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RAM AUTAR SINGH BHADAURIA

v.

RAM GOPAL SINGH AND OTHERS

July 31, 1975

[V. R. KRISHNA IYER, *R.* S. SARKARIA AND A. C. GUPTA, JJ.]

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Representation of the People Act, 1951—*Sec.* 97, 100(1)(d)(iii)—*Conduct of Election Rules*, 1961—*Rule* 38 *and* 56—*General recount and inspection which to be allowed—Recriminatory pleas.*

The appellant and respondent no. 1 and other candidates contested the election from U.P. Legislative Assembly Constituency (No. 293), Sarsaul. The appellant secured 23626 votes and respondent no. 1 polled 23604, the margin being of 22 votes only.

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Respondent no. 1 filed an Election Petition challenging the election of the appellant inter alia on the ground that the result of the election so far as the returned candidate was concerned was materially affected by improper reception and rejection of votes and mistakes in counting. It was alleged that 41 ballot papers were rejected on the ground that the electors' choice was expressed through the instrument meant for the Presiding Officer for stamping on the reverse side of the ballot papers. The particulars of those ballot papers were given in Schedule annexed to the Election Petition. It was further alleged

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that some ballot papers were issued along with the counter foil and were therefore rejected. The appellant in his written statement denied the allegations and stated that the result of the election was not materially affected. Respondent no. 1 did not adduce any evidence in support of his allegations mentioned above, but made an application before the High Court for scrutiny and recount of the ballot papers. The High Court allowed the application and directed scrutiny and recount of ballot papers on the following grounds :

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(a) The appellant won by a very small margin of 22 votes.

(b) It was not disputed that a number of ballot papers were rejected because the polling staff forgot to detach the counter-foils on a number of ballot papers.

(c) It is also the admitted case of the parties that a number of ballot papers were rejected because the voters cast their votes by putting their mark not with the marking instrument issued by the Election Commission but with the

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marking or stamping instrument issued for the use of the Presiding Officers.

(d) It is clear from the petition, written statement and recriminatory petition filed by the respondent that both parties pleaded that there was wrong reception, rejection and counting of votes.

The appellant filed an appeal by special leave against the said order of the Appellate Court.

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Allowing the appeal,

HELD : (1) The returned candidate had not categorically and specifically admitted the allegations made in the Election Petition with regard to the improper rejection of the ballot papers. [195F-G]

(2) Since the appellant did not admit the allegations, the court could not dispense with proof of those facts altogether. [196A-C]

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(3) The Additional pleas set up in the written statements were irrelevant to and beyond the scope of the enquiry into the allegations in the Election Petition falling under s. 100(1)(d)(iii) of the Representation of the People Act, 1951. These Additional pleas were in the nature of recriminatory pleas

which could not be investigated in this Election Petition. 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. [197C-F] A

(4) The pleas of the returned candidate under s. 97 have to be tried after a declaration has been made under s. 100 of the Act. [197F-G]

The learned Judge as in error in ordering general inspection and recount of the total votes polled at the election, merely because in these Additional Pleas the returned candidate also had by way of recrimination, complained of wrong reception and rejection of votes and wrong counting of votes. [198B-C] B

The High Court failed to apply its mind to the question, whether if the facts alleged in the petition were assumed to be correct—a *prima facie* case for improper rejection of the 50 ballot papers—was made out. Rule 38 of the Conduct of Election Rules, 1961, requires every ballot paper and the counter-foil attached thereto to be stamped on the back by the Presiding Officer with such distinguishing mark as the Election Commission might direct. Rule 56 requires every elector to whom ballot paper has been issued to maintain secrecy of voting and making a mark on the ballot paper with the instrument supplied for the purpose by the Election Commission. The object of these rules is to secure not only the secrecy of the ballot but also to eliminate chances of sharp practices in the conduct of election. The requirements, are, therefore, mandatory and a defect arising from their non-observance inexorably entails rejection of the defective ballot papers. [198D-E; 199G-H] C D

