

THE HONOURABLE SRI JUSTICE M. SATYANARAYANA MURTHY

ELECTION PETITION No.1 OF 2011

ORDER:

The unsuccessful candidate in election for Member of Legislative Council of Andhra Pradesh from Chittoor Local Authorities Constituency filed election petition under Sections 80, 80A, 81, 82, 83, 84, 100(1) (d) (iii) and (iv) and 101(a) of the Representation of People Act, 1951 (for short, 'the Act') requesting to re-examine and re-count of the ballots polled in favour of the first respondent and also 14 votes which were declared as invalid and the exhausted votes, declare that the election of the first respondent from Chittoor Local Authorities Constituency, as Member of Legislative Council of Andhra Pradesh, as illegal, null and void, and declare that the petitioner has been duly elected as having been obtained or secured majority of votes from the Chittoor Local Authorities Constituency as Member of Legislative Assembly of Andhra Pradesh.

02. The petitioner is an Advocate, practicing at Madanapalle, Chittoor District. In pursuance of the election notification dt.25.02.2011, for conducting Biennial Elections to the Legislative Council of Andhra Pradesh and the election was scheduled to be held on 21.03.2011 between 8.00 a.m. and 4.00 p.m., the petitioner and respondents 1 to 4 and one G.Ramadas Choudhary filed their nominations, however, G.Ramadas Choudhary withdrew his nomination on 07.03.2011. As a result, only five candidates remained in the tray. The petitioner contested in the election on behalf of Indian National Congress, whereas the second respondent contested on behalf of the Telugu Desam Party, respondents 1, 3 and 4 contested as independent candidates. The polling was held in accordance with the system of proportional representation by means of single transferable vote.

03. The 5th respondent was the Returning Officer for conducting election to the Legislative Council of Andhra Pradesh from Chittoor Local Authorities Constituency. As per the schedule, the polling was held at three polling stations viz., (1) Tirupathi, (2) Madanapally and (3) Chittoor from 8.00 a.m. to 4.00 p.m. The total number of votes in the said constituency were only 914 (Tirupati - 220, Madanapally - 441 and Chittoor - 253 respectively). Out of the said votes, 219 votes were polled at Tirupathi and 441 and 253 each in the other two polling stations, Madanapally and Chittoor. Thus, total votes polled in the election were 913.

04. As per the schedule, counting took place on 23.03.2011 8.00 a.m. onwards on three tables in the counting hall. The petitioner appointed one N.Reddinagulu, S/o.N.Pedda Reddanna, N.Ananda Reddy, S/o. late Gangi Reddy and V. Satya Babu,

S/o. Govindaiah, who are practicing as Advocates at Madanapally, Chittoor District, as counting agents at table Nos.1, 2 and 3 respectively. The other contested candidates were also appointed their respective counting agents at each table. During counting, the petitioner and his election agent M.Ramachandra Reddy, S/o.Rami Reddy were also present in the counting hall.

05. The ballot boxes pertaining to three polling stations, viz., Tirupathi, Madanapally and Chittoor were placed at table Nos.1, 2 and 3 respectively. After opening the boxes, the ballots were bundled by placing 25 ballots in each bundle and the balance ballots were placed in a separate bundle. After completion of the said process on the three tables, all the bundles were placed in a drum and mixed up the bundles. Thereafter 12 bundles, which contain 300 ballots, were assigned to each counting table and the remaining 13 ballot papers were placed at table No.1 in addition to 300 ballots already assigned. They followed normal procedure for keeping tray consisting of six compartments. Out of six compartments, five compartments were earmarked for placing votes of the contesting candidates and the sixth one was earmarked for placing the doubtful votes.

06. The 5th respondent-returning officer was present in the counting hall supervising the counting process and he was deciding the validity of doubtful votes. At table No.1, while the 5th respondent deciding the validity of the doubtful votes, the counting agent of the petitioner, N. Reddinagulu, requested 5th respondent to validate the ballot paper wherein the first preference is clearly expressed in the box opposite to the name of the petitioner. The 5th respondent rejected the said request on the ground that the mark is not first preference, but it is 'L'. The counting agent of the petitioner requested the 5th respondent to treat one of the doubtful votes as invalid, as the preference exercised by the voter in favour of the first respondent is not the first preference, but it appears as 'I'. Instead of rejecting the same, the 5th respondent treated it as valid in favour of the first respondent. The action of the 5th respondent is contrary to the Rule 73 of the Conduct of Election Rules, 1961 (hereafter referred as 'the Rules' for convenience). It is further contended that at table No.2, while the 5th respondent verifying ballot papers, the counting agent of the petitioner at table No.2 requested the 5th respondent to validate the ballot paper wherein the voter clearly expressed his first preference in the box opposite to the name of the petitioner, but the same was rejected on the ground some mark is drawn below the name of the petitioner and in view of the same the elector can be identified. Similarly, the 5th respondent validated one doubtful vote in favour of the first respondent, though no first preference was expressed in the box opposite to the name of the first respondent, but

the voter clearly struck of the name of the first respondent by slash (/) with 40 degrees slope. Thus, validating the vote in favour of the first respondent, despite objection, is contrary to Rule 73 of the Rules.

07. While the 5th respondent verifying doubtful votes at table No.3, the counting agent of the petitioner, V.Satya Babu, brought to the notice of the 5th respondent that in one of the doubtful ballot papers, the preference expressed by the elector in the box against the name of the first respondent is not at all the first preference, but the said mark is in the reverse shape of the capital letter 'L' i.e. ('L'). The 5th respondent, without considering the objection of the counting agent of the petitioner, validated the said vote in favour of the first respondent which is contrary to the Rule 73 of the Rules. Similarly, the 5th respondent validated two votes in favour of the first respondent, though the first preference is not expressed by the elector in favour of the first respondent, who is returned candidate in the election and such reception and rejection of votes is contrary to Rule 73 of the Rules.

08. In the first round of counting, the petitioner and respondents 1 to 4 secured 310, 379, 206, 2 and 2 votes respectively, and 14 votes were rejected. The votes secured by each candidate were kept in a separate cover, which is known as main parcel of each candidate. On the basis of votes polled, the 5th respondent fixed the quota at 450 votes required for declaring a candidate as elected. As no candidate secured the minimum 450 votes as fixed, the 5th respondent decided to eliminate the candidate with lowest number of votes. The respondents 3 and 4 secured equal number of votes i.e. two votes each. By drawing lot, the 4th respondent was eliminated at the first instance. The main parcel of the eliminated candidate was taken to the first table for the purpose of sorting out the ballot papers among the continuing candidates according to the next available preference marked in each ballot paper. In case no other preference is given or the next preference is not marked, the said ballot papers are treated as "**Exhausted ballot papers**". In the said process, the two ballot papers relating to the 4th respondent were treated as "**Exhausted ballot papers**".

09. After eliminating the respondents 3 and 4, there was no change in the votes secured by the petitioner as well as the respondents 1 and 2 i.e. 310, 379 and 206 respectively. Since the 2nd respondent secured least votes among the three candidates, he was eliminated and the votes polled in favour of the first respondent were kept at table No.1 for transferring the second preference votes to the petitioner and the first respondent. In the process of transferring the second preference votes

from the main parcel of the 2nd respondent, the counting agent of the first respondent raised an objection in respect of two ballot papers marked in favour of the petitioner stating that the second preference is not properly marked, though the second preference vote was clearly marked in the box opposite to the name of the petitioner. The counting officer instead of placing the said ballots in the compartment of the petitioner placed them in the compartment, meant for doubtful votes in the presence of the petitioner, at the counting table. The petitioner requested the counting officer to treat the said ballot papers as valid since the second preference vote is clearly expressed in his favour. However, on the request of the petitioner, the said ballot papers were taken to the 5th respondent to decide the validity of the said votes. In one of the ballot papers, the second preference is clearly expressed by the elector by marking **Roman form of two (II)** in the box opposite to the name of the petitioner, but on the objection raised by the agent of the first respondent that it was not **Roman form of two (II)**, but **international form of Indian numeral eleven (11)**. The 5th respondent treated the same as **international form of Indian numeral eleven (11)**, rejected the ballot, it is against Rule 73 of the Rules. The Election Commission of India also published a hand book for candidates (At elections to the A.P. Legislative Council) (reprinted in February 2011) wherein issued instructions to the returning officer as how to deal with the counting of votes in the election etc. Appendix-10 of the said book relates to General Instructions "**For recording of votes at Elections to the State Legislative Council**". As per instruction No.8 of the hand book, marking of international form of Indian numerals like 1, 2, 3, etc., or roman form I, II, III etc., is sufficient to indicate the preference of votes. Though it was brought to the notice of the 5th respondent, he illegally rejected the votes polled in favour of the petitioner and it is contrary to Rule 73 of the Rules and instruction No.8 of Appendix 10 of the hand book for candidates (At Election to Andhra Pradesh Legislative Council) (reprinted in February, 2011).

10. Similarly, in the process of transferring the second preference votes, in one of the ballots, the voter expressed the second preference in the box against the name of the petitioner in **international form of Indian numeral eleven (11)**, but objection of the first respondent on the ground that **international form of Indian numeral two (2)** was not clearly written. Therefore, the rejection of votes polled in favour of the petitioner, reception of two votes in favour of the first respondent, by the 5th respondent, is illegal, arbitrary and against Rule 73 of the Rules and instructions in the handbook referred to supra.

11. At the end of counting, the petitioner secured only 407 votes, whereas the first respondent secured 408 votes and thus the first respondent was leading by one

vote. The petitioner submitted the written representation to the 5th respondent for re-counting and re-examination of exhausted and invalidated votes by the 5th respondent, though there was no need to submit application for re-counting and re-examination. Despite it, the 5th respondent did not properly re-examine the votes and it is against Rule 73 of the Rules and instructions in the hand book and on the other hand refused to re-examine any ballot paper and proceeded with re-counting and it is contrary to Rule 82 of the Rules. As such, the result in the election is affected materially, as the margin is only one. If the exhausted votes are re-examined and treated as valid any one of the two votes rejected by the 5th respondent, the petitioner will be the returned candidate. As such the petitioner prayed for the aforesaid reliefs.

12. The first respondent filed counter admitting the contest in the election, declaring him as returned candidate in the election, while denying the material allegations like illegal and improper rejection and reception of votes, inter alia contending that the alleged marking '†' in the ballots is false. The votes polled in favour of the petitioner and receipt of vote illegally in favour of the first respondent by the 5th respondent is contrary to Rule 73 of the Rules.

13. Similarly, the reception of one of the ballots though marking was '†' with 40 degrees slope, so also two votes polled in favour of the first respondent though the marking was slash (/) with 45 degrees slope and rejection of two votes in the last round allegedly polled in favour of the first respondent and the petitioner are all false.

14. It is specifically contended that the allegation made against the 5th respondent that he adopted different yardsticks in examining the votes polled in favour of the petitioner and the first respondent are all false. The alleged 14 votes polled in favour of the petitioner were rejected and were not found in Form 23-B as they had been rejected at initial stage itself and no candidate including the election petitioner or his agents made any application raising any objection or grievance with regard to 14 votes after first round of count. It is also contended that except mentioning about 14 rejected votes, the petitioner has not established how he is aggrieved by rejection of such votes, but claimed vague relief that re-examination and re-counting of rejected votes in para 9(b) of the election petition. The petitioner and his agents signed before the election authorities after first round of counting, acknowledging the validity of counting. Hence, this election petition lacks cause of action to grant any of the reliefs and the election petition is filed based on misconstrued facts and law by making baseless allegations.

