the case are such which require interference by this Court under section 482 of the new Code. The orders under challenge are hereby quashed and the case is sent back to the same trial Court for deciding it on merits. The learned Magistrate, however, will determine the points of controversy raised by the parties in the petition and the reply. The parties through their counsel are required to put in appearance before the learned Judicial Magistrate at Ludhiana on 15th November, 1977.

K.T.S.

CIVIL MISCELLANEOUS

Before S. S. Sandhawalia, J.

KUNDAN SINGH PATANG and others,—*Petitioners.*

versus

RAGHBIR SINGH GILL and others,—*Respondents*

Civil Misc. No. 13-E of 1977 in

Election Petition No. 1 of 1976

October 25, 1977.

Representation of People Act (XLIII of 1951)—Sections 94, 100 (1) (d) (iii) and 128—Conduct of Election Rules 1961—Rules 40, 40A, 70, 73 and 74—Exercise of franchise in favour of or against a candidate—Tampering of ballot papers alleged—Reception of evidence regarding the casting of votes—Whether absolutely barred—Section 100 (1) (d) (iii)—Whether visualises unveiling of secrecy of votes whenever necessary—Public policy—Whether requires the blacking out of all evidence in every eventuality.

Held, that the plain language of section 94 of the Representation of Peoples Act 1951 indicates that the element of compulsion on the point of answering questions by witnesses with regard to the persons in favour of whom they have voted is sought to be done away with. From the language of the section it follows that it provides only a qualified protection to a witness enabling him to refuse to answer a question on the point and is indeed far from laying down any absolute bar to the reception of all evidence regarding the casting of votes in an election. Even section 128 of the Act gives an indication that the Legislature never intended any absolute blanket rule of secrecy of vote in all contingencies whatsoever.

(Paras 9 and 10)

Held, that section 100(1)(d)(iii) of the Act provides for the setting aside of an election if the result thereof has been materially affected by the improper reception, refusal or rejection of any vote or the reception of any vote which is void. It is plain that whilst the principle of the secrecy of the ballot is a general provision, yet an exception thereto must be made where the very validity of the ballot paper or the factum of its improper reception, refusal or rejection is put in issue. It becomes, therefore, inevitable that the veil of secrecy of the ballot should in such a case be pierced in order to arrive at the truth for determining the issues of substance under section 100(1)(d)(iii) of the Act which can lead to the invalidation of the whole election itself. Far from absolutely excluding all evidence on the point, section 100 of the Act expressly visualises the inspection of ballot papers and the reception of evidence with regard thereto in a proper case. A scanning of the statutory rules also tends to show that no absolute rule of secrecy was visualized by the framers thereof. (Paras 11, 13 and 14).

Held, that the larger public policy does not require a blanket or a complete blacking out of all evidence in every eventuality regarding the casting of a vote. The paramount consideration is the purity of the electoral process on which hinges the democratic structure of the country and that cannot be allowed to be polluted. It is only when this is not infringed or violated in any manner that the salutary but secondary principle of the secrecy of the ballot is to be maintained. The law herein has steered a middle course wherein generally the secrecy of the ballot has been protected but no such blanket or absolute bar against the reception of evidence in all eventualities has been raised. Indeed, if this were to be done then perhaps under the cloak of absolute secrecy, even the very purity of the election process might come to be defiled. (Para 15).

Application under section 151 of the Code of Civil Procedure praying that these 4 postal ballot papers be allowed to be examined and be put to the concerned witnesses when they are in the witness box as it is necessary in the interest of justice and just decision of the case.

S. S. Bedi, Advocate. (N. S. Bhatia and P. K. Jain, Advocates with him), *for the Petitioner.*

Anand Swarup, Advocate with H. S. Mann, A. S. Sandhu, M. L. Bansal, Advocate, *for Respondent No. 1.*

S. S. Kang and Narinder Singh, Advocates, *for Respondent No. 4.*

I. B. Bhandari, Advocate, *for Respondent No. 2.*

JUDGMENT.

