does not require that separate and distinct causes of action should be combined in one suit. Not only the commonality of parties but even that of the causes of action is an essential pre-requisite for invoking the provisions of Order 2 Rule 2.

(13) In the present case, the cause of action for instituting a suit for specific performance had not accrued on April 7, 1988 when the respondent had filed a suit for an injunction to restrain the appellant from alienating the land in dispute to any one else. The cause of action for initiating the present proceedings had arisen after June 15, 1988 when there was failure to execute the sale deed. Since the causes of action were different, the provisions of Order 2 Rule 2 are not attracted. Still further, a bare perusal of the provision shows that a plaintiff must omit or intentionally relinquish a portion of his claim before he can be debarred from suing in respect thereof. In the present case, there was no omission on the part of the respondent to sue in respect of the claim for specific performance of the agreement. There is no waiver of the rights under the contract. Consequently, the plea raised by the learned counsel, cannot be sustained.

(14) Mr. Chhibar also referred to the decision in *Ishar Dass* v. *Kanwar Bhan and others* (2). It was based on different facts. It is of no relevance.

(15) In view of the above, there is no merit in this appeal. It is, consequently, dismissed *in limine*.

J.S.T.

Before Hon'ble Ashok Bhan and P. K. Jain, JJ.

BHARAT SINGH,—*Petitioner.*

versus

DALIP SINGH & OTHERS,—*Respondents.*

C.W.P. No. 9671 *of* 1995.

6th October, 1995.

Constitution of India, 1950—*Arts.* 226/227—*Haryana Panchayati Raj Act*, 1994—*Ss.* 176, 183—*Haryana Panchayati Raj Election Rules*,

(2) 1992 (2) P.L.R. 578.

1994—*Election petition—Prayer for recount of votes—Grant of such prayer—Conditions for allowing recount.*

Ashok Bhan, J.

Held, that recount has not to be ordered as a matter of course where the election is challenged on the grounds other than corrupt practices. It only spells out that on the basis of valid votes recorded by the Returning Officer, the person getting the largest number of votes be declared elected, but, whereever a recount has to be ordered, it is incumbent upon the election petitioner to lay a firm foundation of a fact duly supported by evidence leading to making out a *prima facie* case for recount. If the interpretation put by the trial Court is accepted, then a recount has to be ordered in every case where the election is not challenged on the ground of commission of a corrupt practice. Such an interpretation cannot be accepted as it leads to a ridiculous conclusion.

(Para 29)

Further held, that a recount can be ordered on the basis of an agreement between the parties.

(A.I.R. 1977 S.C. 681 & A.I.R. 1993 Punjab & Haryana 172 Relied).

R. S. Cheema, Sr. Advocate, with D. P. Singh, Advocate, *for the Petitioner.*

R. S. Tacoria, Advocate, Sukhbir Singh, Advocate, Vikram Singh, Advocate, *for the Respondent.*

JUDGMENT

Ashok Bhan, J.

(1) Can a recount of the votes in an election of a Gram Panchayat held under the Haryana Panchayati Raj Act. 1994 (hereinafter referred to as 'the Haryana Act, 1994') read with the Haryana Panchayati Raj Election Rules, 1994 (hereinafter referred to as 'the Haryana Rules, 1994') and the Punjab Panchayati Raj Act, 1994 (hereinafter referred to as 'the Punjab Act, 1994') and the Punjab Panchayat Election Rules, 1994 (hereinafter referred to as 'the Punjab Rules, 1994') be granted only on the asking of the election petitioner without there being adequate averments in the pleadings and in the absence of any contemporaneous evidence to substantiate the allegations made in the petition, is the important question of law which calls for determination in this writ petition.

This judgment shall dispose of Civil Writ Petition Numbers 5690, 6541, 7270, 7665, 9871, 10058, 10610 and 12267, all of 1995, under the

Haryana Act, 1994, and Civil Writ Petition Numbers 5862, 6234 and 6532, all of 1995, under the Punjab Act, 1994.

(2) The provisions under the Haryana Act, 1994 and the Punjab Act, 1994 being slightly different, these two sets of petitions shall be disposed of under two headings i.e. the Haryana Cases and the Punjab Cases. Questions of law being the same, all these petitions are taken up together for disposal.