15. The specific contention that during process of transferring second preference

votes from the main parcel of the second respondent, the counting agents of the first respondent raised objection against the reception of two ballot papers marked in favour of the petitioner, though second preference vote was clearly marked in the box against the name of the petitioner are all false, rejection of ballot on the ground that it is **international form of Indian numeral eleven (11)**, but not **Roman form of two (II)** is false. Similarly the other allegation that **international form of Indian numeral two (2)** is in one ballot and that is rejected on the ground that it was not clearly mentioned are all false and not based on any evidence.

16. The first respondent denied the allegation that one voter expressed his preference in the box against the name of the petitioner by mentioning the **international form of Indian numeral two (2)**, raising objection of the first respondent as '2' was not clearly written is false and bringing to the notice of the 5th respondent, instruction No.12 in Chapter XIII and also Rule 73 of the Rules, the 5th respondent arbitrarily rejected the plea of the petitioner and treated the said ballot as exhausted are all false. He also denied the personal knowledge of the petitioner about illegal rejection of those two votes. The petitioner did not furnish the serial number of the ballot papers, which were allegedly rejected illegally. He also did not mention the names of the election agents of the first respondent, who object as to the validity of the votes. The petitioner has not made out *prima facie* case to proceed with the election petition ordering re-examination and re-counting of votes. Based on vague allegations, not supported by any material, the case of the petitioner cannot be accepted. There is no cause of action and no proper verification of the petition, on this ground, the petition also liable to be dismissed.

17. The petitioner made serious allegations against the 5th respondent about illegal reception and rejection of votes and biased attitude of the 5th respondent in deciding the doubtful ballot papers at table Nos.1 and 2 and that those allegations are not supported by any material and beyond the scope of the election petition filed under Section 100(1) (d) (iii) and Section 101 A of the Act.

18. The election petition is not maintainable due to lack of full material facts required under Section 83(1) (b) of the Act. The petitioner did not bring those illegal acts of the 5th respondent to the higher authorities and that the petitioner though submitted an application did not disclose any of those illegalities while treating the votes as exhausted instead of transferring those two votes in favour of the petitioner in the process of transferring of votes, and it is concocted story. It is well settled that mere allegation of the petitioner that he suspects or believes that there has been improper reception and rejection of votes shall not be sufficient ground to maintain the

election petition and to grant reliefs prayed for.

19. The petitioner specifically contended that the petitioner secured one vote less than the first respondent in 4th round of counting, re-counting and re-examination of votes were undertaken by the 5th respondent, despite the protest by the first respondent, on the ground that the votes were already declared after completion of 4th round of counting, re-counting and re-examination of all votes were done. Each and every ballot paper was shown to the candidates and election agents. However, after re-examination and re-counting of votes, there was no change, and the petitioner and the first respondent secured the very same votes i.e. 407 and 408 respectively, more than two hours was taken for re-examination and re-count of votes, before declaration of election itself, established that the votes were minutely examined and re-examined. Therefore, the question of re-examination and re-counting does not arise in the present set of facts of the case.

20. The allegations made in various paragraphs are vague and baseless. On the strength of those vague allegations, re-examination and re-counting of the votes cannot be ordered unless a *prima facie* material is brought on record and thereby the petition is not maintainable.

21. The election petitioner filed a reply affidavit though it is not contemplated under Rules or under the Code of Civil Procedure (for short, 'the code'). If the petitioner wants to file a rejoinder under Rule 9 of Order VIII of the Code, leave of the Court is necessary for filing reply affidavit by the petitioner to the counter of the first respondent. However, the learned Judge, who conducted trial, received it.

22. The specific allegation made in the reply affidavit is nothing but denial of the allegations made in the counter filed by the first respondent, while specifically contending that Rules 38 (A) (5) and 73(2) of the Rules says that the serial number of the ballot papers shall be effectively concealed in such manner as the election commissioner direct and thereby the question of disclosing the ballot number does not arise and it is not a ground to dismiss the petition. It is further contended that Rule 73(2) of the Rules also further says the serial number of the ballot is required to be concealed and accordingly concealed. Therefore, the failure of the petitioner to disclose the ballot number is not a ground to dismiss the election petition.

23. The petitioner further contended that re-examination could not take place only re-counting took place which does not serve any purpose. Therefore, re-examination of both the votes, counted for the first respondent and the petitioner and exhausted votes, is required to be undertaken, otherwise it is not possible to find out the truth in the allegations and prayed to allow the petition.

24. Based on the above pleadings, this court framed as many as seven issues.

They are as follows:

- 1. Whether the rejection and refusal of four votes polled in favour of the petitioner by the Returning Officer is illegal and contrary to Rules 71 and 73 of the Conduct of Election Rules, 1961?*
- 2. Whether validating eight votes polled in favour of the first respondent, the returned candidate by the Returning Officer is illegal and whether they have to be treated as invalid votes as per Rule 73 of the Conduct of Election Rules, 1961?*
- 3. Whether the allegations in the election petition are supported by material facts as required under law to establish the same in order to pass an order of re-counting and re-examination of votes?*
- 4. Whether the Returning Officer i.e. 5th respondent is neither necessary party nor proper party to the election petition wherein all the allegations are only against him and the same are only basis for filing the election petition?*
- 5. Whether the election of successful candidate i.e. the first respondent herein is to be lightly interfered, in case of admission of no fault of his?*
- 6. Whether the election of the first respondent has to be declared as illegal and void and consequently to declare the petitioner as duly elected?*
- 7. To what relief?*

25. During pendency of the election petition, the first respondent filed application to delete the 5th respondent from the array of the parties in E.A.Nos.1077 and 1009 of 2012, the same were allowed on 21.11.2012 and the petitioner filed application in E.A.582 and 583 of 2011 to strike out pleadings under Rule 16 of Order VI of the Code and to reject the election petition under Rule 11 of Order VII of the Code which went up to Apex Court and ultimately the petitions were ended in dismissal

26. During argument, learned Senior Counsel for the petitioner, D. Sudharshan Reddy mainly contended that the petitioner disclosed material facts, particularly as required under the provisions of the Act and that except by re-examination of exhausted votes and the re-examination votes counted to the credit of the first respondent, there is no possibility of deciding the present dispute, since the material allegation made in the petition are supported by direct evidence, more particularly, the evidence of counting agent and election agent. The rejection of two votes in the process of transferring of votes on the ground of marking **international form of Indian numeral eleven (11)** in the box opposite to the name of the petitioner, is *prima facie* illegal and there is no justification to treat the same as eleven **(11)** since the contesting candidates are 5 in number. Therefore, on this ground alone re-examination of the exhausted vote is required. Further, rejection of votes on the ground that the **international form of Indian numeral two (2)** was not clearly mentioned in the box against the name of the petitioner is another grave illegality committed by the 5th respondent in rejecting the vote. Therefore such ballot is to be

re-examined to decide the illegal rejection of the vote polled in favour of the petitioner. P.Ws.1, 2 and 4 in their evidence specifically testified about the illegal rejection of two ballot papers. Thus, the allegation of illegal rejection of two votes in the process of transferring the second preference of votes is supported by material facts. Apart from that the margin is only one vote, if those two votes are counted in favour of the petitioner, it would affect the result of the election and the petitioner has to be declared as returned candidate in the said election. Therefore, it is necessary to re-examine the exhausted votes to do fair and complete justice to the parties.

27. It is also contended that non disclosure of ballot number is not a ground to dismiss the election petition in view of Rule 38(a) (5) and 73 (2) of the Rules, as the ballot numbers were concealed in view of the above provisions. Thereby it is impossible for the petitioner to disclose the ballot numbers of those two votes.

28. It is also contended that no written representation is required to be given disclosing the particulars of alleged irregularities to the returning officer for re-examination and re-counting as per the provisions of the Act. Mere oral request for re-examination and re-counting is sufficient. Mere failure to disclose the irregularities or illegalities in rejection and reception of votes in the written representation marked as Ex.P.4 is not a ground to dismiss the petition. He also filed written arguments reiterating the above contentions, drawing the attention of this Court the evidence on record and placed reliance on several Judgments in support of his contention and those written arguments will be considered at appropriate stage while answering the issues.

29. The learned Senior Counsel, Sri D.V.Seetharama Murthy for the first respondent argued totally in support of the contentions raised in the counter mainly highlighting failure of the petitioner to disclose the material facts, which is mandatory under Section 82 of the Act, added to that the counsel for the respondent pointed out that non disclosure of the material irregularities committed by the officers concerned, during process of counting in rejection and reception of two votes in Ex.P.4 is fatal. Besides the above, failure of the petitioner to disclose the ballot numbers which are illegally rejected is a sufficient ground to decline the relief in the petition.

30. It is further contended that the allegations made in the petition are not supported by satisfactory and cogent evidence. While appreciating the evidence in the election petition, the court has to scrutinize the evidence with great circumspection since the witnesses are partisan witnesses. If the evidence of witnesses is examined or analyzed with circumspection, the testimony of P.Ws.1 to 4 is liable to be rejected as they are not wholly reliable witnesses.

31. Learned counsel for the first respondent further contended that drafting of the petition based on the principles laid down in the various Judgments, so as to bring the case within the ambit of the provisions of the Act, is not sufficient and apart from that the allegations made in the various paragraphs, more particularly, marking '┐' (**reverse L**) in the box against the name of the petitioner in two ballots and in one ballot making some marking on the ballot paper near the printed name of the petitioner would disclose the identity of the voter. Even if those allegations are accepted, the claim of the petitioner cannot be accepted since the marking of votes disclose the identity of the voter and in addition to that the very marking of preference as 'L' and '┐' is sufficient to reject those votes. Therefore, *prima facie* the allegations made in the election petition would not constitute the cause of action for ordering re-examination and re-counting of votes or the allegation made in the election petition.

He also filed written briefs reiterating the argument advanced by him, referring various paragraphs of evidence in the written arguments placing reliance on several judgments and prayed to dismiss the petition and the said written briefs will be considered at appropriate stage while deciding the issues.

32. The chequered history of the trial of the petition is that initially it was listed before the Senior Judge of this Court, after framing issues on 17.08.2012, the matter was listed before another Senior Most Judge, who retired from service for the present and again the petition was listed before another Senior Most Judge on 17.11.2013, but ultimately the third Judge by a lengthy order dated 22.06.2015 in E.A. No.565 of 2015 filed by the petitioner to transfer the election petition to another Judge was allowed and directed the Registry to list the election petition together with E.A. No.564 of 2015 before any other Judge after obtaining orders of the Hon'ble the Chief Justice, thereupon by Order dated 11.09.2015 the matter was listed before me at the stage of hearing argument.

Issue No.3:

33. In view of the specific contentions raised by the counsel for the first respondent, I find that it is appropriate to take up issue No.3 before deciding the other issues, since the learned counsel for the first respondent contended that the petition lacks material facts as required under law, to pass an order of re-counting and re-examination of votes.