S. S. Sandhawalia, J.

(1) Whether there is an absolute legal bar against the reception of any evidence in Court regarding the exercise of franchise in favour of or against any candidate under the provisions of the Representation of the People Act, 1951, is the significant question which arises in this petition.

(2) For the purposes of this interlocutory order, it is perhaps unnecessary to delve in any great detail into the pleadings of the main election petition or for that matter of the present application as well. It suffices to mention that the election petitioner seeks to challenge the election of S. Raghbir Singh Gill, respondent No. 1, to the Council of States from the Punjab Legislative Assembly Constituency. Both respondent No. 1, who was an independent candidate supported by the Congress and respondent No. 4, S. Gurcharan Singh Tohra, the Akali candidate, secured 23 first preference votes, but the former was declared elected in view of an additional 4.81 second preference transferred votes. It is the common case that the votes of eight Akali legislators, who were in custody during the emergency were cast by postal ballot-papers. The substratum of the election petitioners' case here is that four out of the aforesaid eight ballot papers were tampered with and altered at the instance of respondent No. 1 in order to favour him and these four votes were received in his favour with the express connivance and indeed active manipulations of the Returning Officer himself and others. The detailed allegations on the point made in the election petition are sought to be controverted in the written statement filed on behalf of respondent No. 1. On the pleadings of the parties, seven issues have been framed, but the material ones here are issues Nos. 2 to 4 in the following terms:—

Issue No. 2.—Whether four ballot-papers were unauthorisedly tampered with after the voters thereof had cast their first preferences on them in favour of respondent No. 4? If so, whether they were thereby converted in favour of respondent No. 1 by changing the figure I placed against the name of respondent No. 4 into figure II and further placing the figure I in favour of respondent No. 1. If so, what is its effect?

Issue No. 3.—Whether the aforesaid four ballot-papers were improperly received and counted in favour of respondent

No. 1 by the Returning Officer which fact has materially affected the result of the election in so far as respondent No. 1 is concerned. If so, what is its effect?

Issue No. 4.—Whether the election petitioner is entitled to an inspection of all the ballot-papers cast in the election in the interest of justice ?

(3) In support of his case, the election-petitioner apart from the material documentary evidence has so far examined as many as 13 witnesses. In the course of the examination-in-chief of Shri Surjit Singh Barnala, Union Minister for Agriculture, the ballot-paper cast by this witness was sought to be shown to him and a prayer was made that the same (which was in a sealed cover) be opened and received in evidence. Because at that stage the matter of inspection of ballot-papers was yet in issue, further examination-in-chief of the witness was adjourned and later the present application under section 151, seeking expressly the permission for examination of the four impugned postal ballot papers to put them to the concerned witness had been moved.

(4) As in the election petition, so in the present application, it has been reiterated that in the aforesaid ballot papers, the first preference marked by the voters in favour of respondent No. 4 was later tampered with and converted into second preference in his favour whilst a first preference mark was added thereon and placed in favour of respondent No. 1. It is claimed that these tampered ballot papers are thus facts in issue and the best and indeed the only evidence to prove the petitioners' case on this point. The prayer is hence made that these four ballot papers may be allowed to be examined and to be put to the concerned persons when they are called into the witness-box in the interest of justice and just decision of the case.

(5) In the reply to the application, the primary objection which has later been strenuously pressed is that the allowance of the application will infringe the prohibition contained in section 94 of the Representation of the People Act, 1951 (hereinafter called the Act). The firm stand taken is that by allowance of the application, the secrecy of the ballots would be completely destroyed by their examination and subsequent putting them to the witnesses and asking them to depose with regard thereto in Court. Instances are given

in the reply of cross voting by the Akali legislators on certain occasions after 1960.

