Surjeet Singh and others, (6)**.

(17) The Rule 71 of the Rules of 1978 though records the word ‘shall’ and states that the members present shall be required to vote by writing ‘yes’ or ‘no’ on the ballot-papers, but there is nothing in the Rule to draw an inference that non-compliance of the rule would render the vote as invalid. Even otherwise, such a rule cannot be imposed upon all the classes of Councillors, some of whom may be illiterate, blind or otherwise handicapped in writing such marks. Similar proposition of law arose before the Apex Court in case **Era Sezhiyan versus T. R. Balu and others, (7)** wherein, it was observed as under :—

“17. It is significant that in this sub-rule also there is nothing to indicate that the preference must be indicated in the column reserved for that purpose, the only requirement being that the figure 1 should be written opposite the name of the candidate. Similarly, sub-rule (2)(b) of Rule 73 only lays down that if the figure 1 is set opposite the name of more than one candidate or is so placed as to render it doubtful to which candidate it applied,

(6) AIR 1980 S.C. 1612

(7) AIR 1990 S.C. 838

the ballot-paper would be invalid. Sub-rule (2) of Rule 73 deals with the invalidity of ballot-papers and that sub-rule nowhere states that merely by reason of the preference being marked in the wrong column, if the marking is opposite the name of the candidate concerned, the ballot-paper shall be rendered invalid. It is true that the column in which the preference should have been marked and intended for that purpose was the column on the right-hand side of the first column where the name of the candidate was to be put ; but there is no express provision to the effect that unless the preference is marked in the correct column the ballot-paper would be invalid. In such a situation, the principle enunciated by this court in several judgments and reiterated in **S. Sivaswami versus V. Malaiknnan, (1984) 1 SCR 104 : (AIR 1983 SC 1293)**, that the primary task of the court in a case where the question is whether the ballot-paper is invalid is to ascertain the intention of the voter, must be applied. In that case, the Court held that the ballot-paper shall not be rejected as invalid if it reasonably possible to gather a definite indication from the marking so as to indentify the candidate in favour of whom the vote had been intended to be given. This, of course, is subject to the rule that before a ballot-paper is accepted as valid the ballot-paper must not be invalid under any other express provision and the intention of the voter must not be expressed in a manner which is contrary to or totally inconsistent with the manner prescribed under the said Act or the Election Rules for expressing the same.”

(18) The aforesaid judgment evolved the interpretation of Rule 56 of the Conduct of Election Rules, 1961 (herein referred as ‘the Rules of 1961’) where there was mandatory condition for rejecting the ballot in circumstances. In the instant case instructions of 2003 (Ex.D4) nowhere provide for rejecting such ballot-paper. Clause 2 (xii) of the said instructions reads as under :—

“(xii) That a ballot-paper shall be invalid :—

- (a) if it bears the signatures of the member or contains word, or any visible representation by which he can be identified ; or

- (b) if marks are placed thereon against more than one candidate ; or
- (c) if the mark is so placed thereon as to make it doubtful for which one or two or more candidates the vote was intended to be given.
- (d) if no mark is placed thereon ; or
- (e) if it does not bear the signature of Prescribed Authority.”

The aforesaid instructions clearly depict as to under what circumstances/ eventualities, the prescribed Authority shall declare the votes as invalid, but marking of ‘X’ in favour of a person for whom they wanted to vote does not render the vote as invalid, particularly when Maheshwar Sharma (DW3) has stated that he had the instructions (Ex.P4) issued by the State Election Commission, which provided for marking ‘X’ in the column of voting. As such, we uphold the observations made by both the courts below and while disagreeing with the observations made by the Single Bench of this Court to the effect that tick marking of the vote renders it void, which are reversed. In **Kalyan Kumar Gogoi versus Ashutosh Agnihotri and another**, (8) the Apex Court held as under :—

“23. It may be mentioned that here in this case non-compliance with the provisions of the Representation of the People Act, 1951 and the Elections Rules of 1961 was by the officers, who were in charge of the conduct of the election and not by the elected candidate. It is true that if clause (iv) is read in isolation, then one may be tempted to come to the conclusion that any non-compliance with the provisions of the Constitution or of the 1951 Act or any rules of the 1961 Rules of orders made under the Act would render the election of the returned candidate void, but one cannot forget the important fact that clause (d) begins with a rider, namely, that the result of the election, insofar as it concerns a returned candidate, must have been materially affected. This means that if it is not proved to the satisfaction of the Court that the result of the election insofar as it concerns a returned candidate has been materially affected, the election of

the returned candidate would not be liable to be declared void notwithstanding non-compliance with the provisions of the Constitution or of the Act or of any rules of the 1961 Rules or orders made thereunder.”