34. The major contention of the learned counsel for the first respondent, from the beginning, is that the election petition is not maintainable and it is to be rejected at the threshold on the ground that the petition lacks material facts, which is mandatory requirement, under Section 83 of the Act. It is relevant to mention here that the

petitioner filed E.A. No.582 of 2011 under Rule 16 of Order VI of the Code to strike out of the averments in paragraphs 6, 7, 8, 9, 13, 14 and 17 of the petition as they are frivolous, scandalous and vexatious and another application in E.A. No.583 of 2011 to reject the election petition on the ground that it does not disclose the cause of action under Rule 11 of Order VII of the Code, but by order dated 03.04.2012, this Court dismissed both the applications holding that there are no grounds to grant both the reliefs, as the substance of the allegations made in the election petition disclose the material facts, it gives cause of action for filing election petition.

35. Aggrieved by the order, the petitioner carried the matter to the Apex Court in S.L.P. No.13621 and 13628 of 2012, but the special leave petitions were dismissed at the stage of admission, while permitting the petitioner to make appropriate application before this Court to delete/ striking out the name of the 5th respondent. Thus, the finding of this court in E.A. No.582 and 583 of 2011 attained finality. When the issue was raised with regard to maintainability of the application for lack of material particulars, this Court passed an order which attained finality, the first respondent is precluded to reiterate the same contention before this Court, as the issue was already held against the first respondent by this court and upheld by the Apex Court at the stage of admission of Special Leave Petitions on the principle of *res judicata* or on the principle issue *estoppel*.

36. It is the specific contention of the first respondent at every stage of the proceedings that the petition is liable to be dismissed on the ground of non disclosure of material facts which gives rise to cause of action for filing the petition. Section 83 of the Act mandates the disclosure of material particulars and for better appreciation Section 83 is extracted hereunder:

83. Contents of petition.—

(1) An election petition—

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

[Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.]

37. The first respondent based his contention on sub-clause (a) to sub-section

(1) of Section 83 of the Act placed reliance on the judgment of the Apex Court in support of his contention during argument.

38. The expression of 'material facts' has neither been defined in the Act nor in the Code, but the Apex Court in various decisions drawn distinction between 'material facts' and 'material particulars'. However, the material facts required to be stated are those facts which are to be considered as materials supporting the allegations made. In other words, there must be such facts as to be the over all basis for the allegations made in the petition.

39. In other words, it can be said that a material fact can be said to be a fact which gives rise to cause of action for filing a petition, material particulars can be said to be details of facts which gives rise to establish the principal facts (i.e. material fact), but material particulars can be said to be collateral fact to prove the principal fact. In view of Sub-Clause (a) to Sub-Section (1) of Section 83, in the petition the petitioner did not disclose the material particulars which form basis the allegations made in the petition or facts which gives rise to give cause of action. Hence, the petition shall be rejected.

40. Learned counsel for the petitioner in support of his contention drawn attention of this Court to a judgment of the Apex Court reported in **Jitendra Bahadur Singh v. Krishna Behari**^[1] relying on the judgment of **Ram Sewak Yadav v. Hussain Kamil Kidwai and others**^[2] and **Dr. Jagjit Singh v. Giani Kartar Singh**^[3] in all the decisions the law declared by the Apex Court is that if there were material facts required to be stated are those facts which can be considered as material supporting the allegations made. In other words they must be such facts as to afford a basis for the allegations made in the petition and if a Judge can be satisfied only on the basis of proof and not on the basis of mere allegations, the court may order inspection of ballot papers and grant appropriate reliefs based on *prima facie* satisfaction of the Judge. In **R.Narayanan v. S. Semmalai and others**^[4] followed the principle laid down by the Apex Court in **Jitendra Bahadur Singh** referred to *supra*.

41. Learned Senior Counsel for the first respondent, Sri D.V. Sitarama Murthy, in the written arguments contended that narration/ description/ drawing of figures of alleged 12 votes without giving the basis for drawing the same in the Election Petition, shall be treated as only allegations and not material facts and drawn attention of this Court to certain paragraphs in the evidence of witnesses during cross-examination and in the evidence, P.Ws.2 to 4 admitted that they have been provided paper, pad and pencil before entering in to the counting hall and therefore they would have noted

the alleged marks on the paper and would have filed those papers along with the election petition, if those allegations are true, but they miserably failed to note down those marks on the paper provided to them by the authorities concerned and this factum of providing paper, pad and pencil is not disclosed in the election petition and in the absence of any paper, noting down the marks they found on the rejected ballots or received ballots, the petition is not maintainable. Since it is not the case of the petitioner that the election agent or counting agents came and explained on the papers about the alleged votes and figures to the election petitioner, who is said to have been drafted the election at any point of time.

42. During the cross-examination, P.Ws.2 to 4 simply stated that they do not know who drafted the election petition. Thus it means that in the absence of agents, election petition was drafted, when the details of facts and figures on the votes are said to be within their knowledge only. Therefore, the facts pleaded in the election petition are not based on any personal opinion of the election petitioner. Thereby the election petition is without any basis. No doubt the counting agents or election agents are not required be present at the time of drafting the election petition and according to the evidence of P.W.1, he being the Advocate drafted the election petition on the strength of the information given by the counting agents and election agents. Therefore, the absence of election agents and counting agents at the time of drafting election petition is not a ground to reject the petition. The counsel for the first respondent further drawn attention of this Court to the cross- examination of P.W.1 at page 21, where P.W.1 admitted that the allegations made in paragraphs 6 to 8 of the petition are not based on personal knowledge and that after completion of 4th round of counting, his election agents and counting agents informed him about the improper validation/ reception and rejection of the votes, this information has been given to him by signs by showing in air, but this material fact was not pleaded in the petition and in the absence of those particulars, the election petition is to be rejected.

43. Learned counsel for the first respondent pointed out the failure of election agent to object illegal rejection and reception of votes by any written objection and not even brought to the notice of the returning officer, and when pleadings are prepared based on the various principles laid down by the Apex Court regarding the pleadings in election petition, preparing election petition filing it is of no use and drawn attention of this court to a judgment reported in **Thupiri Penchalaiah v. The Election Court, Kavali, constituted under A.P. Gram Panchayat Act, (Principal District Munsifi, Kavali) and others** [\[5\]](#).

44. Whereas the learned counsel for the petitioner contended that the Rules does not require the petitioner to give written request or objection for re-examination

and re-counting in the election of Legislative Counsel. In the absence of any Rules, mere submitting a representation under Ex.P.4 is not a ground for rejecting the prayer in the petition. However, refuting the said contention, learned counsel for the respondent while admitting that no written representation is required for re-counting and re-examination and still contended that having given representation, the petitioner would have disclosed the nature of objection and other details and that the petitioner could not raise such objection as to illegal rejection or reception of votes.

45. Undoubtedly, the petitioner submitted a representation marked as Ex.P.4 without disclosing the details of illegality either in reception or in rejection of votes, but mere failure to disclose the details of illegality in Ex.P.4 is not a ground since Ex.P.4 is not required to be given in view of Rule 82 of the Rules. Even if any such written representation is made, the same cannot be equated with election petition, which required to contain the material particulars, as under Section 83 of the Act. Therefore, on this ground, the Court cannot decline the relief claimed in the petition.

46. The judgment of this Court in **Thupiri Penchalaiah** referred to supra would not come to the aid of the petitioner, wherein this Court is classified the election petitions as follows:

- 1) The category of cases where the allegations in the election petition are absolutely vague,*
- 2) The cases where some details are given but they are not sufficient,*
- 3) The category of cases where the facts are given in great detail/ but they have been made only for the purpose of satisfying the principles laid down in certain rulings of the Supreme Court inasmuch as the basis of the facts is not specified or there is no contemporaneous documentary evidence to give credence to the correctness of the so called minute details; and*
- 4) The cases where details given in the petition are sufficient and they are truthful and they are also substantiated in the evidence.*

47. Here the contention of the petitioner is that the present petition falls within the category of (3) referred above, as the petition was prepared on the principles laid down by certain Judgments without minute details, but not supported by any evidence. Therefore, the petition is liable to be dismissed on this ground. But this contention holds no substance for the reason that in the earlier Judgment of the Apex Court in **Jitendra Bahadur Singh** referred to supra, relying on the Judgment in **Ramsewak Yadav** and **Dr. Jagjit Singh**, laid down certain principles, wherein the Apex court succinctly held that a Judge has to satisfy himself on the basis of petition and not on the basis of allegations to grant any of the reliefs and that the petitioner is required to disclose the material facts required to be stated or those facts which are to be considered as materials supporting the allegations made. In other words, they must be of such facts as to afford a basis for the allegations made in the petition. Though

pleadings in the election petition is appears to have prepared based on the principles laid down by the Apex Court, if those pleadings are substantiated by any evidence and if the Judge satisfies about the proof of those allegations, the Court can grant relief.

48. One of the contentions of the Senior Counsel, Sri D.V. Sitarama Murthy, that the material facts are important to the election petition and drawn attention of this Court to the decision of the Apex Court reported in **P.K.K. Shamsudeen vs. K.A.M. Mappillai Mohindeen & Others**^[6] and **Vadivelu vs. Sundaram And Others**^[7], in both the decisions, the Apex Court discussed about the importance of material facts in election petition. In the facts of the above Judgment, the panchayat elections were challenged before the Election Tribunal and the Tribunal ordered for recounting of votes in the election petition and the election petitioners got more votes than originally elected candidates in the said re-counting, Election Petitions were allowed, declaring the Election petitioners as elected. Aggrieved by the orders of Tribunal the first respondent/ originally elected candidates' preferred Revision Petitions before the concerned High Court, the High Court set aside the order of the Tribunal and restored the election result in favour of the first respondents. However, the settled law is that disclosure of material facts is mandatory in view of Section 83 of the Act.

49. In **Kattinokkula Murali Krishna vs Veeramalla Koteswara Rao & Others**^[8] the Apex Court reiterated the principles laid down in **P.K.K. Shamsuddin** and in **Vadivelu** and reiterated that to order recounting the petition shall contain the material facts in an election petition.

50. In the present case, the material facts were pleaded which constitute the cause of action for filing the election petition and merely because the petition was drafted with minute details that cannot be thrown out as if it was prepared on the basis of various principles laid down by the Apex Court in several judgments. If those allegations are substantiated by any evidence, the court can accept such pleadings and on the ground of lack of material facts, the relief cannot be denied.

51. The learned Senior Counsel for the first respondent further drawn attention of this Court to Ex.P.4 written representation given by P.W.1 to the returning officer for reexamination and recounting and the letter- Ex.P.4 is extracted hereunder:

From,
B. Naresh Kumar Reddy
Candidate
Chittoor Local Authority Legislative Council

To
The Returning Officer

Chittoor Local Authority Legislative Counsel

Sir,

I humbly request following few lines for your consideration. The votes casted in my favour is rejected is unfair as the intention of the votes is very clear that they casted in my favour. I also request that the votes cated in favour of Dr.Tippa Reddy is to be reexamined. I request you to please reexamine the entire votes and recount.