(6) Now, the whole stand of the election petitioners' case here is that in substance the present election petition hinges entirely on the factum of the tampering of four postal ballot papers after these were marked by the voters. That this is so is evident from the very frame of issues Nos. 2 and 3 and it is indeed the very fact in issue thereunder. Learned counsel for the election petitioners, therefore, forcefully contended that on the basis of the detailed statement of facts made in the election petition and the present application as also on the evidence recorded in the case not only is the inspection of the four ballot papers necessary but in fact the election petition can hardly be tried in its absence and would not be able to proceed further unless it is so done. Therefore, it was submitted that the strongest case for the inspection of these ballot papers was made out and indeed, there existed no other mode for arriving at a determination of the facts in issue in the election petition. At the very outset, I may notice that Mr. A. S. Mittal on behalf of respondent No. 1 was virtually forced to concede that for arriving at a finding on issues Nos. 2 and 3, the inspection of the ballot papers would indeed be inevitable. This is indeed obvious because it is impossible for the Court to hold whether the four ballot papers were unauthorisedly tampered with or improperly received as votes in favour of respondent No. 1 without even examining the said ballot papers or receiving evidence with regard thereto. The stand of Mr. Mittal, therefore, was sought to be rested entirely on the letter of the law which according to him totally barred the inspection of ballot-papers or the reception of the evidence with regard thereto on the so-called inviolable principle of secrecy of the ballot papers. Counsel took the stand that even if the matter has to be pre-empted at this very stage by the refusal of the application and the consequent denial of the trial of the election petition, yet this was the inevitable result of the existing statutory provisions.

(7) Before adverting in detail to the relevant provision of the Act and the rules on the point of the secrecy of the ballots, reference may first be made to section 87(2) of the Act, which provides that the provisions of the Indian Evidence Act shall subject to the provisions of this Act be deemed to apply in all respects to any trial of the election petition. Section 5 of the Indian Evidence Act then

lays down that the evidence may be given in any proceeding of the existence or non-existence of every fact in issue as also of all relevant facts. As has been noticed earlier, the pleadings of the parties and the frame of issue Nos. 2 and 3 leave no manner of doubt that the question of tampering or otherwise of the four ballot papers and their subsequent reception in favour of respondent No. 1 appears to be the basic fact in issue in the case and in any case is directly a relevant fact thereto. The substratum of the election petitioners' case is that the four postal ballot papers cast in favour of respondent No. 4, the Akali candidate, by distinguished Akali Legislators were tampered with deliberately and so altered in order to boost the votes of respondent No. 1 and were improperly received in the latter's favour to the total detriment of respondent No. 4. Section 100(1) (d) (iii) lays down that whenever the High Court is of the opinion that the result of the election has been materially affected by the improper reception of any vote which is void then there is no option but to declare the election of the returned candidate as void. The same result ensues under section 100(1) (d)(iv) where there is any non-compliance with the provisions of the Constitution or of the Act or rules made thereunder. In the present case, the first preference votes of the two rival candidates were equal and, therefore, if the election petitioners are able to establish the allegations covered by issues Nos. 2 & 3 aforesaid, respondent No. 4 would be entitled to succeed. The matter of tampering with the four ballot papers and their improper reception in favour of respondent No. 4 is a fact directly in issue in this case and indeed forms its substratum. This position indeed appears to be beyond the scope of challenge. That being so, the primary question that arises is whether in spite of the fact that the matter lies at the very root of the case, nevertheless evidence with regard thereto both by way of inspection of the ballot-papers and the testimony of witnesses with regard thereto is barred by law.

(8) Inevitably, the matter has to be first examined in the light of the provisions of the Act itself. Section 94 of the Act on which the primary reliance is placed by respondent No. 1 is in the following terms :—

> *Secrecy of voting not to be infringed.*—No witness or other person shall be required to state for whom he was voted at an election."

The forceful contention of the learned counsel for the election-petitioners was that the provision aforesaid does not and cannot

imply an absolute bar to the reception of any evidence with regard to the casting of the votes. It was contended that the plain intention of the legislature here is to provide a protection to the witness or to any other person who may not wish to divulge the choice of his candidate. It was pointed out that in the first instance it is the secrecy of the vote of the witness which he has himself cast which is sought to be protected by this provision and if he chooses not to avail of the same or is himself willing to depose with regard thereto, then there is no rationale in preventing him from doing so. According to the learned counsel such a blanket bar would work great public mischief and would even tend to erode larger and the salutary principle of the purity of the electoral process. In sum, the submission is that section 94 of the Act only gives a qualified protection to the witness which he is perfectly entitled to waive.