Re. : Question No. 2.

(19) Now coming to the second question of breach of secrecy of voting :—On conjoint reading of Rules 75 and 85 of the Rules of 1978, it transpires that for setting aside the election, there are two main grounds—one of ‘corrupt practice’ and other is ‘material irregularity’. The relevant provisions in this regard of the Rules of 1978 are reproduced as under :—

“Rule 75 : Election Petition.—[(1) An election petition against the return of a candidate to an election or against the return of a President or Vice-President or against unsuccessful candidate with a view to his disqualifications under (section 272) **[Substituted for “rule 87” by Haryana Notification No. GSR 113/HA24/73/Ss. 257 and 276/82, dated 11th October, 1982]** on the ground of corrupt practices or material irregularity in the procedure shall be in writing, signed by a person who was a candidate at such election or an elector, shall be presented to the Tribunal within thirty days after the day on which the result of the election is declared by the Returning Officer **[Substituted by Haryana Notification No. S.O. 72/HA24/73/S. 257 and 276/94, dated 19th August, 1994]**.

Provided that the time limit of fourteen days may be extended by the Deputy Commissioner [by the period not exceeding thirty days] **[Inserted by Haryana Notification No. GSR 113/HA24/73/Ss. 257 and 276/82, dated 11th October, 1982]** if there are in his opinion sufficient grounds for such extension. **Rule 85 : Grounds for declaring election to be void :** (1) Subject to the provisions of sub-rule (2), if the [Tribunal] is of opinion,—

- (a) xxx xxx xxx
- (b) that any corrupt practice specified in clauses (1), (2), (5) or (6) of rule 73, has been committed by a returned candidate or his agent or by any other person with the consent of a returned candidate or his agent ; or

- (c) xxx xxx xxx
- (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—
- (i) xxx xxx xxx
- (ii) xxx xxx xxx
- (iii) by the improper reception, refusal or rejection of any vote or reception of any vote which is void ;
or
- (iv) by any material irregularity in the procedure of the election the Tribunal shall declare the election of the returned candidate to be void.

Explanation :— “Material irregularity in the procedure of any election “includes any improper acceptance or refusal of any nomination or improper reception or refusal of a vote or reception of any vote which is void for non-compliance with the provisions of the Act or of the rules made thereunder or any mistake in the use of any form annexed thereto which materially affect the result of an election.”

Respondent No. 1 has not pleaded any corrupt practice as a ground for setting aside the election. Only irregularity in the procedure and breach of secrecy have been pleaded for setting aside the election. Out of the afore-quoted two grounds ; Regarding the first ground, it has already been discussed that mere marking of ‘X’ by the elector, result of the returned candidate is not materially affected. We would not hesitate in further recording a finding that the voting procedure which was completed within a short time on the same day, does not suggest any such material irregularity in the procedure, non-compliance of which has materially affected the result of the election.

(20) Learned Senior Counsel for the appellant has urged that the Single Bench has termed the marking of serial number over the ballot-paper and also preparation of the electoral roll as breach of secrecy amounting

to material irregularity, which could result into expected breach of secrecy. As such, it would certainly affect the result of the election, but the Single Bench was not correct in its approach. Actually, preparation of the electoral roll as well as the marking of the serial number were neither against the rule nor amounted to breach of the secrecy.

(21) Secondly, it has been urged that no such plea was raised that due to the alleged breach of secrecy, the result was materially affected. While elaborating his arguments, he took us to the statements of various witnesses and urged that the evidence does not indicate of any breach of such secrecy. His further contention is that it was the obligation cast on the public servants to maintain the secrecy and in case of breach of secrecy, it was an electoral offence punishable under Section 275 of the Act of 1973, which provides for an imprisonment for a term not exceeding three months or with fine or with both in case of breach of secrecy of voting.