Yours truly,

sd/-"

52. The details of illegality in rejection or reception of the votes is not mentioned in Ex.P.4. The same is fatal. The present petition is an afterthought and in support of his contention he placed reliance on several Judgments of the Apex Court reported in **M. Omkar v. Revuri Prakash Reddy**^[9], **Hareram Pandey v. Ajit Chaudhary**^[10], **R. Narayanan's case**, **Jagith Singh's case**, **Chanda Singh v. Choudary Shiv Ram Verma**^[11] and on the Judgment of the Patna High Court reported in **Jai Nandan Singh v. Shankar Dayal Singh and others**^[12]. In all the judgments, the Apex Court held that application lacks allegations raised in the election petition, filing of election petition is an afterthought to bring the case within the parameters laid down by the Apex Court, attributed partiality against the staff, without any allegation in the application made to the returning officer, the petition is not maintainable.

53. In Patna High Court Judgment referred supra it was held that in the absence of supporting documents regarding the improper rejection of votes polled in favour of the petitioner, the petition is not maintainable and atleast the agent should give application to returning officer before mentioning the details before declaration of result.

54. In the present case, Ex.P.4 did not contain any allegation about the illegality committed by the returning officer in rejecting or reception of votes. But the only contention of the counsel for the petitioner is that in the absence of any mandatory requirements to give representation for re-examination and re-counting the votes on the basis of Ex.P.4, the relief cannot be denied.

55. Rule 63 of the Rules permits the candidate contested in the election in State of Legislative Council to make a request for re-counting of votes after completion of the counting and record the result shall be in Form-20. Rule 63 is extracted hereunder:

"63 – Re-count of votes – (1) *After the completion of the counting, the returning officer shall record in the result sheet in Form 20 the total number of votes polled by each candidate and announce the same.*

(2) *After such announcement has been made, a candidate or, in his absence, his election agent or any of his counting agents may apply in writing to the returning officer to re-count the votes either wholly or in part stating the grounds on which the demands such re-count.*

(3) On such an application being made the returning officer shall decide the matter and may allow the application in whole or in part or may reject it in toto if it appears to him to be frivolous or unreasonable.

(4) Every decision of the returning officer under sub-rule(3) shall be in writing and contain the reasons therefor.

(5) If the returning Officer decides under sub-rule (3) to allow a re-count of the votes either wholly or in part, he shall –

(a) do the re-counting in accordance with (rule 54A) rule 56 or rule 56A, as the case may be;

(b) amend the result sheet in Form 20 to the extent necessary after such re-count; and

(c) announce the amendments so made by him.

(6) After the total number of votes polled by each candidate has been announced under sub-rule (1) or sub-rule (5), the returning officer shall complete and sign the result sheet in Form 20 and no application for a re-count shall be entertained thereafter:

Provided that no step under this sub-rule shall be taken on the completion of the counting until the candidates and election agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by sub-rule(2).

56. Rule 63 of the Rules is applicable only for recounting of votes and not for reexamination of ballots. But Rule 82 of the Rules is relevant for deciding the present controversy and according to it,

“(1) any candidate or, in his absence, his election agent or counting agent may, at any time during the counting of the votes either before the commencement or after the completion of any transfer of votes (whether surplus or otherwise) request the returning officer to reexamine and recount the papers of all or any candidates (not being papers set aside at any previous transfer as finally dealt with), and the returning officer shall forthwith reexamine and recount the same accordingly.

(2) The returning officer may in his discretion recount the votes either once or more than once in any case in which he is not satisfied as to the accuracy of any previous count:

Provided that nothing in this sub-rule shall make it obligatory on the returning officer to recount the same votes more than once.”

57. Rule 82 relates to re-examination and re-counting of votes in the election to the Legislative Counsel, where no application is required in writing to make a request for re-examination and re-counting, whereas under Rule 63 a written application is required. But Rule 63 has no application for re-examination and re-counting of votes in Legislative Counsel Election. Therefore, in the absence of requirement of written application for re-examination and re-counting, mere submission of a request for recounting and reexamination without details is not a ground. When the petitioner made out sufficient ground to the satisfaction of the Court to grant any of the reliefs and such representation would not estop the petitioner to raise such ground in the election petition regarding the illegalities or irregularities committed in rejection or reception of votes.

58. Most of the Judgments relied on by the counsel for the petitioner pertains to

other than elections to the Legislative Council. Therefore, the principles laid down in those judgments cannot be applied straight away to the present facts of the case. Hence, on the ground that the petitioner did not disclose the illegalities or irregularities in rejection and reception of votes in Ex.P.4, the relief cannot be denied.

59. One of the contentions of the learned Senior Counsel, Sri D.V. Sitarama Murthy, is that when a serious allegation is made against the returning officer alleging that he adopted a different yardstick to the petitioner than the first respondent in rejection and reception of votes, it has to be substantiated. Otherwise, the petition is liable to be dismissed.

60. No doubt a specific allegation is made in paragraph 15 of the petition contending that the 5th respondent-returning officer adopted a different yardstick in rejection and reception of votes, the petitioner did not make any allegation attributing malafides to the 5th respondent-returning officer. But if the allegations made in the paragraph 15 of the petition are proved, certainly it would amount to adopting different yardstick in rejection or reception of votes. It is not a case of attribution of malafides to the 5th respondent-returning officer.

61. Learned Senior Counsel while submitting that in the absence of proof that the 5th respondent-returning officer adopted different yardstick in rejection and reception of votes, and Since this allegation is not supported by material facts and particulars regarding partiality attributed to the 5th respondent-returning officer, as required under the Act, the petition is liable to be dismissed and placed reliance on the judgments of the Apex Court in **State of Bihar v. Sri P.P. Sharma**^[13], **Chanda Singh v. Choudary Shiv Ram Verma**^[14], wherein the Apex Court defined the word 'malafide'. In **N. Narayanan**'s case referred to supra and in **E.P. Rayappa v. State of Tamilnadu and another**^[15] in **Ajit Kumar Nag v. G.M. (P.J.) Indian Oil**^[16], **Gulam Mustafa and others v. State of Maharashtra and others**^[17] the Apex Court defined the word 'malafide' and what are the requirements to establish the malafides. But the principles laid down in the above judgments are totally irrelevant, since no malafides were attributed except making allegations that the 5th respondent adopted different yardstick to the petitioner while rejection or reception of votes. Therefore, it is unnecessary for me to go into the principles laid down in the above judgments.

62. The allegation of partiality is made against the 5th respondent does not amount to malafides. However, the petitioner adduced evidence to substantiate his contention, reiterated that the counting agents of the petitioner, at 4th round, informed

him about partiality of the 5th respondent. The specific allegation made in paragraph 15 of the election petition is that the petitioner came to know from his agents after 4th round of counting about partiality of returning officer, the same is reiterated in paragraph 14 of the examination-in-chief of P.W.1, however in the cross-examination at page 4 and 12, P.W.1 testified that he himself drafted the election petition and that he made an allegation that the 5th respondent had adopted different yardstick in deciding doubtful votes and therefore he was partial to the first respondent. He has no prior acquaintance with the 5th respondent and he had no enmity with the returning officer etc. But P.Ws.2 to 4 did not testify in their examination-in-chief anything specifically that 5th respondent was partial towards the first respondent.

63. Curiously, the counsel for the first respondent elicited in the cross-examination of P.W.2 that P.W.2 informed about partial attitude of the 5th respondent to the petitioner after first and second round of counting. This piece of evidence is contrary to the pleading in the petition. Similarly, P.W.3 also testified in (vide paragraph 2 in the cross-examination) the election agent reported about partial attitude of the 5th respondent and supported the allegation made in paragraph 15 of the election petition and that he complained the same to the Mr. Parikala Vallavan, Election Observer, about the attitude of the 5th respondent, but that was not pleaded in the election petition and supported by the evidence of P.W.1. Similarly in the cross-examination of P.W.4 (vide page 6 in the cross-examination), the counsel for the first respondent elicited that P.W.4 never informed about adopting different yardstick to the petitioner and the first respondent. Therefore, the fact elicited in the cross-examination of P.W.4 falsify the allegation made in paragraph 15 of the election petition.

64. On close analysis of the evidence of P.Ws.2 to 4, it is evident that they did not inform anything about partiality attributed to the 5th respondent and the evidence of P.W.1 is not corroborated by the evidence of the agents, who allegedly informed about partial attitude of 5th respondent to the petitioner. Therefore, the allegation made in paragraph 15 that the 5th respondent was partial towards the first respondent and adopted different yardstick cannot be accepted.

65. Sri. D.V.Seetharama Murthy, learned Senior Counsel for the first respondent, raised a specific plea that details of ballots including ballot numbers were not disclosed in the evidence. In the absence of such details, a sample verification or inspection cannot be ordered. Rule 38 (A) (5) of Rules says that a serial number of the ballot paper shall be effectively concealed, in such manner, as Election

Commissioner direct. When serial number of the ballot is concealed as directed by the Commissioner, the question of disclosing the details of ballot number on which **Roman form of two (II)** or **international form of Indian numeral two (2)** were noted by the voter in the box against the name of the petitioner to give second preference does not arise. A similar question came up before the Apex Court reported in **S.Baldev Singh V. Teja Singh Swatantar (died) and others** ^[18]. The Full Bench of the Apex Court had an occasion to decide the similar question, wherein it was held as follows:

"the reform in the numbering on the back of the ballot cannot be a reason for the recount. However, the change in the method of printing the serial numbers makes it difficult to observe what is at the back of the paper, and as such, this omission cannot go against an otherwise well grounded request for inspection of ballots by court. Judicial approach must be readjusted to the new ballot printing. But the election petitioner should rest his case which for inspection on other telling testimonial basis."

66. By applying the principle laid down in the above judgment to the present facts of the case, mere failure to disclose the ballot numbers in the pleadings and in the evidence is not a ground to accept the contention of the counsel for the first respondent.

67. On analyzing the pleadings in the petition, the petitioner furnished material facts which give rise to cause of action for filing the election petition. Therefore, the plea of the respondent that the election petition is not maintainable for lack of material facts, the petition is liable for dismissal is without any substance. In view of perceptive parallel rulings of Apex Court the issue is held in favour of election petitioner and against the first respondent.