Haryana Cases :

(3) Facts are taken from Civil Writ Petition No. 9671 of 1995. Shortly stated, the same are.

(4) Election of Gram Panchayat of Village Staundi, Tehsil and District Karnal, was held on 15th December, 1994 and the writ petitioner was elected as the Sarpanch. Respondent No. 1 (hereinafter referred to as 'the election petitioner'), claiming to be a voter in the Gram Panchayat and a supporter and an agent of respondent No. 11, one of the rival candidates, filed an election petition under Section 176 of the Haryana Act, 1994, in the Court of the Senior Sub Judge, Karnal. Which was later on assigned to the Court of the Sub Judge 1st Class, Karnal. Election was challenged mainly on the grounds of irregularities and illegalities. It was also alleged that some ballot papers were printed on both the sides and the process issued by the Government/Election Department was illegal. Allegations regarding lapses in counting were also incorporated although the same were lacking in particulars.

(5) Writ Petitioner in his written statement controverted all the averments made in the election petition. Respondent No. 11 also filed his written statement, broadly supporting the stand taken by the election petitioner. Respondent No. 11 also appeared as one of the witnesses in support of the election petition.

(6) In support of the pleadings, parties were permitted to lead their evidence. Election petitioner produced PW-1 Sat Pal, PW-2 OP Mittal, PW-3 Mani Ram and PW-4 Ram Lal, besides himself appearing as PW-5. Writ petitioner also adduced his oral evidence. He himself appeared as DW-1, Rangi Ram appeared as DW-2 and Ishwar Singh as DW-3. Respondent No. 11 appeared as a defence witness and supported the contentions of the election petition in the election petition.

(7) On 13th June, 1995, election petitioner filed an application before the Sub Judge 1st Class. Karnal, making a prayer for recount of the votes. Copy of this application has been annexed as Annexure P-2 to the writ petition. In para 5 of this application, it was pleaded *"although voluminous evidence has been recorded by this Court, yet it is of no legal value and consequence, in as much as the petitioner is not interested in pressing any other ground mentioned in his election petition or otherwise which emerges from the evidence produced by the parties and wishes to submit before this Hon'ble Court that his election petition be decided solely after ordering and having a recount of the votes polled at the time of election irrespective of the illegalities and improprities committed in the election".*

(8) Writ Petitioner filed reply to this application, copy of which has been attached as Annexure P-3 to the writ petition. In his reply, the writ petitioner highlighted that during the course of counting, no application for recount was ever filed as required under the rules nor any objection was raised on behalf of any of the candidates regarding any irregularity or illegality committed during the course of counting that the election petitioner had failed to make out a *prima facie* case for recount and the secrecy of the ballot papers being of paramount importance, recounting could not be ordered on flimsy grounds.

(9) Trial Court decided the issue regarding the recount of votes by the impugned order, Annexure P-4. While interpreting Section 176(4) (b) of the Haryana Act, 1994, it has been held that when ever any person having *locus standi*, files an election petition challenging the validity of the election on the grounds other than the corrupt practice, the Court having the jurisdiction is bound to order a recount.

(10) Relevant portion of Section 176 of the Haryana Act, 1994, reads as under :—

> "176. (1) Determination of validity of election enquiry by judge and procedure. If the validity of any election of a member of a Gram Panchayat, Panchayat Samiti or Zila Parishad or Up-Sarpanch, Sarpanch of Gram Panchayat, Chairman or Vice-Chairman, President or Vice-President of Panchayat Samiti or Zila Parishad respectively is brought in question by any person contesting the

election or by any person qualified to vote at the election to which such question relates, such person may at any time within thirty days after the date of the declaration of results of the election, Present an election petition to the Civil Court having ordinary jurisdiction in the area which the election has been or should have been held, for the determination of such question.

(2) A petitioner shall not join as respondent to his election petition except the following persons :—

(a) Where the petitioner in addition to challenging the validity of the election of all or any of the returned candidates claims a further relief that he himself or any of the election of all or any of the returned candidates other candidate has been duly elected, all the contesting candidates other than the petitioner and where no such further relief is claimed, all the returned candidates ;

(b) any other candidate against whom allegations of any corrupt practices are made in the election petition.