(22) To the contrary, counsel for respondent No. 1 while taking us through the Rules of 1978, the instructions dated 17th April, 2003 (Ex.D4) and order dated 20th June, 2003 (Annexure-A) issued by the State Election Commission, Haryana stressed that the marking of serial number or preparation of electoral rolls provides the material from where "who voted for whom" could easily be found. As such, that was a material irregularity, which materially affected the result.

(23) Having critically viewed the rival contentions, we find ourselves persuaded with the contention of the counsel for the appellant. There is no dispute with regard to factual position that 35 ballot papers were prepared at the spot, which were having serial numbers mentioned thereon as well as the counter-foil/issue receipt was prepared. Before issuing these ballot paper for voting to the members, these were re-shuffled and on obtaining their signatures one by one on the receipt, ballots were issued. Maheshwar sharma (DW3) has stated that the election process was completed within two to three hours. There is also no denying a fact that the electoral roll prepared at the spot was sealed separately and it remained intact and it was never opened except by the court when the statement of V. K. Sood was recorded on 27th November, 2008 and it was resealed there and then. Preparation of electoral roll and marking of serial numbers appear to be quite in consonance with the Rules of 1978 as also the guide-lines as issued

by the State Election Commission, Haryana in April, 2003 (Ex.D4). As a matter of fact, irrespective of nature of the election, may be of a larger constituency or a smaller one ; election to the Lok Sabha or Rajya Sabha, it does not make any difference, rules provide for the preparation of the electoral roll and for providing the serial numbers.

(24) Sub-Section (2)(1)(e) of the Rules of 1961 refers to the 'electoral roll' in relation to an election by Assembly Members as under :—

"2. Interpretation (1)(e)—“electoral roll”, in relation to an election by assembly members means the list maintained under Section 152 by the Returning Officer for that election ;”

The rules of 1961 in Rule 23 provide for mentioning a serial number in case of postal ballot and Rule 30 relating to the voting in the parliamentary and assembly constituencies, and both refer to the counter-foil attached to every ballot. To understand it further, the relevant part of rule 23 is reproduced as under :—

"23. Issue of ballot paper— (1) *a postal ballot paper shall be sent by post under certificate of posting to the elector together with—*

(a) to (d) xxx xxx xxx

(2)— *The Returning Officer shall at the same time—*

(a) *record on the counterfoil of the ballot paper the electoral roll number of the elector as entered in the marked copy of the electoral roll.*

Similarly, rule 28 of the Conduct of Elections and Election Petitions Rules 1951 (herein referred as 'the Rules of 1951') reads as under :—

"The ballot papers to be used for the purpose of voting at an election to which this Chapter applies shall contain a serial number and such distinguishing marks as the Election Commission may decide."

The Rule 47(1)(c) of the Rules of 1951 reads as under :—

“a ballot paper contained in a ballot box shall be rejected if it bears any serial number or mark different from the serial numbers or marks of ballot papers authorised for use at the polling station or the polling booth at which the ballot box in which it was found was used.”

Similar are the provisions pertaining to the Municipal elections as provided under the Rules of 1978. Sub-rule (k) of Rule 2 of these rules defines “roll” as the electoral roll of persons entitled to vote at a municipal election under these rules. Rule 12 of the Rules of 1978 provides for revision of electoral roll for municipal elections. Further Rule 36 provides that “Every ballot paper shall have a counter foil attached thereto, and the said ballot Paper and the counter-foil shall be in such form, and the particulars therein shall be [in Hindi and such other language]. Rule 69(F)(4) of the Rules provides that “ballot papers shall be serially numbered”. Rule 71 refers to the nature of a ballot to be issued to the candidate, which reads as under :—

“71. Ballot to be taken and result thereof.— [(1) if only one candidate each for the offices of the President or Vice-president is proposed, such candidate shall be declared to have been duly elected. If the number of proposed candidates is more than one for each office, the voting shall be by ballot. The members present shall be required to vote by writing ‘yes’ or ‘no’ on the ballot paper. The candidate getting the maximum number of votes shall be declared to have been elected. Special ballot-paper shall be used for such voting, each bearing an official mark to be placed thereon by the Deputy Commissioner.”