ISSUE No.2:

68. The petitioner also raised the specific contention that the petitioner challenged the election of the first respondent on the ground of illegal reception of votes in favour of the first respondent, the specific allegation is made to that effect at paragraph 7 in the election petition i.e. at table No.2, while 5th respondent verifying the doubtful ballot papers, the election agent of the petitioner requested the 5th respondent to validate the ballot paper, wherein the voter expressed his preference of vote in favour of the petitioner in the box opposite his name, but the same was rejected by the 5th respondent on the ground that the mark is below the name of the petitioner. It is contended that the 5th respondent validated one doubtful ballot paper though no first preference was expressed by the voter in the box opposite the name of the first respondent, but the voter clearly struck off the name of the first respondent on the ballot by (slash) '/' with 40 degrees slope and in spite of objecting the same was

received illegally and similarly in paragraph 8, it is alleged that the 5th respondent validated two votes in favour of the first respondent, though the first preference is not expressed by the elector in favour of the first respondent except '**slash mark**' with 45 degrees slope. In spite of the request of the counting agent of the petitioner, not to count the said ballots, the 5th respondent validated two other ballots in favour of the first respondent, though the ballot papers contain not only the first preference in favour of the first respondent but there is a horizontal line in the box opposite to the name of the 2nd respondent, in spite of the request of the counting agent of the petitioner to reject the said two ballot papers. The petitioner did not disclose the details of the ballots on which 'slash mark' with 40 or 45 degrees were mentioned in the column provided in marking preference on the ballot. However, according to the petitioner, three ballots were validated though 'slash mark' with 40 and 45 degrees was mentioned in the column meant for mentioning preference against the name of the first respondent. Undoubtedly, some of the voters may be illiterates though they are from local bodies and marking of the letter 'I' depends upon their qualification and physical, mental condition and style of writing the letters or figures and the support while marking their preference. Merely because the straight line is bent towards right that cannot be invalidated on the ground that the letter 'I' is not straight, bent towards right, appearing to be slash and when the voter indicated his preference rightly by marking 'I' expressing the intention of the voter, such preference cannot be said to be invalid. The petitioner also contended that a horizontal mark was put against the name of the other candidates and marking the first preference against the name of the first respondent would not invalidate the two votes, but the said fact was not substantiated by any evidence during trial. Considering the facts and circumstances of the case, this Court while passing the order dated 11.03.2016 declined to order inspection of the votes polled in favour of the first respondent as there is no substantive evidence to prove the allegations made against the 5th respondent in reception of such votes referred in paragraphs 7 and 8 of the pleadings i.e. election petition. Hence, the alleged reception of two votes by the 5th respondent and counting them in favour of the first respondent is without any substance and such reception would not invalidate the election of returned candidate—the first respondent. Such reception is not against Rule 73 of the Rules 1961.

69. In para 8 of the petition, the petitioner specifically contended that at table No.3, the 5th respondent illegally validated two votes where votes marked reverse shape of capital letter 'L' i.e. '┐' despite objection of agent of the petitioner. It is also contended that 5th respondent validated two ballot papers in favour of the first respondent though ballot papers not only contained first preference but also horizontal

line in the box opposite to the name of the 2nd respondent. The 5th respondent also validated two votes though '/' is marked. When the petitioner made a specific allegation of illegal reception of votes in favour of the first respondent, it is for him to establish the same by adducing satisfactory evidence; otherwise liable for rejection.

70. To substantiate the above contention, the petitioner himself was examined as P.W.1 and supported his contention in examination-in-chief. Much credence cannot be given to his testing because he was moving from one table to the other, but his counting agent were alonen watching the counting process, raising objections for validating votes. In such case, the evidence of election agents who were present at relevant tables assumes important. P.Ws.2 and 3 counting agents at table 1 and 2 respectively were examined. P.W2 testified the illegal reception of votes by the 5th respondent in favour of the first respondent at table No.1, but have discussed in evidence of P.W1 in earlier paras and the same is disbelieved for it relates to alelged illegal reception of the same is disbelieved so far it relates to the alleged illegal reception of the votes in favour of the first respondent, therefore his evidence does not require recommendations, as there is a possibility of smudging due to folding of ballot.

71. P.W.3 Ramachandra Reddy, Election agent testified about objection raised by counting agent Anandha Reddy who was not examined before this court, raised an objection regarding reception of two ballots where mark '/' slash was marked against the name of the first respondent. Even if the same is true the court already recorded reasons for validating those two votes in favour of the first respondent, so need not once again repeat the same. His evidence is silent regarding marking the reverse letter 'L' i.e. '┐'. Even if such letter '┐' was marked in the column provided for marking preference, such vote cannot be invalidated sinch such allegation on the top of 'I' is probably due to shaking etc., but the intention of the voter is to give first preference. Hence, validation of two such ballots in favour of the first respondent shall not described as an illegality, in view of principle laid down in **Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari and another** [\[19\]](#).

72. P.W.4, V. Satya Babu, counting agent at Table No.3 testified about reception of 5 (five) ballot papers in favour of the first respondent by the 5th respondent, due to marking (slash) '/' with 40 degrees slope and marking reverse of 'L', in view of my discussion in each paras, reception of these three votes is not illegal. In the other two ballots papers, the voter disclosed identity, but how voter disclosed identity was not explained in examination in chief. On the other hand, the petitioner is silent about disclosure of voter identity on two ballots allegedly received in favour of the first respondent. In the absence of pleading, any amount of evidence adduced by the

petitioner cannot be looked into. Therefore, the evidence of P.W.4 is of no assistance to the petitioner to establish illegal reception of votes in favour of the first respondent by the 5th respondent. In the absence of satisfactory evidence, the votes polled in favour of the first respondent need not be re-examined or re-inspected.

73. On over all consideration of entire pleadings and oral evidence, I find no satisfactory evidence to substantiate the plea of illegal reception of votes in favour of the first respondent. Thus, the petitioner failed to substantiate this ground. Consequently, the first respondent election cannot be set aside on this ground.

74. Accordingly, this point is held in favour of the first respondent against the petitioner.

ISSUE No.1:

75. The basis for filing the election petition is rejection of four votes polled in favour of the petitioner by the 5th respondent - returning officer and it is contrary to Rule 71 and 73 of the Rules. In the pleadings, the petitioner narrated as to how the four ballots were rejected. Moreover, the first respondent – returned candidate denied the alleged illegal rejection, while contending that the returning officer rejected the ballots in accordance with the Rules. In the petition, a specific allegation is that rejection of votes polled in favour of the petitioner, in the 4th round of counting during process of transferring second preference votes from the main parcel of the second respondent herein. The counting agent of the first respondent raised an objection in respect of two ballot papers marked in favour of the petitioner on the ground that the second preference is not properly marked in the box opposite to the name of the petitioner. Similarly, in the election petition it is alleged that two votes were illegally rejected when the voter marked his preference against the name of the petitioner, but the letters 'reverse L' and 'upward L' were written in the box against the name of the petitioner, but without considering the intention of the voter to cast vote in favour of the petitioner, the returning officer rejected those two votes illegally.

76. In view of the specific request, it is appropriate to advert to the election petition itself. In the election petition, there are specific allegations about marking of option by voters in favour of the petitioner, but the election officer adopted a different yardstick in examining the votes polled in favour of the petitioner and the first respondent. In various paragraphs of the petition, the specific illegality committed by the 5th respondent is pointed out in rejecting the votes polled in favour of the petitioner, similarly marking of ' L ' and 'reverse L ' and receipt of the vote polled in favour of the first respondent though the letter ' L ' was not written clearly but with slope

of 40° and therefore such rejection is illegal and if the rejected and exhausted ballots are inspected, the truth can be found and therefore requested to inspect/ re-examine the rejected the ballots of exhausted votes.

77. Sri D. Sudershan Reddy, learned senior counsel appearing for the petitioner, would contend that marking of preference _____ against the name of the petitioner is though distinct, intention of the voter to give preference only to the petitioner has to be considered and drawn the attention of this Court to the definition of the word '*distinct*' defined in thesaurus, which means not distinct; not clearly marked or defined, incapable of being clearly distinguished or indistinct shapes in the gloom and as such drawn the attention of this Court to a decision of the Apex Court in ***Arikala Narasa Reddy*¹⁹**, wherein in Para 28 it was held that Ex.X-3 has to be held to be an invalid ballot because of marking or making a mention against the name of the contested candidate as 'his vote is for Venkata Rama Reddy' and also putting a mark '1' in front of the name of the contested candidate and putting a **tick mark** in front of the name of the another. In those circumstances, it is impossible to make out in whose favour the elector has voted and; similarly, in another ballot against the name of the contested candidate marked '1' put his signature as well and the signature is legible and distinguishable. Therefore, it would be difficult to identify the elector and accept the ballot in favour of the petitioner but here, in one ballot the voter only signed against the name of the petitioner in Ex.C-2 and on the strength of the signature, the voter can be identified and in the other ballot an indistinct mark ____ was put in the column provided for making preference against the name of the petitioner. The petitioner further contended that if the round on the top is sloped towards left side of the figure _____, it would be **international form of Indian numeral two (2)** amounting to give 2nd preference to the petitioner, drawn the attention of this Court to Para 33 of the decision of the Apex Court in ***Arikala Narasa Reddy*¹⁹**, wherein one long stroke is made to make a mark denoting the number '1' and there was a small curve connecting the stroke and due to the said curve the figure on the ballot is in fact '9' but the Apex Court did not accept this contention on the ground that the voter intended to mark 1st preference to the contesting candidate therein, examining all the letters in hyper technical manner and accepted the ballot but, in the present, marking of ____ on Ex.X.2 cannot be accepted as **international form of Indian numeral two (2)** because of the unmeaning reference of the sign marked in the column provided for preference, which is neither **Roman form of two (II)** nor **international form of Indian numeral two (2)**. Even if the curve on the head of the letter is changed towards left side, it is difficult to accept that the voter exercised his option in favour of the petitioner on Ex.X.2. The Courts are bound to avoid hyper technicalities even in examining the

words to find out the intention of the voter but such approach cannot be stretched to the extent of accepting a vote by marking a mark _____, which did not convey any meaningful reference. However, Rule 73 of the Rules specifies the modes of marking preference and when it is not in accordance with Rule 73 of the Rules, the preference marked against the name of the petitioner and rejection of the same is to be treated as legal. Therefore, I find no illegality in rejection of Ex.X.2.

78. After completion of trial in the election petition, during hearing, this Court found that there is sufficient material or *prima- facie* material to make sample inspection as there is no other possibility to prove such rejection except by examination. I am conscious about maintenance of secrecy of the ballots but the sample inspection would not disclose the identity of the voter effecting privacy and secrecy. Thereupon this Court passed an order dated 20.01.2016 appointing the Registrar (Judicial) as Commissioner to inspect the exhausted votes which are allegedly rejected illegally by the 5th respondent – returning officer. After inspection, the Commissioner has submitted his report stating that one vote was not properly counted and the other vote was not marked properly in favour of the petitioner. Those two votes were marked as Exs.X.1 and X.2 for convenience of reference. In one ballot, Ex.X.1- Photostat copy of ballot, the letter **Roman form of two (II)** was marked in the box against the name of the petitioner and in the other ballot – Ex.X.2, the voter marked his preference in the box against the name of the petitioner as _____.

79. Thus, there is *prima facie* material about the rejection of one ballot where **Roman form of two (II)** was mentioned in the box against the name of the petitioner. Having satisfied that there is a *prima facie* material in rejection of one vote, this Court while passing a reasoned order on 11.03.2016 appointed the Registrar (Judicial) as Commissioner, to inspect or re-examine the rejected votes allegedly polled in favour of the petitioner. Thereupon, the Registrar (Judicial) submitted his detailed report marking the Photostat copy of the disputed ballots as Exs.C.1 to C.14.