The High Court had to apply its mind as to whether these facts by themselves were sufficient to attract rule 56. The High Court had also to apply its mind as to whether the facts alleged in the petition, if correct, would fall within the mischief of rule 56. [200B; 202A-B]

Times out of number, this Court has pointed out that a general scrutiny and recount of the ballot papers should not be lightly ordered. Before making such an extraordinary order, the Court must be satisfied that all the material facts have been pleaded and proved and that such a course is imperatively necessary in the interests of justice. In the present case, there was no foundation in the petition, for ordering a general recount. Nor could the Additional Pleas in the written statement of the returned candidate be taken into account for making an order for general inspection of the ballots. [202C-E] E

The order of the High Court was set aside. [203B] F

The High Court was directed to decide the questions mentioned in this judgment and, thereafer, decided the application of the Respondent no. 1 for recount of the specific ballot papers. [203B-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 783 of 1975.

Appeal by special leave from the judgment and order dated the 9th April 1975 of the Allahabad High Court in Application No. A. 77 in Election Petition No. 22 of 1974. G

R. K. Garg, S. C. Agarwala and V. J. Francis, for the appellant.

D. Mukherjee and *Pramod Swarup,* for respondent No. 1.

The Judgment of the Court was delivered by H

SARKARIA, J. We have already announced our order in this appeal on the 2nd May 1975. We now proceed to give our reasons therefor.

A The appellant, Shri Ram Autar Singh Bhadauria, Respondent No. 1 Chaudhari Ram Gopal Singh and Respondents 2 to 11 contested election, as rival candidates from U. P. Legislative Assembly Constituency (No. 293), Sarsaul. The poll was held on 24-2-1974. The appellant was declared elected. The total number of votes polled was 72735. Out of these, the appellant secured 23626 and Respon-
B dent 1, his nearest rival polled 23604, the margin being of 22 votes only.

Respondent 1 filed an election petition challenging the election of the appellant *inter alia* on the ground (vide para 9(1) of the petition) that the result of the election so far as the returned candidate was concerned materially affected by improper reception and rejection of
C votes and mistakes in counting. It was alleged :

> "para 11(a). That in a number of polling stations, the instruments supplied to the electors for the purposes of stamping on or near the symbol of the candidate to whom he intends to vote, was seal of Presiding Officer which was meant to be put on the reverse of the ballot papers. Since
> D the electors were supplied these instruments by the Presiding Officer for marking the ballot papers the electors indicated their choice by marking in the column of the petitioner with that instrument. There were 41 such ballot papers which were clear votes for the petitioner that were illegally rejected by the Presiding Officer on the ground that the electors' choice was expressed through the instrument meant
> E for the Presiding Officer for stamping on the reverse side of the ballot papers. Particulars of such ballot papers are given in Schedule I attached to the Election Petition.
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> (b) That in a number of polling stations, the electors were issued ballot papers along with the counter-foil. While issuing the ballot papers to the electors, the polling staff deputed there did not detach the counter foil and the electors
> F after putting seal mark put the ballot papers along with the counter foil in the ballot box. It was due to the mistake of the staff deputed at the polling station. The number of some of such ballot papers are—100976, 100977, 100978, 100979, 100980, 100982, 100983 and 100984. These ballot papers clearly indicate the votes for the petitioner but
> G they were illegally rejected on the ground that the identity of the elector can be established. The reason on which it was rejected was wholly illegal. The particulars of such ballot papers are given in Schedule II attached to this election petition."

In his written statement, the successful candidate stated :

> H "65(1). That the contents of paragraph No. 9(1) of the Election Petition are not admitted. The result of the election in so far as the answering respondent is concerned has not been materially affected by any improper reception or

rejection, or by wrong arithmetical and clerical mistake in counting of votes and/or counting and acceptance of void votes in favour of the answering respondent. In fact no improper reception or rejection or arithmetical mistake or any clerical mistake was done in favour of the answering respondent.

16. That the contents of paragraph No. 11(a) of the petition are wrong and denied. It is wrong to say that 41 ballot papers mentioned in Schedule I or any ballot paper counted in favour of the respondent No. 1 by marking with the seal of the Presiding Officer. It is admitted that the ballot papers on which unauthorised seal was found were rejected. Some of these rejected ballot papers may be of the petitioner but most of them were of respondent No. 1 and other contesting candidates.