The requirement of the above rules appear to have been completely complied with. It has come in evidence that special ballot-papers were prepared at the spot. So, the provisions, with regrd to marking of serial numbers have not been excluded by this rule, rather, the comp;iance of the instructions dated 17th April, 2003 (Ex.D4) issued by the State Election Commission, Haryana was also made. Clause (vii) of the said instructions reads as under :—

“That the Deputy Commissioner or the officer appointed by him shall assign serial number to each candidate with reference to

their names written alphabetically in Hindi in *Devanagri* script and then announce to the Members serial number assigned to each candidate.”

The above clause is in addition to the frame of the ballot-papers as mentioned in the instructions, therefore, mere marking of the serial numbers or preparation of electoral roll cannot be said to be contravention of the Rules of 1978 and this act of the Returning Officer does not amount to breach of secrecy. As a matter of fact, casting of a ballot is done in a separate compartment, where the ballot box is kept for the purpose and where except the voter, none-else remains present at the time of voting. If no record regarding the issuance of ballot-pater is kept in the record-sheet (Form 12) by the Returning Officer, then following repercussions can arise :—

- (a) The member who has been issued ballot-papers by the Returning Officer may not cast his ballot by pocketing the same or chewing it and in such an eventuality, it would be impossible to recognize the member who does such mischief.
- (b) As in the present case, the number of issued ballot-papers were 32, if no record regarding issuance of ballot-papers was maintained, then any member/s of minority party or group who very well knew that his/their candidate if likely to loose for any reason whatsoever, may without putting the ballot in ballot box may pocket the same and later on at the time of counting the number of ballot polled extracted from the ballot box, is found to be lesser than the actually issued, then the Returning Officer would not have been able to identify as to who has committed the mischief with a view to vitate the whole of the election process.”

Thus, the record of issuance of ballot-papers is essential to be kept, but it could only be used in case of controversy or a serious dispute or in order to avoid the bogus voting. Mentioning of the serial number is not a visible representation from which an elector could be identified. In this regard, we may draw support from the judgment of the Apex Court in case

Km. Shradha Devi versus Krishan Chandra Pant and others, (9) and also **Woodward versus Sarsons, (10)** wherein, it was observed as under :—

“It is not every writing or every mark besides the number on the back which is to make the paper void, but only such a writing or mark as is one by which the voter can be identified.”

In **Km. Shradha Devi's case (supra)**, it was observed as under :—

“It would imply that there must be some casual connection between the mark and the identity of the voter that looking at one the other becomes revealed. Therefore, the mark or a writing itself must reasonably give indication of the voter's identity. It may be that there must be extrinsic evidence from which it can be inferred that the mark was placed by the voter by some arrangement.”

(25) The rule of secrecy of ballot and purity of election are two central pillars supporting the edifice of Parliamentary democracy envisioned in the Constitution stand in confrontation with each other or are complementary to each other. As emerged from the Representation of the People Act, 1951 (herein referred as ‘the Act of 1951’) the State Legislature enshrined the provisions of Section 275 and 275A of the Act of 1973 to complete the underlying object of secrecy in the municipal elections. These provisions have to be interpreted in a way that helps to achieve the constitutional goal. The Constitution reposed a trust in the voter and required him to act as a responsible person to choose his leader for governing the town. The interpretative process must advance the basic postulate of free and fair election for setting up democratic institution and not to retard it. Similar observations were made in case **Raghubir Singh Gill versus S. Gurcharan Singh Tohra and others (11)**.