80. In the first report dated 25.02.2016, the two ballots, which are marked as Exs.X.1 and X.2, the voter marked his preference as follows:

Ex.X.1 -

Name of the Candidate	Mark Order of preference
B. NARESH KUMAR REDDY	II
G. MURALI NAIDU	I
Dr. DESAI THIPPA REDDY, M.S.	
NARAMAKULA THIPPA REDDY M.Com	
P. VENKATAMUNI REDDY	

Ex.X.2 -

Name of the Candidate	Mark Order of preference
B. NARESH KUMAR REDDY	
G. MURALI NAIDU	I
Dr. DESAI THIPPA REDDY, M.S.	
NARAMAKULA THIPPA REDDY M.Com	
P. VENKATAMUNI REDDY	

81. Similarly, in his second report dated 18.03.2016, the Registrar (Judicial) examined the rejected ballots allegedly polled in favour of the petitioner and submitted his detailed report. Even as seen from the Photostat copies of the disputed ballots, it is difficult to accept the contention of petitioner and the preference mentioned in the ballots. (marked as Exs.C.1 to C.14) for convenience of reference as follows:

Sl. No.	Vote marked for the purpose of this Report with pencil	Name of the candidate against whose name marking is made	Column provided for marking order of preference	Remarks
1.	C1	B. Naresh Kumar Reddy 1 (in Telugu) B. Naresh Kumar Reddy 2 (in English)	Blank	No other marking is found
2.	C2	B. Naresh Kumar Reddy		No other marking is found
3.	C3	G. Murali Naidu Dr Desai Thippa Reddy	1 1	No other marking is found
4.	C4		No marking	Blank vote
5.	C5	B. Naresh Kumar Reddy Dr.Desai Thippa Reddy	1 1	No other marking is found
6.	C6	B. Naresh Kumar Reddy Dr. Desai Thippa Reddy	1 1	No other marking is found
7.	C7	B. Naresh Kumar Reddy		No other marking is found
8.	C8		No marking	Blank vote
9.	C9	G. Murali Naidu - Dr. Desai Thippa Reddy 2	Blank	No other marking is found
10.	C10	Dr. Desai Thippa Reddy	Blank	No other marking is found
11.	C11	B. Naresh Kumar Reddy Dr Desai Thippa Reddy	1 1	No other marking is found
12.	C12	Dr Desai Thippa Reddy		No other marking is found
13.	C13	B. Naresh Kumar Reddy Dr.Desai Thippa Reddy	1 1	No other marking is found
14.	C14		No marking	Blank vote

82. Thus, on scrutiny of the rejected ballots, it is evident that in Ex.C.1, in the

column provided for marking preference against the name of the petitioner '1' and '2' are mentioned leaving the column as blank meant for marking preference. Similarly, in Ex.C.2 in the box against the name of the petitioner, some signature was found. In Ex.C.3, the voter marked first preference to both G. Murali Naidu and Dr. Desai Thippa Reddy - returned candidate. In Ex.C.4, no preference was marked against the name of the petitioner. In Exs.C.5 and C.6, first preference was mentioned in the box against the names of both the petitioner and the returned candidate, whereas in Ex.C.7, the voter marked '**tick mark**' against both the election petitioner and the first respondent. In Ex.C.8, no marking was found on the ballot, exercising option by the voter and the entire boxes against the names of the contested candidates were left blank, whereas in Ex.C.9 the voter mentioned '2' against the name of Desai Thippa Reddy in the column meant for the name of the candidate leaving the column meant for marking order of preference and also marked "-" against the name of G. Murali Naidu and no marking was made against the name of the petitioner. Similarly in Ex.C.10, in the column provided for the petitioner left blank, in Exs.C.11 and C.12, international form of Indian numeral one (1) was marked in the box against the name of the election petitioner and first Respondent, whereas in Ex.C.12 in the column provided for marking the order of preference against the name of Desai Thippa Reddy - first respondent '**tick mark**' was marked. Whereas in Ex.C.13, international form of Indian numeral one (1) was marked in the box against the name of the election petitioner and first respondent and in Ex.C.14, the column provided for marking preference was left blank. Thus in Exs.C.3, C.4, C.8 to C.10, C.12 and C.14, no marking was given against the name of the petitioner, whereas in Ex.C.1, the voter mentioned international form of Indian numeral 1 and 2 in the box provided for the name of the petitioner. In Ex.C.3, some signature was found in the column meant for marking preference. In Exs.C.3, C.5, C.6, C.11, C.13, first preference was given to both B. Naresh Kumar Reddy and Dr. Desai Thippa Reddy, the said preference is against the Rules i.e. Rule 73.

83. Before deciding the illegality of rejection of Exs.X.1, X.2, C.1 to C.14, it is appropriate to extract relevant rule and guidelines for better appreciation. Rule 73 of the Rules is extracted herein for better appreciation.

"73. Scrutiny and opening of ballot boxes and the packets of postal ballot papers:-

- 1) The returning officer shall -*
 - a) first deal with the covers containing the postal ballot papers, if any, in the manner provided in sub-rules (2) to (7) of rule 54A;*
 - b) then open the ballot boxes, take out from each box and count the ballot papers contained therein, and record their number in a statement;*
 - c) scrutinize the ballot papers taken out of the ballot boxes as well as the postal ballot papers taken out from the covers; and*

d) separate the ballot papers which he deems valid from those which he rejects endorsing on each of the latter the word “Rejected” and the ground of rejection.

2) Subject to rule 38A as made applicable, by clause (ii) of rule 70, to election, in a council constituency and, by assembly members other than by postal ballot under clause (a) of rule 68, a ballot paper shall be invalid on which -

a) the figure 1 is not marked; or

b) 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 is intended to apply; or

c) the figure 1 and some other figures are set opposite the name of the same candidate; or

d) there is any mark or writing by which the elector can be identified; (or)

e) there is any figure marked otherwise than with the article supplied for the purpose:

Provided that this clause shall not apply to a postal ballot paper:

Provided further that where the returning officer is satisfied that any such defect as is mentioned in this clause has been caused by any mistake or failure on the part of a presiding officer or polling officer, the ballot paper shall not be rejected, merely on the ground of such defect.

Explanation: *The figures referred to in clauses (a), (b) and (c) of this sub-rule may be marked in the international form of Indian numerals or in the Roman form or in the form used in any Indian language, but shall not be indicated in words.*

84. Similarly, the Election Commission issued guidelines to the counting officers to reject or to validate any vote polled in favour of the parties. The guidelines are extracted hereunder:

“8. Grounds for Rejection of Ballot paper-

A ballot paper shall be invalid on which

(a) the figure ‘1’ is not marked; or

(b) the figure ‘1’ is set opposite the name of more than one candidate; or

(c) the figure ‘1’ is so placed as to render it doubtful to which candidate it is intended to apply; or

(d) the figure ‘1’ and some other figure like 2,3, etc., are set opposite the name of the same candidate; or

(e) there is any mark or writing by which the elector can be identified; or

(f) there is any figure marked on the ballot paper otherwise than with the article (i.e. sketch pen of violet Colour ink) supplied to him for the purpose.

(g) Blank paper without any preference marked

9. Preference indicated in Words

9.1 Under the Rules, the electors are required to indicate their preferences by marking the figures 1, 2 etc. and such preferences cannot be indicated in words. Therefore, if the first preference on any ballot paper has been indicated by writing the word or words ‘one’ or ‘first preference’ instead of figure ‘1’ or such words have been written in addition to the figure ‘1’, such ballot paper shall be rejected.

11. Mark or Writing by which Elector can be identified

11.1 Under Rule 73(2)(d), a ballot paper shall be rejected if it bears any mark or writing by which an elector can be identified. The Supreme Court has held in *Shradha Devi vs. Krishna Chandra Pant* (AIR 1982 SC 1592) that the mark or writing which would invalidate the ballot paper must be such as to itself unerringly point in the direction of or reasonably give indication of the identity of the voter. There must be some casual connection between the mark and the identity of the voter that looking at one, the other becomes revealed. In the absence of such suggested mark or writing, the ballot paper cannot be rejected merely because there is some mark or writing. Any mark or writing

of an innocuous nature cannot be raised to the level of such suggestive mark or writing as to reveal the identity of the voter.

12. Other grounds on which ballot paper NOT to be Rejected:

12.1 A ballot paper should also not be rejected simply because

(a) the figure '1' has been marked more than once in the column of the same candidate;

(b) the figure '1' has been marked not in the column meant for marking the order of preference but at some other place in the panel of candidate;

(c) the original mark is patently in the column of one candidate but an impression or smudge thereof appears against the name of some other candidate due to wrong folding;

(d) the mark indicating the vote is indistinct or made more than once, if the intention that the vote is for a particular candidate clearly appears from the way the paper is marked; or

(e) there is a faint undecipherable thumb impression or smudge impression left inadvertently by the elector on the ballot paper while handling it because of the presence of some ink on his thumb which was put thereon for the purpose of obtaining his thumb impression on the counter foil of the ballot paper.

12.2. while allowing the candidate or their agents to inspect the ballot papers proposed to be rejected by you, do not allow them to handle any ballot paper physically."

85. In view of the guidelines issued by the Election Commission of India in Chapter XIII , the ballot paper shall not be treated as invalid on the ground that the figure '1' is not marked; but shall be rejected if the figure '1' is set opposite the name of more than one candidate; or the figure '1' is so placed as to render it doubtful to which candidate it is intended to apply; or the figure '1' and some other figure like 2,3, etc., are set opposite the name of the same candidate; or there is any mark or writing by which the elector can be identified; or there is any figure marked on the ballot paper otherwise than with the article (i.e. sketch pen of violet Colour ink) supplied to him for the purpose, or the Blank paper without any preference marked.

86. In the present case, on Ex.X.2 ' _____ ' is marked against the name of the petitioner with un-meaning reference and to treat the same as either international form of Indian numeral or Roman numeral. But the contention of Sri D. Sudershan Reddy, the learned Senior counsel for the petitioner, is that the intention of the voter is to be considered while rejecting or accepting the vote polled in favour of particular individual contesting in the election and that if '0' is added on the top towards left side of the letter marked against the name of petitioner in the box meant for preference, it would be '2' and the same has to be taken into consideration as vote polled in favour of the petitioner. According to Clause 12 of chapter XIII of the guidelines issued by the Election Commission, the figure '1' has been marked more than once in the column of the same candidate; the figure '1' has been marked not in the column meant for marking the order of preference but at some other place in the panel of candidate;

the original mark is patently in the column of one candidate but an impression or smudge thereof appears against the name of some other candidate due to wrong folding; the mark indicating the vote is indistinct or made more than once, if the intention that the vote is for a particular candidate clearly appears from the way the preference is marked; or there is a faint undecipherable thumb impression or smudged impression left inadvertently by the elector on the ballot paper while handling it because of the presence of some ink on his thumb which was put thereon for the purpose of obtaining his thumb impression on the counter foil of the ballot paper. If the guidelines in para 12.1 are applied to the present facts of the case, the preference marked against the name of the election petitioner on Ex.X.1 is neither **international form of Indian numeral two (2)** nor **Roman form of two (II)**, but basing on the indistinct mark a voter can be identified. In such case, it is difficult for me to find out the specific preference exercised by the voter whether it is first or second. The learned counsel for the petitioner further contended that marking any letter other than the letters or numerals mentioned in the rules and guidelines referred above, such vote shall not be rejected or invalidated. Therefore, the preference marked on Ex.X.2 is not a proper preference of **international form of Indian numeral two (2)** as contended by the counsel for the petitioner. Therefore, rejection of Ex.X.2 by the 5th respondent – returning officer is in accordance with the rules and guidelines issued by the Election Commission referred above.