17. That the contents of para 11(b) of the petition and Schedule II are not admitted as stated. Only on one polling station, due to the mistake of the Presiding Officer some ballot papers were issued along with their counter-foils. The counterfoils did contain the name and signature or thumb impression of the voters attached to the ballot paper. In these circumstances such ballot papers were rejected by the Returning Officer. It is submitted that such ballot papers were in respect of all the candidates including the respondent No. 1.

Further, no such objection was raised at the time of counting by the Petitioner or his election agent and/or his counting Agent.

56. That no different criteria was adopted by the Returing Officer in the matter of acceptance or rejection of ballot papers and the respondent No. 1 maintains that many ballot papers in which the Electors expressed their choice in favour of the respondent No. 1 by putting the seal of the Presiding Officer as supplied by the Presiding Officer, were wrongly rejected during the counting by the Returning Officer."

Respondent 1 did not adduce any evidence in support of the allegations extracted above. But on 24-2-1975, he made an application before the High Court, praying for scrutiny and recount of the ballot papers. The allegations in para 11(a) and (b) of the election petition were reiterated in the application. The appellant in reply filed a counter-affidavit which was substantially a reproduction of his reply in the written statement.

The learned Judge of the High Court by his order, dated 9-4-1975, allowed that application and directed scrutiny and recount of ballot papers on the view that :

(a) The appellant "was declared to have won by a very small margin of only 22 votes".

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(b) "It is not in dispute that a number of ballot papers were rejected by the Returning Officer as invalid because the polling staff of a particular polling station forgot to detach the counter-foils of a number of ballot papers. As the counter-foils contained the identity of the voters, the ballot papers were rejected for no fault of the voters, but because of negligence or incompetence on the part of the polling staff".

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(c) "It is also the admitted case of the parties that a number of ballot papers were rejected because the voters cast their votes by putting their mark not with the marking instrument issued by the Election Commission but with the marking or stamping instrument issued by the Election Commission for the use of the Presiding Officers. This happened because instead of the instrument which the polling staff should have given to a voter to put the mark showing for which candidate he wanted to vote, the polling staff by mistake handed over to the voter the stamp meant for the Presiding Officer..... to affix on the back of the ballot paper."

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(d) "The petition, the written statement, the recriminatory petition filed by the respondent (now appellant) and the reply thereto filed by the petitioner would show that this is a case in which both parties have pleaded that there was wrong reception, rejection and counting of votes."

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It is against this order, dated 9-4-75 of the High Court that this appeal has been filed by the returned candidate after obtaining special leave.

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Having heard learned Counsel on both sides, we are of opinion that the order made by the High Court for a general scrutiny and recount of all the ballot papers cast at the election, was not justified.

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The returned candidate had not categorically and specifically admitted the allegations made in the election petition with regard to the improper rejection of the ballot-papers. This will be clear from a comparative reading of Paragraph 11(a) and (b) of the petition and the answers thereto given in the written statement, which have been reproduced above verbatim. It is to be noted that the reply of the returned candidate to the contents of the aforesaid sub-paras (a) and (b) starts with a denial or a non-admission. Such a traverse is then followed by qualified and vague admissions that some ballot-papers were rejected because they were not marked with the instrument meant for this purpose, or bore the names or signatures of the voters on the counter-foils that remained attached to them, owing to the mistake of the Presiding Officer. After having thus replied to the petitioner's allegations, the returned candidate said that most of these rejected

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ballots had been cast for him and not for the petitioner. This was a counter-assertion which was not, strictly speaking, relevant to the case set up in the petition.

Mr. Mukherjee, learned Counsel for Respondent 1 (election-petitioner) has drawn our attention to the "Additional Pleas" in the written statement of the appellant. According to Counsel it were these pleas, more than anything else, that led to the finding "that this is a case in which both parties have pleaded that there was wrong reception, rejection and counting of votes."