(9) I find substantial merit in the contention aforesaid. The plain language of Section 94 of the Act seems to indicate that the element of compulsion on the point of answering questions by witnesses with regard to the persons in favour of whom they have voted is sought to be done away with. The language of the provision appears to me as fairly open to the construction that it only provides a protection to the witness and not a blanket bar against all evidence on the point. If such an absolute bar without exception was sought to be imposed there indeed could have been no difficulty in framing the section in categorical terms. If any such blanket ban was intended by the legislature then the section could well be framed as — 'no witness or other person shall at any time be permitted to disclose for whom he had voted at an election'. Such pre-emptory language is well known to the legislature for more than a century by now. Reference in this connection may be made to the language used in sections 122, 123 and 126 of the Indian Evidence Act of 1872. In these sections which intend to lay an absolute bar (except in the contingencies expressly provided), the language used in terms is that no person shall be permitted to state or disclose with regard to matters provided therein. In sharp distinction to this categorical language are the provisions of sections 124 and 125 of the Evidence Act, which merely give qualified protection to the witnesses and lay down that they shall not be compelled to disclose with regard to certain matters provided therein. The language of section 94 of the Act is in line with these latter provisions and in fact appears to be even in relatively milder

terms. Therefore, on the plain language of section 94 of the Act it seems to follow that it provides only a qualified protection to a witness enabling him to refuse to answer a question on the point and, is indeed far from laying down any absolute bar to the reception of all evidence regarding the casting of the votes in an election.

(10) Another provision in the Act itself which was brought to my notice is section 128.

"128. *Maintenance of secrecy of voting*:—

(1) Every officer, clerk, agent or other person who performs any duty in connection with the recording or conducting of votes at an election shall maintain, and aid in maintaining, the secrecy of the voting and shall not (*except for some purpose authorized by or under any law*) communicate to any person any information calculated to violate such secrecy.

(2) Any person who contravenes the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to three months or with fine or with both."

It is plain that this provision has no direct relevance to the giving of evidence in Court. It is concerned primarily with the election staff deployed in the recording or counting of votes at an election. Nevertheless even this provision gives an indication in favour of the view that the legislature never intended any absolute blanket rule of secrecy of vote in all contingencies whatsoever. The portion in italics for emphasis and contained in the brackets of this provision itself visualises some purposes authorised by law or under the provisions of any law which may warrant abandonment of the mandate of the secrecy even by the election staff itself. The provision far from in any way aiding the case of the respondents, to my mind, tends to lend support to the proposition canvassed on behalf of the election petitioners.

(11) A reference to section 100(1) (d) (iii) of the Act is again instructive on this point. It provides for the setting aside of an election if the result thereof has been materially affected by the improper reception, refusal or rejection of any vote or the reception

of any vote which is void. Now, how is such improper reception, refusal or rejection of a vote to be determined ? Obviously, one of the modes for doing so is the inspection of the ballot paper therefor and thereafter to determine whether it was rightly or improperly received or rejected. Inspection of such ballot papers is thus implicit in the statutory provision itself. Indeed, it could well be argued that normally without the inspection of the relevant ballot paper, no such matter can at all be adjudicated upon. Once that is so, it is plain that under the present system of counter-foils for the ballot-papers, the identity of the voter and the person in whose favour he had cast the vote conclusively established. The secrecy of the ballot paper in such a case has necessarily to be violated to arrive at a finding under the mandate of the abovesaid provision itself. It appears to be thus plain that whilst the principle of the secrecy of the ballot is a general provision, yet an exception thereto must be made where the very validity of the ballot-paper or the factum of its improper reception, refusal or rejection is put in issue. It becomes, therefore, inevitable that the veil of the secrecy of the ballot should in such cases be pierced in order to arrive at the truth for determining the issues of substance under section 100(1) (d) (iii) of the Act which can lead to the invalidation of the whole election itself. It appears to me that far from absolutely excluding all evidence on the point, section 100 of the Act expressly visualises the inspection of ballot papers and the reception of evidence with regard thereto in a proper case.