(26) Secrecy means the trait of keeping things secret. It refers to secrets, which are synonymus to concealment, privateness and privacy, but the word “secrecy” does not permit non-compliance of the Rules, but it

(9) AIR 1982 S.C. 1569

(10) (1874-75) L.R. 10 C.P. 733

(11) AIR 1980 S.C. 1362

denotes to keep the things secret and not to make it public. Secrecy of ballot and secrecy of voting have been well defined in the judgment delivered in case **Patil Shivayya versus Kavishetti Shankarappa Sugurappa and others (12)**, wherein, it was observed as under :—

- “5. Secrecy of voting or secrecy of ballot means the fact to whom out of more than one contestant, an elector has cast his vote at a given election shall not be made known to the public. That is why S. 94 of the Act confers a privilege on a voter to refuse to testify to whom he has cast his ballot, and S. 128 prohibits the persons from making known any information calculated to violate such secrecy. One of the ways by which it is possible to know to whom a particular person has cast his vote is by opening the ballot boxes and examining the ballot papers. Courts have held that it being the important to maintain the secrecy of the ballot which is sacrosanct, inspection of ballot-papers should not be allowed on frivolous, vague and indefinite grounds.”

In the aforesaid case, the question was, whether the electoral roll could be allowed to be produced in evidence. While discussing this issue, the Court observed that the production of the electoral roll would not amount to invisible representation and leaking secrecy. The court observed as under :—

- “6. Now, the question is, would the secrecy of the ballot be violated if the petitioner is permitted to get the marked electoral rolls on record as evidence ? The marked electoral rolls used by the Presiding Officers of polling booths or polling stations at an election would only show whether franchise has been exercised by or in the name of the person whose name finds a place in the electoral roll. Beyond that nothing else can be known. It is not possible to know from these electoral rolls whether the person who had cast his vote had voted for a particular candidate or symbol. In the circumstances, it cannot be said that permitting the petitioner to get the marked electoral rolls on record as evidence would be violative of the principle of the secrecy of voting. The 1st respondent also cannot draw any inspiration in

this connection from R. 93 of the Rules. That rule merely provides that packets of unused ballot papers with counterfoils attached thereto, the packets of used ballot papers, the packets of counter-foils of used ballot-papers, the packets of the marked copy of the electoral roll, and the packets of the declarations by electors and the attestation of their signatures, while these packets are in the custody of the District Election Officer or the Returning Officer, shall not be opened and their contents shall not be inspected or produced before any person or authority except under the order of a competent court.”

(27) Again, while commenting upon the marked electoral rolls, the Apex Court in case **Rekha Rana (SMT) versus Jaipal Sharma and others (13)**, observed as under :—

“24. From marked electoral rolls, it is only possible to ascertain whether or not a vote had been cast in the name of a voter from a particular polling booth, but it is never possible to decipher therefrom as to who is the beneficiary of the said vote as there is no indication on the electoral roll showing for whom the voter had cast his vote. It is to be borne in mind that the marked electoral roll is maintained primarily for the purpose of identifying the elector and as such, we fail to see how its production would impair the “secrecy of ballot” principle. Accordingly, we reject the contention of the learned counsel for the appellant on this aspect.”

(28) Again, the golden rule for holding the elections void on the ground of material irregularity is the proof of the fact that the result of returned candidate must have been materially affected. This ingredient is missing in this case. The mere non-compliance of the provisions of certain rules, which too are directory in nature, would not lead to the conclusion that result is materially affected. The direction to mark ‘X’ against the candidate of choice was of the Returning Officer in discharge of his *bona fide* official duties, which too were apparently in compliance of the directions received from the State Election Commission, Haryana (Ex.P4) and further

more there was no violation of the directions on the part of any of the electors and all the votes were polled in the prescribed manner, as directed by the officer.

(29) To our mind, no election could be challenged on the ground of apprehended or anticipated breach of secrecy. No such act of breach of secrecy has been pleaded or proved by evidence. If we go through the pleadings as set out by respondent No. 1 in his petition, there is nothing to disclose if at the time of preparation of the list, issuance of the ballots and polling of the votes, any ballot was leaked, which influenced, impressed, prejudiced to the elector to cast his vote in different manner than what he had thought. None of the electors has come forward to say that due to any such pressure on account of breach of secrecy, he had to change his mind or he was compelled by any of the candidates to cast his vote for a particular candidate. There are only vague pleadings that with the marking of the serial numbers, the electors would have felt that their ballot-papers were open to scrutiny and for the fear of reprisal, they may not have exercised their right to vote in a free and fair manner.