We will discuss this aspect of the case a little later. At this place it will be sufficient to say that since the returned candidate in his written statement did not specifically and fully admit all the facts alleged in Paragraph 11(a) and (b) of the petition, the Court could not dispense with proof of those facts altogether. For instance, in reply to the facts alleged in Para 11(a) of the petition, the returned candidate did not admit that the instrument with which such rejected ballot-papers were found stamped, was *supplied by the Presiding* Officer. On the contrary, the reply to sub-para (a) begins with a clear traverse : "that the contents of paragraph No. 11(a) of the petition are *wrong and denied*". This denial notwithstanding, the learned Judge appears to have erroneously assumed this fact as admitted by the returned candidate. The parties being at variance on this material point, this issue of fact was required to be proved by the party alleging it.

Now, we come to the finding of the learned Judge as to the wrong reception and rejection of votes being a common ground between the parties. We have catalogued this finding as ground (b) which is one of the four pillars on which the impugned order rests. This ground, according to Mr. Mukherji, draws particulars support from the "Additional Pleas" set up in the written statement. We do not propose to over-burden this judgment by reproducing all that has been stated in Paragraph 47 to 56 of the written statement under the caption "Additional Pleas". It will be sufficient to extract some of it by way of sample :

> "47. That the Returning Officer did not allow any improper acceptance or rejection against the interest of the election-petitioner, rather mistakes of improper acceptance and rejection of ballot papers were done against the interests of the answering respondent.
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> . . . . . .
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> 49. That many ballot papers which bore the major portion of the stamp mark within the column of the Respondent No. 1 were wrongly rejected by the Returning Officer at the time of counting.
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> 50. That as in the case of the Election-Petitioner, the Ballot Papers in favour of the Respondent No. 1 with which counterfoils were attached were rejected. In case the Hon'ble Court finds that similar ballot papers in favour of

A the election petitioner are to be accepted, the ballot papers in favour of the Respondent No. 1 in the same condition should also be accepted and counted as valid votes in favour of the Respondent No. 1.

51. That many ballot papers containing votes in favour of the Respondent No. 1..... were wrongly put in the B bundles of the votes in favour of the Election Petitioner.

. . . . . .

53. .....That the bundles of ballot papers in..... favour of the Respondent No. 1 in fact contained more than 50 ballot papers and there was thus wrong counting.....

I say that the Respondent No. 1 filed an application be- C fore the Returning Officer on 27-2-74 but the Returning Officer without considering the submissions made therein rejected it and did not order for recount."

If we may say so with respect, in taking these Additional Pleas into account, the learned Judge completely misdirected himself. He overlooked the fact that these Pleas were irrelevant to and beyond the D scope of the enquiry into the allegations in the election-petition falling under s. 100(1)(d)(iii) of the Representation of the People Act, 1951. These "Additional Pleas" were in the nature of recriminatory pleas which could not be investigated in this election petition. As clarified by this Court in *Jabar Singh* v. *Genda Lal*[1], the scope of the inquiry in a case under s. 100(1)(d)(iii) is to determine whether any votes had been improperly cast in favour of the returned candi- E date or any votes had been improperly refused or rejected in regard to any other candidate. These are the only two matters which would be relevant for deciding whether the election of the returned candidate had been materially affected or not. At such an enquiry the burden is on the petitioner to prove his allegations. In fact s. 97(1) of the Act has no application to a case falling under s. 100(1)(d)(iii). The scope of the enquiry is limited for the simple reason that F what the clause requires to be considered, is, whether the election of the returned candidate has been materially affected and nothing else.

It is true that in a composite election petition wherein the petitioner claims not only that the election of the returned candidate is void but also that the petitioner or some other person be declared to have been duly elected, s.97 would also come into play and allow the returned G candidate to recriminate and raise counter-pleas in support of his case, "but the pleas of the returned candidate under s. 97 have to be tried *after a declaration has been made under s.*100 *of the Act.* The first part of the enquiry in regard to the validity of the election of the returned candidate has therefore to be tried within the narrow limits prescribed by s. 100(1)(d)(iii) and the latter part of the enquiry governed by s. 101(a) will have to be tried on a broader basis permit- H ting the returned candidate to lead evidence in support of the pleas taken by him in his recriminatory petition; but even in such a case the

(1) [1964] 6 S. C. R. 54.

enquiry necessary while dealing with the dispute under s. 101(a) will not be wider if the returned candidate has failed to recriminate and in a case of this type, the duty of the Election Tribunal will not be to count and scrutinise all the votes cast at the election.