(12) Having dealt with the relevant provisions of the Act itself, reference may now be made to the statutory rules framed thereunder. These again are a pointer to the fact that the legislature did visualise unveiling of the secrecy of vote in Court wherever it becomes necessary. Rule 93 of the Conduct of Election Rules, 1961 pertains to the production and inspection of election papers (which in terms includes used ballot-papers and packets of counter-foils thereof) and provides that whilst in the custody of the District Election Officer or the Returning Officer they shall not be opened and inspected except under the orders of a competent Court. It is obvious here that the framers of the rules themselves visualise and authorise the inspection and production of even the used ballot-papers under the orders of the Court. Reference may again be made to Rule 40 of the Conduct of Election Rules, 1961 as also Rule 40-A forming part of Rule 70 in part-IV of the said rules

which provide for the assistance of a companion of not less than 21 years of age for the recording of votes of illiterate, blind or infirm electors. This also in a way implies a deviation from the rule of secrecy where necessity so requires.

(13) Reliance on behalf of the petitioners was also placed on Rule 73 of the Conduct of Election Rules, 1961 and in particular to sub-rule (2) thereof. Rule 73 provides for the scrutiny and opening of ballot-boxes and packets of postal ballot-papers by the Returning Officer. Sub-rule (2) lays down five grounds upon which a ballot-paper shall be declared invalid. Now, section 100(1) (d) (iii) pertains both to improper reception as also to an improper rejection of any vote. It was rightly pointed out that improper reception of a vote may involve the counting of a vote in favour of 'B' where in fact it has been cast and marked by the voter in favour of 'A'. This visualises a possibility without the vote being in any way rejected. Improper reception may also involve the taking into consideration and counting of a vote where the ballot-paper is invalid for any reason specified in Rule 73(2). How can such a wrongful reception or a wrongful rejection under Rule 73(2) be determined except by the inspection of the ballot-paper either so wrongfully received or wrongfully rejected ? It was, therefore, rightly contended that when the statute makes a wrongful or improper reception or rejection in violation of Rule 73(2) a ground for invaliding an election then it would be obviously unreasonable to hold that the ballot paper with regard to which such wrongful or improper reception or rejection has taken place is neither to be inspected nor evidence be allowed with regard thereto on the supposed inviolable principle of the secrecy of the ballot. Similarly, the learned counsel for the petitioners' reliance on Rule 74 which provides for the arrangement of valid ballot papers in parcels was equally well-founded. It is plain that the valid vote means a ballot-paper which has been so marked in favour of a candidate of his choice by the voter. Where a ballot-paper has been so tampered with as to alter the same in favour of a candidate other than the one originally intended, it cannot in the eye of law be a valid ballot-paper worthy of taking into consideration. Counsel was, therefore, right in contending that countenancing such a result on a supposed principle of absolute secrecy would entail acceptance of tampered ballot-paper, which is only a mockery of a real ballot-paper. If any cloak of absolute secrecy is to be raised around such forged ballot-papers and no remedy is to be left to the aggrieved

candidate thereby then such a thing would truly go to the root of the electoral process and foul the purity of the same which can hardly be assumed to be the intent of the law.

(14) I am, therefore, of the opinion that the scanning of the relevant statutory rules also tends to show that no absolute rule of secrecy was visualised by the framers thereof.

(15) Apart from the statutory provisions aforesaid, it may perhaps be conceded in favour of the respondents that the principle of secrecy of the ballot cannot be reduced merely to a personal right of the voter, who has cast the same. Undoubtedly, an element of public policy equally enters the arena. However, can it ever be said that the larger public policy requires a blanket or a complete blacking out of all evidence in every eventually regarding the casting of a vote ? I am unable to hold so. As has been often highlighted by their lordships of the Supreme Court, the paramount consideration here is the purity of the electoral process on which hinges the democratic structure of the country. That of course, cannot be allowed to be polluted and Mr. Kang for the respondent No. 4 was on a firm footing in his submission that the purity of the election process is indeed the primary and pre-eminent consideration here. It is only when this is not infringed or violated in any manner that the salutary but secondary principle of the secrecy of the ballot is to be maintained. It appears to me that the law herein has rightly steered a middle course wherein generally the secrecy of the ballot has been protected but no such blanket or absolute bar against the reception of evidence in all eventualities has been raised. Indeed, if this were to be done then perhaps under the cloak of absolute secrecy even the very purity of the election process might come to be defiled.