87. On Ex.X.1, the voter marked preference 'II' but the same was rejected on the ground that it is 'eleven', but it is **roman numeral two (II)** as appearing on the face of preference exercised by the voter. When the guidelines issued by the Election Commission clearly indicate that marking of **Roman form of two (II)** is sufficient exercise of preference, the preference exercised by voter on Ex.X.1 can be conclusively held that it is **Roman form of two (II)**. Therefore, rejection of Ex.X.1 on the ground that it is **International form of Indian numeral eleven (11)** is illegal, since, candidates contesting in the election are only '5', thereby question of marking 'eleven' does not arise. On examination of Ex.X.1, the intention of the voter is clear that second preference was given to the election petitioner - B.Naresh Kumar Reddy, but the 5th respondent –returning officer illegally rejected the vote i.e. second preference marked against the petitioner in the column against the petitioner and against 12.1 of guidelines issued by Election Commission and Section 73 of the Act. Hence, the vote covered by Ex.X.1 is to be counted in favour of the petitioner.

88. In the second report, two preferences were marked against the name of the petitioner in the column meant for the contest candidates, leaving blank, the column meant for marking preference. More curiously, against the Telugu name preference 'I'

is marked and against the English name preference 'II' is marked in the column meant for the name of the candidates contested. Therefore, the 5th respondent rejected Ex.C.1 since preference is totally doubtful and it is against guideline No.12.1 (b) of Ex.P.3. Hence, the rejection of Ex.C.1 is not illegal.

89. Coming to Ex.C.2, against the name of the petitioner some signature was written (signature of the voter or some one else) which cannot be understood by any one and nothing to be inferred from the said writing whether the voter gave first preference or second preference to the election petitioner and since Ex.C.2 did not disclose the actual preference as per guidelines and when there is any mark by which the elector can be identified or if there is any figure marked on the ballot paper otherwise than with the article supplied to him for the purpose marking on the ballot, can be invalidated as per clause 8 (e) and (f) of guidelines and similarly such ballot can be invalidated. When the voter did not indicate his preference against the name of the election petitioner properly, rejection of the same is legal and that too by such writing a voter can be identified. In Ex.C.3, C.5, C.6, C.11 and C.13 the voter marked first preference against G. Murali Naidu and Dr.Desai Tippa Reddy and B. Naresh Kumar Reddy and Dr. Desai Tippa Reddy and B. Naresh Kumar Reddy, Dr.Desai Tippa Reddy, B. Naresh Kumar Reddy and Dr. Desai Tippa Reddy respectively. Such marking of first preference against the name of two contesting candidates is sufficient to invalidate the vote since the voter cannot exercise his preference more than one contested candidate in view of clause 8(b) of Ex.P.3. Therefore, rejection of Exs.C.3, C.5, C.6, C.11 and C.13 by the 5th respondent is in accordance with the rules. Similarly in Exs.C.4, C.8 and C.14, the voter did not exercise any preference in favour of any of the contesting candidates. The column meant for mentioning preference was left blank and such ballot is invalid in view of clause 8(a) of Ex.P.3. Similarly, in Exs.C.7 and C.12 a tick mark was mentioned against the name of B. Naresh Kumar Reddy and Dr. Desai Tippa Reddy (Ex.C.7) and Dr. Desai Tippa Reddy (Ex.C.12), such marking is not in accordance with the guidelines and once 'tick mark' is mentioned against the name of both the petitioner and first respondent, in such case it is difficult to find out the preference of the voter. Therefore, rejection of Ex.C.7 is valid. Similarly in Ex.C.12 no marking was made against the name of the petitioner. Hence, rejection of Ex.C.12 is in accordance with the Rules. Therefore, rejection of Exs.C.1 to C.14 is in accordance with law by the 5th respondent –returning officer

90. The main endeavor of the counsel for the petitioner is that when the preference exercised by the voter indicates the mind of the voter, such option can be taken in favour of the petitioner and placed reliance on the judgment of the Apex Court

reported in **Arikala Narasa Reddy**¹⁹, wherein the Apex Court while deciding the appeal, against the order of this Court in election petition, held as follows:

"For ballot to be invalid due to writing or marking thereon there must be some casual connection between the mark and the identity of the voter and such writing or marking itself must reasonably give indication of the voter's identity. As to whether such marking or writing in a particular case would disclose the identity of the voter, would depend on the nature of writing or marking on the ballot involved in each case. Therefore, such marking or writing must be such as to draw an inference about the identity of the voter."

91. In the present case, on Ex.C.2 the voter signed in the column provided for marking preference against the name of the petitioner by which a voter can be identified. In such case, the rejection of vote by the 5th respondent is to be accepted. In paragraph 17 of the said judgment, the Apex Court interpreted Rule 73(2)(d) and concluded that there must be some casual connection between the identity of the voter and such writing or marking itself must reasonably give indication of the voter's identity. As to whether such marking or writing in a particular case would disclose the identity of the voter, would depend on the nature of writing or marking on the ballot involved in each case. Therefore, such marking or writing must be such as to draw an inference about the identity of the voter.

92. The Apex Court, in another judgment reported in **S.Sivaswami v. Malaikannan and others**^[20], considered as to when a vote can be rejected based on handbook for candidates and if the court found that rejection of any vote is not in accordance with the rules, the court can order re-examination of ballots.

93. One of the contentions of the learned counsel for the petitioner is that when there is no other procedure to prove serious allegations made in the petition, the court can re-examine the rejected votes to find out the illegality in such rejection and declare the election as void, while declaring the petitioner as returned candidate. Mode of proof of allegations depends upon the nature of allegations. Whether an election petitioner can be asked to prove something that is not amenable to proof and whether by doing so a ground that is recognized by the statute as a valid ground for declaring the election to be void can be rendered otiose or sterile is the question and in such case, the Apex Court in **Ashok Mahadeo Mankar v. Rajendra Bhausahem Mulak**^[21], placing reliance on *Swantraj v. State of Maharashtra* and other Judgments, held that when allegations made in the petition are specific and the individuals who have cast their votes have been named and reason given why the votes cast by them were improperly received, the petitioner has alleged that exclusion of five votes cast by the persons named in the petition would materially affect the result of the election. Suffice it to say that the question whether any votes were improperly received and if so, whether such reception had materially affected the result of the election are

matters to be examined at the trial after the parties have adduced evidence in support of their respective cases. But in view of her lordship Justice Gyan Sudha Misra dissent opinion, the matter was referred to the Larger Bench consisting of three Judges. Therefore, the Judgment of the Apex Court referred supra is of no help to the petitioner. In **Jabar Singh v. Genda Lal**^[22] the Apex Court held that where the election petition was filed challenging the election of the returned candidate on the ground of improper reception of the votes in favour of the returned candidate or any votes had been improperly refused or rejected in regard to any other candidate. If the court finds that those votes would affect result of the election, the Court can make necessary enquiry and in paragraph 10 held that it would be convenient if we take simple case of an election petition where the petitioner makes only one claim, i.e. that the election of the returned candidate is void, This claim can be made under S.100. Section 100 (1) (a), (b) and (c) refer to three distinct grounds on which the election of the returned candidate can be challenged. We are not concerned with any of these grounds. In dealing with the challenge to the validity of the election of the returned candidate under s. 100(1)(d), it would be noticed that what the election petition has to prove is not only the existence of one or the other of grounds specified in clauses (i) to (iv) of S.100(1)(d), but it has also to establish that as a result of the existence of the said ground, the result of the election in so far as it concerns a returned candidate has been materially affected. It is thus obvious that what the Tribunal has to find is whether or not the election in so far as it concerns the returned candidate has been materially affected, and that means that the only point which the Tribunal has to decide is: has the election of the returned candidate been materially affected? And no other enquiry is legitimate or permissible in such a case. This requirement of S.100 (1) (d) necessarily imports limitations on the scope of the enquiry. Confining ourselves to clause (iii) of S.100(1)(d), what the Tribunal has to consider is whether there has been an improper reception of votes in favour of the returned candidate. It may also enquire whether there has been a refusal or rejection of any vote in regard to any other candidate or whether there has been a reception of any vote which is void and this can only be the reception of a void vote in favour of the returned candidate. In other words, the scope of the enquiry in a case failing under s. 100(1)(d)(iii) is to determine whether any votes have been improperly cast in favour of the returned candidate, or any votes have been improperly refused or rejected in regard to any other candidate. These are the only two matters which would be relevant in deciding whether the election of the returned candidate has been materially affected or not. At this enquiry, the onus is on the petitioner to show that by reason of the infirmities specified in s. 100(1)(d) (iii), the result of the returned candidate's election has been materially affected, and that, incidentally, helps to determined the scope of the enquiry.

Therefore, it seems to us that it, the case of a petition where the only claim made is that the election of the returned candidate is void, the scope of the enquiry is clearly limited by the requirement of [s. 100\(1\)\(d\)](#) itself. The enquiry is limited not because the returned candidate has not recriminated under Section 97(1); in fact, S.97(1) has no application to the case falling under Section 100(1)(d)(iii), the scope of the enquiry is limited for the simple reason that what the clause requires to be considered is whether the election of the returned candidate has been materially affected and nothing else. If the result of the enquiry is in favour of the petitioner who challenges the election of the returned candidate, the Tribunal has to make a declaration to that effect, and that declaration brings to an end the proceedings in the election petition.

94. In the present facts of the case, the first respondent elected with majority of one vote, if rejection of one vote in the exhausted votes or rejected ballots is validated, certainly it would change the entire result. Therefore, this Court ordered sample inspection initially and having found prima facie truth in the allegations made in the petition, ordered re-examination of exhausted and rejected ballots. But ultimately found that only one ballot-Ex.X.1 was illegally rejected by the 5th respondent as the voter exercised his preference 'II' in favour of the petitioner. In one of the judgments of the Apex Court reported in **S. Baldev Singh**¹⁸, the Apex Court observed as follows:

"10. The main ground which appealed to the High Court in making this order for a fresh inspection, scrutiny and recount of the Sherpur segment was the alleged illegal rejection of votes on the score that the signature of the Presiding Officer was absent on the ballot paper. The Court construed Rule 56 of the rules in the light of Rule 38 and took the view that the ballot paper shall not be rejected merely on the ground of such a formal defect as the accidental omission of the signature of the Presiding Officer, without the Returning Officer proceeding to consider if such defect was occasioned by the inadvertence or lapse of the Presiding Officer or the Polling Officer. This approach is sound in law and a recount was rightly undertaken. However, the number of totally rejected ballot papers of all the candidates when subjected to a repeated scrutiny yielded disappointing results from the point of view of the petitioner. Out of 1096 rejected ballot papers only 17 claimed by the petitioner and 7 by the first respondent were found faulty. One of the rejected papers of the petitioner was mutilated and its rejection was thus justified. The net result was that the petitioner gained 16 votes and the first respondent 7. The lead being only 9, proved colourless so far as the conclusion was concerned. Undaunted by the flimsy difference, the petitioner hopefully urged that the other segments of the Parliamentary Constituency should be similarly put through a second inspection and recount. The basis being jejune, the learned Judge declined the request. However, the general contentions raised by the petitioner about the unfair counting and biased processing were examined by the High Court. Those contentions were:

1. The attitude of the counting staff was hostile to the petitioner and his party.
2. The petitioner's votes were rejected for want of the mark or signature prescribed under Section 83, while similar votes of the respondent Teja Singh Swatantra were accepted.
3. That the votes of the petitioner were wrongfully put in the bundle of the respondent No.1 to inflate his count.
4. That a number of votes marked in favour of the petitioner were rejected simply because they were smudged due to folding of ballot papers.