(30) Besides the vague pleadings, it could also be well assessed that only one candidate, each from Congress and BJP party contested the election of the president and they did not loose even a single vote from their party, rather in case of the election of the Vice-President also, they got five votes more than the party votes. As such, they cannot be allowed to say that their party votes were in any way influenced. None from the independents appeared in the witness box to say that he voted for congress due to some threat or pressure or in view of the apprehended damage to him. As such, in the absence of such evidence, it would not be possible to hold that there was any breach of secrecy. It may further be observed that the election process was videographed. It has also come in evidence that the election process was concluded in a peaceful manner. During that period, no objection was raised nor there is any communication addressed to any authority. The Returning Officer recorded the election proceedings into writing (Ex.D3) and at that time, nobody raised any objection with regard to any such breach of secrecy. Mere marking of the serial number on the ballot-papers does not amount to such visible representation from where an elector could be identified as regards his choice for voting.

(31) Sections 275 and 275-A of the Act of 1973 refer to the maintenance of secrecy. Section 128 of the Act 1951 and Rule 39 of the Rules of 1961 are para-materia to the aforesaid provisions. In these Sections, it is specifically mentioned that while conducting election, no officials or employees engaged in election would reveal the secrecy of the ballot to anyone (except as required under the law) and if they willfully breach the secrecy, then it would be treated as an electoral offence punishable with fine or imprisonment under both the Acts. Secrecy of voting or secrecy of ballot means the fact to whom out of more than one contestant, an elector has cast his vote at a given election shall not be made known to the public. That is why Section 94 of the Act confers a privilege on a voter to refuse to testify to whom he has cast his ballot, and Section 128 prohibits the persons from making known any information calculated to violate such secrecy. Thus, on conspectus of the above discussion, it has become apparent that there was no breach of secrecy at any stage or time, which amounted to material irregularity materially affecting the election results. In any case, it is not the case of respondent No. 1 that printed serial number on the ballot-paper or putting of said serial number on the separate sheet/register of voters (Ex.D5) constituted "visible representation" by which the voter can be identified and, therefore, there was breach of secrecy warranting or justifying the setting aside of election.

(32) Now, coming to the next point that respondent has neither pleaded the material facts nor has brought the evidence to press his view point. Rule 81(3) of the Rules of 1978, which is para materia with the provisions of Section 83 of the Act of 1951, is synonymous to Order 6 Rule 2 of the Code of Civil Procedure, 1908, which reads as under :—

“Order VI—2. Pleading to state material facts and not evidence—

- (1) Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved.
- (2) Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph.
- (3) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

In **Azhar Hussain versus Rajiv Gandhi, (14)** it was held as under :—

“All the facts which are essential to cloth the petition with complete cause of action must be pleaded and failure to plead even a single material fact would amount to disobedience of the mandate of Section 83 (1) (a). An election petition, therefore, can be and must be dismissed if it suffers from any such vice.”

An election petition can be summarily dismissed if it does not furnish cause of action in exercise of the powers under the CPC. In **Ram Sarup versus Peer Chand and others, (15)** it was observed as under :—

“Section 83 is to be read along with Section 100 of the Act May by material facts to prove the grounds are required to be given in a concise manner, however, all material facts necessary to prove the grounds must be stated and if one of such material facts is missing, the petition cannot be put to trial.”

In **Samant N. Balakrishana etc. versus George Fernandez and others, (16)** the Apex Court observed on Sections 81, 83 and 86 of the Act, as follows :—

“Section 83 is mandatory and requires the election petition to contain; first a concise statement of material facts and then requires the fullest possible particulars. What is the difference between “material facts” and particulars ? The word “material” shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. Function of particulars is to give necessary information to present full picture of the cause of action.”