(16) Adverting inevitably to precedent, it may be noticed at the out-set that Mr. Mittal frankly conceded his inability to cite any case in support of the proposition of absolute secrecy of ballot, which he was canvassing and was candid enough to concede that according to him the matter was *res integra*. Whilst it is true that no judgment bearing directly on the point could be brought to my notice, yet it appears to me that by way of analogy the highest authority again appears to be a pointer to the fact that the legislature never intended any blanket bar against the reception of

evidence on the point of the casting of a vote. In the celebrated case, *Ram Sewak Yadav* v. *Hussain Kamil Kidwai and others*, (1) Shah J. speaking for the Court, had this to say :—

> "But the Election Tribunal is not on that account without authority in respect of the ballot papers. 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 O. 11 Code of Civil Procedure may be exercised, subject to the statutory restrictions about the secrecy of the ballot paper prescribed by Sections 94 and 128(1)".

In *Shri Shashi Bhushan etc.* v. *Prof. Balraj Madhok etc.*, (2), even in the absence of any direct evidence to support the claim of inspection of ballot papers, their Lordships allowed inspection where in the very nature of things the allegations with regard to their tampering with chemical treatment could be proved or disproved only by inspecting the ballot papers. In *Manphul Singh* v. *Surinder Singh* (3), their Lordships almost laid down the procedure regarding the proof in Court of a vote cast in favour of a particular candidate on the following terms :—

> "As and when the trial proceeds in the case of votes cast in the name of dead persons the death certificates already produced would have to be proved as relating to the particular individual whose name is found in the electoral roll and then the counterfoil relating to the particular number of the voter would have to be looked into to see whether the vote had been cast and then it would have to be found out in whose favour that vote had gone.
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> ** ** **
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> Then the voting papers itself would have to be looked into to see in whose favour it has been cast. It might

(1) A.I.R. 1964 S.C. 1249.
(2) A.I.R. 1972 S.C. 1251.
(3) A.I.R. 1973 S.C. 2158.

even be necessary to look into the counterfoils if the respondent wants to establish that the vote has been cast by the real voter. If the person who gives evidence admits that he had voted in the name of an absent voter he may have to be confronted with the counterfoil and the signature or thumb impression thereon and it may have to be compared with the signature or thumb impression of the person who gives evidence. This might even become necessary in some cases where even the voter concerned comes forward and gives evidence that he did not cast his vote."

(17) Counsel for the petitioners had then drawn my attention to the trial in *Shri Gurbachan Singh Bajwa* v. *Shri Satnam Singh Bajwa,* where in the course of the examination of P.W. 5, an objection was raised regarding the evidence of a witness on the point of casting his vote for a particular candidate. Sarkaria J. while trying the petition, overruled the objection with the categorical observations that the witness cannot be forced to reply to this question but if he wants to reply voluntarily then he may do so. In *Shri Kundan Singh* v. *Shri Kabul Singh etc.* (5), Mahajan J. not only appraised the evidence regarding the casting of a vote by a particular voter but arrived at a finding with regard thereto in the following terms :—

"According to the Full Bench decision, the three votes of Hari Singh, Balwant Singh and Harjinder Singh are void. On inspection of the three ballot papers it has been found that they cast their first preference votes in favour of Kundan Singh (election petitioner) and Kabul Singh (recriminator). Two votes have gone to Kabul Singh and one to Kundan Singh."

(18) It is evident from the above that the weight of authority is entirely tilted in favour of the election-petitioners. I must, therefore, conclude on the basis of the provisions of the Act itself the rules framed thereunder, on principle and the weight of precedent, there does not exist any absolute rule of secrecy forbidding the reception of evidence in all contingencies regarding the casting of a vote in an election.

(4) E.P. 47 of 1972 decided on 13th August, 1973.

(5) E.P. 1 of 1968, decided on 20th March, 1969.