Moreover, in the instant case, it is a matter of controversy to be decided as to whether the recriminatory petition filed by the appellant is within time or not.

The above being the law on the point, it is clear that the learned Judge was in error in ordering general inspection and recount of the total votes polled at the election, merely because in these Additional Pleas the returned candidate also had by way of recrimination, complained of wrong reception and rejection of votes and wrong counting of votes. The pleas at this stage could not be investigated even in the recriminatory petition filed by the returned candidate. They were beyond the scope of the enquiry into the petitioner's case which (as set up in Para 11 of the petition) fell under s. 100(1)(d)(iii) of the Act.

Further, the High Court did not properly apply its mind to the question, whether on the facts alleged in Para 11(a) and (b) of the petition—assuming the same to be correct—a *prima facie* case for improper rejection of the 50 ballot papers referred to therein, had been made out. In other words, if the defects in these 50 ballot papers were attributable to the mistakes or negligence of the Presiding Officer or his staff, would it take those ballot papers out of the mischief of clauses (a) and (b) of Rule 56(2) of the Conduct of Election Rules, 1961 ?

Rule 56 runs thus :

> "(1) Subject to such general or special directions, if any, as may be given by Election Commission in this behalf, the ballot papers taken out of all boxes used in a constituency shall be mixed together and then arranged in convenient bundles and scrutinised.
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> (2) The returning officer shall reject a ballot paper—
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> (a) if it bears any mark or writing by which the elector can be identified, or
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> (b) if, to indicate the vote, it bears no mark at all or bears a mark made otherwise than with the instrument supplied for the purpose, or
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> (c) if votes are given on it in favour of more than one candidate, or
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> (d) if the mark indicating the vote thereon is placed in such manner as to make it doubtful to which candidate the vote has been given, or

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(e) if it is a spurious ballot paper, or

(f) if it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established, or

(g) if it bears a serial number, or is of a design different from the serial numbers, or, as the case may be, design, or the ballot papers authorised for use at the particular polling station, or

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(h) if it does not bear (both, the mark and the signature) which it should have borne under the provisions of sub-rule (1) of rule 38;

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Provided that where the returning officer is satisfied that any such defect as is mentioned in clause (g) or clause (h) 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 :

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Provided further that a ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote shall be for a particular candidate clearly appears from the way the paper is marked.

(3) to (5) : .. ..

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(6) Every ballot paper which is not rejected under this rule shall be counted as one valid vote :

. . . . . ."

Clauses (a) and (b) of Rule 56(2) are referable to Rule 38 which requires every elector to whom ballot paper has been issued under Rule 38 to maintain secrecy of voting and "to make a mark on

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the ballot paper with the instrument supplied for the purpose on or near the symbol of the candidate for whom he intends to vote."

Rule 38 is also relevant. This Rule requires every ballot paper and the counterfoil attached thereto to be stamped on the back by the Presiding Officer with such distinguishing mark as the Election Commission may direct. Every such ballot paper before it is issued is re-

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quired to be signed in full on its back by the Presiding Officer. Sub-rule (2) requires that at the time of issuing of ballot paper, the Polling Officer shall on its counterfoil record the electoral roll number of the elector and obtain his signature or thumb-impression.

The object of these rules is to secure not only the secrecy of the ballot but also to eliminate chances of sharp practices in the conduct

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of elections. Their requirements are therefore mandatory, and a defect arising from their non-observance inexorably entails rejection of the defective ballot paper except to the extent covered by the Provisos to Rule 56(2).