(3) All election petitions received under sub-section (1) in which the validity of the election of members to represent the same electoral division is in question, shall be heard by the same Civil Court.

(4)(a) If on the holding of such inquiry the Civil Court finds that a candidate has, for the purpose of election committed a corrupt practice within the meaning of sub-section (5) he shall set aside the election and declare the candidate disqualified for the purpose of election and fresh election may be held.

(b) If, in any case to which clause (a) does not apply, the validity of an election is in dispute between two or more candidates, the court shall after a scrutiny and computation of the votes recorded in favour of each candidate, declare the candidate who is found to have the largest number of valid votes in his favour, to have been duly elected :

Provided that after such computation, if any, equality of votes is found to exist between any candidate and the addition of one vote will entitle any of the candidates to be declared elected one additional vote shall be added to the total

number of valid votes found to have been received in the favour of such candidate or candidates, as the case may be, elected by lot drawn in the presence of the judge in such manner as he may determine."

(11) Aggrieved against the order, Annexure P-4, passed by the trial Court, ordering recount of the votes, present writ petition has been filed by the elected candidate, *inter alia,* on the grounds that the learned trial Court has mis-interpreted the provisions of Section 176 of the Haryana Act, 1994; that the interpretation put by the learned trial Court is founded on incorrect assumptions, such as, that whenever an election petition is filed and the grounds tentamounting to corrupt practices are either not taken or given up, the petition is to be treated as the one governed by Section 176(4)(b) of the Haryana Act, 1994. The validity of the election being in dispute, the election petition is entitled to claim a recount, which the Court is bound to order. That there is no need or scope for any inquiry or to establish a *prim* a *facie* case for ordering the recount. In a case where the validity of an election has been questioned on any ground other than corrupt practice, it is mandatory for the Court to carry out the secrutiny and computation of the votes.

(12) Notice of motion was issued, in response to which written statement has been filed.

(13) With the consent of the counsel for the parties, the petitions are being disposed of at the motion stage as these petitions pertain to elections of Gram Panchayats, which need immediate disposal.

(14) In the written statement filed by the election petitioner before the trial Court, the stand taken was that an objection was raised on behalf of the candidate claiming a recount. An application was moved claiming a recount before the Returning Officer on the ground that the counting was not done in a proper manner and the method and manner of counting of votes undertaken by the polling staff was illegal. The prayer for recount was not considered by the polling staff and infact had been rejected. It was asserted that a *prima facie* case was made out for recount of votes.

On the questions of law, it has been averred that the recount had rightly been ordered by the trial Court; that in the absence of any allegation. regarding a corrupt practice, the same having been given up, it was mandatory for the trial Court to order recount under sub-clause (b) of Section 176(4) of the Haryana Act, 1994, that

sub-clauses (a) and (b) of Section 176(4) of the Haryana Act, 1994, have to be read in conjunction with each other, to put a proper interpretation on Sub -Section (4) of Section 176 of the Haryana Act, 1994, and that apart from this, the election petitioner had led evidence making out a *prima facie* case for ordering recount.

(15) Counsel for the parties have been heard at length.

(16) The basic questions to be decided are as to whether an order of recount has to be necessarily passed where the validity of the election has been challenged on the grounds other than corrupt practices, even though there are no pleadings or cogent evidence warranting the order of recount and as to whether the interpretation adopted by the learned Sub Judge is legally and constitutionally valid.

(17) It is true that Section 176 of the Haryana Act, 1994, is not happily worded. At the outset, it may be stated that the Rules 62 to 72 of the Haryana Rules, 1994, dealing with the recount of votes. are para materia to Rules 53 to 63 of the Rules framed under the Representation of People Act, 1951, known as the Conduct of Election Rules, 1961, which also deal with recount of votes.