5. That some of the votes counted for the contesting respondent were invalid because of multiple markings, while others were mutilated and the markings thereon did not clearly indicate for whom they had been cast.

95. The principle laid down in the above judgment is directly applicable to the present facts of the case, since the rejection of one vote-Ex.X.1 by the 5th respondent is improper and against the rules. In the above said Judgment, it is further observed that in **Chanda Singh v. Choudhary Shiv Ram Verma and Others** ^[23] at paras 19 and 20 the Apex Court discussed the power of Election Tribunal to direct inspection and re-count is undoubted but will be exercised sparingly,

“19. A certain amount of stability in the electoral process is essential. If the counting of the ballots are interfered with by too frequent and flippant recounts by courts a new threat to the certainty of the poll system is introduced through the judicial instrument. Moreover, the secrecy of the ballot which is sacrosanct becomes exposed to deleterious prying if recount of votes is made easy. The general reaction, if there is judicial relaxation on this issue, may well be a fresh pressure on luckless candidates, particularly when the winning margin is only a few hundred votes as here, to ask for a recount Micawberishly looking for numerical good fortune or windfall of chance discovery of illegal rejection or reception of ballots. This may tend to a dangerous disorientation which invades the democratic order by injecting widespread scope for reopening of declared returns, unless the Court restricts recourse to recount to cases of genuine apprehension of miscount or illegality or other compulsions of justice necessitating such a drastic step.

20. This implies no break from the liberal stance we have indicated for Returning Officers. Election petitions come to court after a month and a half and ripen for trial months later and then the appeal, statutorily vested, inevitably follows. In this operation Litigation, which is necessarily protracted, liberal recount or lay re-inspection of votes may create belated uncertainties, false hopes and a hovering sense of suspense, long after elections are over. Governments formed and legislatures begin to function. Moreover, while a recount, within the counting station, with the entire machinery familiar with the process still available at hand and operational, is one thing, a re-inspection and recount, which is an elaborate undertaking with mechanics and machinery of a specialized nature and which cannot be judicially brought into existence without an amount of time, toil and expense, is a different thing. This Court has laid down clear principles on the subject, meeting the ends of justice, but, without opening the flood-gates of recounts on flimsy grounds. Less election litigation is a sign of people's adult franchise maturity and adventurist election petitions are an infantile disease to be suppressed. Our view of Rule 63, the relevant wholesome instructions by the Commission and the rulings of this Court, harmonise with the overall considerations of law and democracy.”

96. Even if the principle laid down in the above judgment is applied to present facts of the case, this Court having satisfied that there is a *prima facie* truth in rejection of one ballot, due to marking of two vertical lines indicates the intention of the voter that he marked second preference by mentioning Roman form of two (II), however, the exercise undertaken by this Court by appointing the Registrar (Judicial) for re-examination of the rejected ballots allegedly polled in favour of the petitioner become futile exercise.

97. In **P.H. Pujar v. Dr.Kanthi Rajashekhar Kidiyappa and others** ^[24], the Full Bench of the Apex Court while deciding the appeal against the election petition

filed on the ground of improper reception, refusal or rejection of votes and non-compliance with the provisions of the Act and held that clearly the main object seems to be to find the intention of the voter and where the intention of the voter to vote for a particular candidate is evident from the way the ballot paper is marked by him, it shall not be rejected merely on the ground stated in the second proviso to Rule 56-B(2). From this, it is clear that if the voter clearly indicated his preference in the ballot, such rejection of the same is illegal.

98. In the present facts of the case, on Exs.X.2, C.1 to C.14, the voter did not indicate his intention to give particular preference to the petitioner clearly, but on Ex.X.1, the voter expressed his intention by marking **Roman form of two (II)** in the box against the name of the petitioner, if the intention is inferred from the circumstances of the case, rejection of Ex.X.1 is illegal, but rejection of other ballots Ex.X.2, C.1 to C.14 is not tainted by any illegality or irregularity.

99. In **P.T. Rajan v. T.P.M. Sahir and Others**^[25], the Apex Court, while discussing about the necessity of pleadings and burden of proof, held that for inspection of ballot papers, the election petition must make out a strong prima facie case, only after setting out material facts in the election petition and leading evidence to that effect the court can make a sample inspection.

100. In the present facts of the case, the petitioner disclosed the all details of the votes polled in his favour and its illegal rejection by the 5th respondent. Therefore, this Court ordered sample inspection of exhausted ballots by order dated 20.01.2016 and later ordered inspection of rejected ballots, but found one vote-Ex.X.1 was rejected improperly by the 5th respondent.

101. On overall consideration of material on record, the petitioner failed to establish that the 5th respondent rejected Exs.C.1 to C.14 and Ex.X.2 illegally and established illegal rejection of Ex.X.1.

102. The learned counsel for the first respondent would contend that there are no specific pleadings disclosing the material facts to accept the contention of the petitioner, and in fact I have decided such contention while deciding point No.3. Therefore, there is no necessity of examination again while deciding this issue. However, the difference of votes is only one between the petitioner and the first respondent till Ex.X.1 is counted in favour of the petitioner, now the vote secured by the petitioner and the first respondent are equal. In such case, the course open to this court is to invoke Section 102 of the Act. Section 86 of the Act contemplates the procedure to be followed in trial of election petition and Section 87 of the Act

prescribes the procedure before the High court, at the same time Section 94 of the Act mandates that no witness other than the person shall be required to state for whom he has voted in election petition to maintain secrecy of the vote. In the present case, Exs.X.1 and X.2, C.1 to C.14 did not disclose the identity of the voter except one ballot “Ex.C.2” in view of the sign in the column provided in marking preference. Section 98 of the Act contemplates order that can be passed by the High Court in an election petition- dismissing the election petition; or declaring the election of (all or any of the returned candidates) to be void; or declaring the election, of (all or any of the returned candidates) to be void and the petitioner or any other candidate to have been duly elected. Section 99 of the Act deals with the other orders to be made by the High court, but they are not relevant. Section 100 of the Act deals with the grounds for declaring to be void, and it is extracted hereunder:

100. Grounds for declaring election to be void – (1) *Subject to the provisions of Sub-Section (2) if the High Court is of opinion-*

a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act (or the Government of Union Territories Act, 1963 (20 of 1963)) ; or

b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

c) That any nomination has been improperly rejected; or

d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected –

(i) by the improper acceptance or any nomination, or

(ii) by any corrupt practice committed in the interest of the returned candidate (by an agent other than his election agent), or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

The High Court shall declare the election of the returned candidate to be void.

2) If in the opinion of the High Court, a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice but the High Court is satisfied –

(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent, of the candidate or his election agent;

(c) that the candidate and his agent took all reasonable means for preventing the commission of corrupt practices at the election; and

(d) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents,

Then the High Court may decide that the election of the returned candidate is not void.

103. According to section 100 (1)(d)(iii) of the Act, if improper reception, refusal or rejection of any vote or the reception of any vote which is void if found, the court can

declare election of the returning candidate to be void, if such rejection directly affects the result.

104. In the present facts, rejection of Ex.X.1 is illegal since the voter marked his preference in **roman form of two (II)**. Therefore, such rejection would directly affects the result of returned candidate. As per the material, both the petitioner and respondent secured equal votes

ISSUE No.5:

105. One of the contentions of the first respondent is that the election of the first respondent cannot be lightly interfered on the basis of the allegations made in the petition. No doubt, the Courts must maintain restraint in interfering with such election of the returned candidate normally, but if the court finds that the petitioner proved any of the grounds contemplated under Section 100(1) of the Act to maintain purity in the election can interfere with the election of the first respondent.

106. In the present facts of the case, the 5th respondent illegally rejected Ex.X.1, which would effects the result of the election of the first respondent since he was declared as elected with majority of one vote. Therefore, I find no substance in the contention of the learned counsel for the respondent while holding that the Court can interfere with the election of the first respondent in case the election petitioner proved any of the grounds under Section 100 of the Act. Accordingly the point is answered in favour of the petitioner and against the first respondent.

Point No.6:

107. According to Section 102 of the Act if during the trial of an election petition, it appears that there is an equality of votes between any candidates at the election and that the addition of a vote would entitle any of those candidates, any decision made by the returning officer under the provisions of this Act shall, in so far as it determines the question between those candidates, be effective also for the purposes of the petition; and in so far as that question is not determined by such a decision the High Court shall decide between them by lot and proceed as if the one on whom the lot then falls had received an additional vote. As such declaration of the first respondent as elected Member of Legislative Council from Madanapally Local Bodies Constituency is liable to be set aside and accordingly set aside. Accordingly, the point is held against the first respondent and in favour of the petitioner.

108. In the present case, after adding the vote Ex.X.1 to the credit of the petitioner, secured total votes "408" and the votes polled in favour of the first

respondent-returned candidate are “408”.

109. Therefore, the course left open to this Court is to decide result by lot exercising the power under Section 102 of the Act.

110. Since both the election petitioner and first respondent-returned candidate secured equal votes, after inspection of rejected and exhausted votes and after validating one rejected vote casted in favour of the petitioner, therefore by following procedure under Section 102 of the Act, lot was taken in the presence of Sri Srinath Reddy, learned counsel for the petitioner and Sri N. Ashwani Kumar, learned counsel for the first respondent. In the said lot, petitioner-B.Naresh Kumar Reddy became successful.

111. IN the result, the election petition is allowed declaring that the election petitioner Sri B. Naresh Kumar Reddy as elected from the constituency of Chittoor (local bodies) as Member of Legislative Council, while declaring that the election of first respondent-Dr.Desai Tippa Reddy as returned candidate as illegal and invalid. There shall no order as to costs.

112. Miscellaneous petitions, if any, pending in this election petition, shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 20.04.2016

BV/RDS

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[\[1\]](#) AIR 1970 SC 276

[\[2\]](#) (1964) 6 SCR 238

[\[3\]](#) AIR 1966 SC 773

- [\[4\]](#) 1980 AIR 206
- [\[5\]](#) 1990(1) ALT 669
- [\[6\]](#) (1989) 1 SCC 526
- [\[7\]](#) (2000) 8 SCC 355
- [\[8\]](#) (2010) 1 SCC 466
- [\[9\]](#) AIR 1999 SC 2167
- [\[10\]](#) AIR 1999 SC 3827
- [\[11\]](#) (1975) 4 SCC 394
- [\[12\]](#) AIR 1999 Patna 231
- [\[13\]](#) AIR 1991 SC 1260
- [\[14\]](#) (1975) 4 SCC 394
- [\[15\]](#) (1974) 4 SCC 3
- [\[16\]](#) (2005) 7 SCC 764
- [\[17\]](#) (1976) 1 SCC 800
- [\[18\]](#) (1975) IV SCC 406
- [\[19\]](#) AIR 2014 SC 1290
- [\[20\]](#) AIR 1983 SC 1293
- [\[21\]](#) (2012) 12 SCC 27
- [\[22\]](#) AIR 1964 SC 1200
- [\[23\]](#) (1975) 4 SCC 393
- [\[24\]](#) (2001) 6 SCC 558
- [\[25\]](#) (2003) 8 SCC 498