In the case of 41 ballot papers mentioned in para 11(a), what happened was that instead of marking those ballot papers with the instrument supplied for this purpose by the Election Commission, the electors concerned *stamped* it with the instrument meant to be used exclusively by the Presiding Officer for stamping the counterfoils and backs of the ballot papers. The Court had to apply its mind as to whether these facts by themselves were sufficient to attract Rule 56 (2)(b) ? This question would further resolve itself into two issues : (i) Was the stamping instrument with which these 41 electors "marked" the ballot papers, given to them by the Presiding Officer or any member of his staff ? (ii) If so, could these ballot papers be deemed to have been marked with "the instrument supplied for the purpose" within the contemplation of Rules 38 and 56(2)(b) ? The first one was an issue of fact, the determination of which would depend on evidence. The second issue would arise only on proof of the first, and involve the question of interpreting and applying the phrase "instrument supplied for the purpose". This phrase is capable of two interpretations—one narrow and literal, and the other liberal and contextual. Without there being any proof of the fact that the stamping instrument was handed over to the 41 electors by the Presiding Officer/Polling Officer, a final expression of opinion on our part would be academic and premature. It will be sufficient to reiterate that the provisions of Rules 38 and 56(2)(a) and (b) with which we are concerned in this case are mandatory and strict compliance therewith is essential. Once it is established that the fault specified in clauses (a) or (b) of Rule 56(2) has been committed, there is no option left with the Returning Officer but to reject the faulty ballot paper. We would further make it clear that even if any such defect as is mentioned in clauses (a) or (b) of Rule 56 is caused by any mistake or failure on the part of the Returning Officer or Polling Officer, the Returning Officer would be bound to reject the ballot paper on the ground of such defect. That such is the imperative of Rule 56(2) is clear from the fact that the said clauses (a) and (b) have advisedly been excluded from the first Proviso to Rule 56(2) which gives a limited discretion in the matter of rejection to the Returning Officer only where the defect is of a kind mentioned in clauses (g) and (h) of this sub-rule.

In the view that such Rules relating to the conduct of elections, are required to be observed strictly, we are fortified by the ratio of this Court's decision in *Hari Vishnu Kamath* v. *Syed Ishaque and ors.*(1) In that case, voters for the House of the People in Polling Stations Nos. 316 and 317 in Sobhapur were given ballot papers with brown bar intended for the State Assembly, instead of ballot papers with green bar which had to be used for the House of the People. The total number of votes so polled was 443, out of which, 62 were in favour of the then appellant, 301 in favour of the first respondent therein and the remaining in favour of the other candidates. Rule 47(1)(c) of the Conduct of the Election Rules, 1951 provided that "a ballot paper contained in a ballot-box shall be rejected if it bears

(1) [1955] 1 S. C. R. 1104.

A any serial number or mark different from the serial number or marks of ballot papers authorised for use at the polling station or the polling booth at which the ballot-box in which it was found, was used." The election-petitioner contended that in accordance with this rule, the ballot papers received at the two polling stations, not having the requisite mark, should have been excluded. The returned candidate
B pleaded that the Returning Officer had rightly accepted 301 votes because Rule 47 was directory and not mandatory. It was contended that the electors were not at fault and that the wrong ballot papers were issued due to the lapse on the part of the Returning Officer and that to reject the votes of the electors for the failure of the Polling Officer to deliver the correct ballot papers under Rule 23 would be to disfranchise them, and that a construction which involved such a consequence should not be adopted. This Court repelled the con-
C tention in these terms :

> "If the word 'shall' is thus to be construed in a mandatory sense in Rule 47(1)(a), (b) and (d), it would be proper to construe it in the same sense in Rule 47(1)(c) also. There is another reason which clinches the matter against the 1st respondent. The practical bearing of the distinction
D between a provision which is mandatory and one which is directory is that while the former must be strictly observed, in the case of the latter it is sufficient that it is substantially complied with. How is this rule to be worked when the Rule provides that a ballot paper shall be rejected ? There can be no degrees of compliance so far as rejection is concerned, and that is conclusive to show that the provision is
E mandatory."