In **Hari Shanker Jain versus Sonia Gandhi, (17)** it was held that Section 83 (1) (a) of the Act of 1951 mandates that an election petition shall contain a concise statement of the material facts on which the petitioner relies. The material facts required to be stated are those facts which can be considered as material supporting the allegations made. In other words, there must be such facts as would afford a basis for the allegations made

(14) AIR 1986 S.C. 1253

(15) AIR 1963 Pb. & Hy. 180

(16) AIR 1969 S.C. 1201

(17) 2001 (8) S.C.C. 233

in the petition and would constitute the cause of action as understood in CPC. The expression “cause of action” has been compendiously defined to mean every fact, which, it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of court. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. Respondent No. 1 was under legal obligation to present a full picture of the cause of action with necessary further information in detail regarding the contents of the plea which he wanted to set up, so as to apprise the appellant of the actual grounds of challenge. Merely quoting the words of the Section does not amount to stating material facts. Material facts would include positive statement of facts as also positive averments of a negative fact, if necessary. Failure to plead “material facts” is fatal to the election petition. The election law even does not allow the party to amend the material facts after the expiry of certain time. In this regard, reference may be made to the case of **Shri Ved Singh versus Jitender Singh** and others, (18).

(33) Hence, in the absence of complete cause of action having been pleaded as to how the result of the election has been materially affected by not giving material facts in the election petition and that too by not stating who would have voted for the petitioner as a result of this apprehended or anticipated of breach of secrecy on the basis of which the election of the appellant was void, the election petition discloses no triable issues. It is well-settled that even if there is a violation/ non-compliance of the provisions of the Act and the Rules, though in the present case there is none, until and unless the party setting up any such plea succeeds to prove that on account of violation of such, the election of the returned candidate has been materially affected, the election of the returned candidate cannot be held void. In **Kalyan Singh Chouhan versus C. P. Joshi** (*Civil Appeal No. 870 of 2011 decided on 24th January, 2011*) the Apex court laid down the following principles of law to be adhered to while adjudicating upon an election petition :—

- “(1) It is not permissible for the court to permit a party to seek a roving enquiry. The party must plead the material fact and adduce evidence to substantiate the same so that the court may proceed to adjudicate upon that issue.

- (2) The court cannot consider any fact which is beyond the pleading of the parties. The parties have to take proper pleading and establish by adducing evidence that by a particular irregularity/ illegality the result of the election has been materially affected.”

In the aforesaid judgement, the view expressed is that if a single declaration is sought for the election to be declared void of the returned candidate then the scope of inquiry by the Tribunal is to be limited only on the question as to whether the result of the election has been materially affected or not.

(34) The hyper technicalities should not be used to throttle the will of the people expressed through the ballot in an election held substantively in accordance with law, rules and procedure. An insignificant deviation of the rule without disturbing the substantial frame does not make any official act done by a public servant in discharge of his official duties as illegal rendering the whole process void, resulting into stalling of the business and the development activities, and the elected machinery working for the welfare of the public at large. A little go-bye to the procedural provisions, thus, can hardly render the whole process as void, unless, there is transgression to the fundamental provisions of the Constitution. The petitioner (respondent No. 1 herein) while submitting to the whole process accepting the ballot paper, endorsing it for a particular candidate, accepting the defeat without challenging the proceedings at that time and without pointing out such breach of secrecy, which might have materially affected the result of elections, has challenged the election, but appears to have failed in his design. Both the Election Tribunal as well as Appellate Court have touched the core issues and disturbed the election result, while holding that the election was to result in expected breach of secrecy, as such, it amounted to illegality. But the Tribunal as well as the Appellate Court did not look into the fact, whether the breach of secrecy was a ground to set aside the election and whether there was any breach of secrecy and if there were sufficient pleadings in this regard. Thus, we do not hesitate to hold that the Tribunal as well as the Appellate Court also fell in error in appreciating the evidence and the law in prospective manner. Consequently, the verdict given by them through judgments (Annexure P-2 and P-4) are liable to be set aside. The judgement passed by the learned single judge appears to have not touched the core

issues who is swayed by some irregularities in the procedure, which are hardly sufficient to silence the voice of majority. Therefore, interference in the impugned judgment has become inevitable.

(35) Resultantly, we accept the appeals, set aside the impugned judgment and dismiss the election petition. The returned candidate is held entitled to resume his office of President as substantive term is still available for him.

R.N.R.

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