(19) Once the legal hurdle is out of the way then it appears to me that the election-petitioners have a cast iron case in their favour. There is indeed no dearth of either pleadings or evidence and indeed there is the plethora of both on which the claim for inspection of the postal ballot-papers in the present case is firmly rested. The necessary pleadings are contained in paragraphs 8, 17 18 and 22 of the election petition. It deserves recalling that the respondent had even earlier sought to challenge that these were vague and lacking in a concise statement of material facts. In my exhaustive order dated the 16th November, 1976, the preliminary issue No. 1 was decided in favour of the election petitioners on the finding that these pleadings did not any way lack in material facts etc. That order has not been the subject-matter of any challenge and still holds the field. A reference to the same makes it evident that adequate and ample ground has been laid for the necessity of the inspection of the postal ballot papers in the present case.

(20) There is then the evidence of P.W. 2 Shri M. S. Khaira Advocate who was the counting agent of respondent No. 4 bearing directly on the point. He specifically mentioned that the wax-seals on six of the ballot-papers were not decipherable at all. He has also deposed that two out of the four postal ballot-papers marked in blue ink were heavily over written and especially so as regards the making of the second preference. Similarly, the third postal ballot-paper bore marks of tampering and writing on them had been done twice or thrice. Similarly, as regards the fourth ballot-paper, he noticed that it was marked with a red ball point and the second preference marking showed a difference in colour of the two lines etc. There is then the testimony of P.W. 3. Giani Ajmer Singh, Secretary of the Shiromani Akali Dal regarding the party whip issued to all the Akali legislators to vote in favour of respondent No. 4 Shri Gurcharan Singh Tohra and further that no second preference be cast for any other candidate. He also gave testimony regarding the party's stand and the integrity of the relevant Akali legislators to whom postal ballot-papers had been issued. P.W. 4 Shri J. M. Kaush, Deputy Superintendent, Punjab Vidhan Sabha, Secretariat, had produced the ballot-papers in the election and at the request of the election petitioners' counsel which was not objected to at all on behalf of the respondents, the eight postal ballot-papers were separated and sealed in two packets. Undisputed evidence has also been placed regarding the despatch of eight postal ballot papers to the Akali legislators who were detained in

custody at the time of the election during the emergency. Lastly, there is the partly recorded statement of Shri S. S. Barnala, Central Minister for Agriculture and Irrigation, which is categorical on the point that he had cast only one preference vote in favour of respondent No. 4 and did not cast any second preference vote in favour of any other candidate.

(21) As has been pointed out a little too often in the present case already, it is plain that the whole election petition hinges on the tampering of the postal ballot-paper after these were marked by the Akali legislators in custody and the subsequent improper reception thereof in favour of respondent No. 1. The election-petitioners have brought on record ample material on which they rely in support of the case and it appears to me that in order to decide the dispute in the present election petition and in fact virtually the only primary fact in issue therein, the inspection of the postal ballot-papers in the present case is absolutely necessary. I had repeatedly asked the learned counsel for the respondents whether the allegation regarding the tampering of the ballot-papers could possibly be established in any other manner than by inspecting the ballot-papers and no satisfactory answer thereto could possibly be rendered. To my mind, in the very nature of things the allegation regarding the tampering of the postal ballot-papers can be proved or disproved only by first inspecting the same.

(22) I would accordingly allow the application and direct the inspection and examination of the postal ballot-papers in the present case. Inevitably, the witnesses relevant to these ballot-papers are also allowed to be examined with regard thereto in the interest of justice.

N.K.S.

FULL BENCH

CRIMINAL MISCELLANEOUS

Before S. S. Sandhawalia, Prem Chand Jain and S. C. Mital, JJ.

GURBAKSH SINGH SIBIA.—*Petitioner.*

versus

STATE OF PUNJAB,—*Respondent.*

Criminal Misc. No. 3753-M of 1977

September 13, 1977.

Code of Criminal Procedure (2 of 1974)—*Sections* 167(2), 437 *and* 438—*Indian Evidence Act* (I of 1872)—*Section* 27—*Power to grant*