The above observations are apposite. Judged by the guiding principle enunciated therein, it can safely be said that the provisions of Rule 56(2)(a) and (b) read with Rule 38, are mandatory and not merely directroy.

F It was contended by the learned Counsel for the respondent before us, that the Provisos to sub-rule (2) of Rule 56 are only illustrative and not exhaustive, and consequently, the principles underlying these Provisos would give a discretion to the Returning Officer not to reject a ballot paper on the ground of a defect caused by mistake or negligence of the Presiding Officer/or Polling Officer, notwithstanding that such defect is one mentioned in clauses (a), (b), (c), (d), (e)
G and (f) of Rule 56(2).

This contention is not tenable. The word 'shall' used in the opening part of sub-rule (2) read in the context of the general scheme of this Rule shows that it is mandatory. Sub-rule (5) puts the matter beyond doubt. It says that "every ballot paper which is not rejected under this sub-rule shall be counted as one valid vote". Rule 56 is a
H complete code by itself. The Provisos to Sub-rule (2) are exhaustive of the kinds of defects which the Returning Officer may condone, if those defects are caused by the mistake or failure of the Polling Staff. The first Proviso is in terms limited to defects falling under Clause

(g) or (h). Neither of these Provisos appears to be attracted if the defects is any of the defects mentioned in clauses (a) or (b).

The learned Judge of the High Court has not applied his mind as to whether the facts alleged in Paragraph 11(b) of the petition, if correct, would fall within the mischief of clause (d) of Rule 56(2). This will necessarily require consideration of the issue whether there has been an infringement if any of the provisions of Rule 38, referable to clause (a) of Rule 56(2). Another point in this context, for consideration will be whether the "counterfoil" can be said to be an integral part of the "ballot paper" so that any writing or marks of identification of the voter on a counterfoil issued to the voter by mistake, is to be deemed to be a defect of the nature mentioned in clause (a) of Rule 56(2). The High Court has not at all addressed itself to any of these questions.

Times out of number, this Court has pointed out that a general scrutiny and recount of the ballot papers should not be lightly ordered. Before making such an extraordinary order, the Court must be satisfied that all the material facts have been pleaded and proved and that such a course is imperatively necessary in the interests of justice. In the case in hand, the allegations in the election petition (vide Paragraph 11) are confined to 41 plus 9, total 50 votes only (vide Paragraph). There was no foundation in the petition for ordering a general recount. Nor could the Additional Pleas in the written statement of the returned candidate be taken into account for making an order for general inspection of the ballots, because investigation of those pleas was beyond the scope of the case alleged in Para 11 of the petition falling under section 100(1)(d)(iii) of the Act.

We have said enough. We will close the discussion by repeating the note of caution that this Court speaking through V. Krishna Iyer J. recently sounded in *Chanda Singh* v. *Ch. Shiv Ram*(1).

> "A democracy runs smooth on the wheels of periodic and pure elections. The verdict at the polls announced by the Returning Officers leads to the formation of Governments. 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 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 of 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 reopen-

(1) A.I.R. 1975 S.C. 403.

A ing 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."

In the result we allow the appeal and set aside the order of the High Court for general scrutiny and recount of the ballot papers. B However, the High Court will have to determine, (after taking such evidence as may be necessary) *inter alia,* (i) whether the instrument which was used for marking the 41 votes (referred to in the election petition) was supplied to the voters by the Presiding Officer or any other member of his Polling Staff. If on evidence adduced, the learned Judge finds this issue in the affirmative, the further question to be considered would be (ii) whether such supply would answer the legal C requirement of "instrument supplied for the purpose" in Rule 56(2)(b). If both these issues (i) and (ii) are answered in the positive, then and then only he may proceed to inspection and recount of these 41 votes mentioned in the petition. Similarly, after considering the legal questions indicated above, he may order recount of the 9 votes alleged to have counterfoils attached thereto. There appears to be no justification for ordering a general inspection of the ballots on the facts D of this case.

The learned Judge shall proceed with the trial of the election petition in the light of what has been said above. Costs to abide the event in the High Court.

P.H.P. *Appeal allowed.*