(18) Section 183 of the Haryana Act, 1994, emphasis the maintenance of secrecy of votes i.e. the same emphasis which has been mandated by the Legislature while enacting the Representation of People, Act, 1951. Reference to the Representation of People Act, 1951, and the Rules framed thereunder is being made as the provisions under this Act and the Rules framed thereunder, regarding recount have come up for interpretation in a number of cases. It has been ruled by the Supreme Court of India in a number of cases that recount is not to be granted as a matter of course or right. Recount can only be granted where proper foundation of material facts has been laid in the pleadings of the parties duly supported by trust worthy evidence, which would satisfy the Court that in order to decide the dispute and to do complete justice between the parties the inspection of ballot is necessary. It has further been held that the discretion in this behalf should not be exercised as to enable the applicant to indulge in a proving inquiry.

(19) A Constitution Bench of Supreme Court in *Ram Sewak Yadav* v. *Hussain Kamil Kidwai and others* (1), held that having regarding to the insistence upon secrecy of the ballot papers, the

(1) A.I.R. 1964 S.C. 1249.

Court should not order inspection of ballot papers and order recount as a matter of course. It was held in *Ram Sewak Yadav's* case (supra), as under :—

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

In *N. Narayanan* v. *S. Semmalai and others* (2), Supreme Court of India spelt out the grounds which would justify an order of recount and it was held as under :—

> "The relief of recounting cannot be accepted merely on the possibility of there being an error. It is well settled that such allegations must not only be clearly made but also proved by cogent evidence. The fact that the margin of votes by which the successful candidate was declared elected was very narrow, though undoubtedly an important factor to be considered, would not by itself vitiate the counting of votes or justify recounting by the Court.

(2) A.I.R. 1980 S.C. 206.

The Court would be justified in ordering a recount of the ballot papers only where :

(1) the election petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded ;

(2) On the basis of evidence adduced such allegations are *prime facie* established, affording a good ground for believing that there has been a mistake in counting ; and

(3) The Court trying the petition is *prima facie* satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties."

(20) In *S. Raghbir Singh Gill* v. *Gurcharan Singh Tohra and others* (3), Supreme Court of India again re-iterated the principles laid down for recount in *Ram Sewak Yadav's* case (supra) holding that recount cannot be ordered just for the asking without laying down foundation of material facts duly supported with evidence thereby convincing the Court of a *prima facie* case for a recount.

(21) In a recent judgment, *Shri Satyanarain Dudhani* v. *Uday Kumar Singh and others* (4), Supreme Court of India again reiterated that the secrecy of the ballot papers cannot be permitted to be tinkered lightly and a recount can only be ordered on a *prima facie* case made out on the basis of material facts pleaded and duly supported by contemporaneous evidence justifying a recount. It was held by their Lordships as under :—

"Thus in the instant case only three line objection application was filed before the Returning Officer. No objection whatsoever was raised during the counting and no irregularity or illegality was brought to the notice of the Returning Officer. Even the material in the election petition has been pleaded with the object of having a fishing enquiry and it did not inspire confidence. A cryptic application claiming recount made by the contestant before the Returning Officer. No details of any kind

(3) A.I.R. 1980 S.C. 1362.
(4) A.I.R. 1993 S.C. 367.

was moved by the petitioner. Not even a single instance showing any irregularity or illegality in the counting was brought to the notice of the Returning Officer. Held, when there was no contemporaneous evidence to show any irregularity or illegality in the counting, ordinarily, it would not be proper to order recount on the basis of bare allegations in the election petition."

(22) A Division Bench of this Court in *Surjit Kaur* v. *Surjit Kaur and others* (5), followed at the view taken by their Lordships of the Supreme Court in *Shri Satyanarain Dudhani's case* (supra) (which was a Punjab case) and held that recount cannot be ordered prior to the filing of the written statement, affording of opportunity to the opposite side and there being evidence to support making out a case for recount.

(23) Trial Court brushed aside all these authorities on the ground that the same were under the Representation of People Act, 1951, and were, therefore, not applicable to the elections of the Gram Panchayat held under the Haryana Act, 1994, provisions of the Haryana Act, 1994, being different from the Representation of People Act, 1951. As stated in the foregoing paragraphs, the rules regarding recounting in the Conduct of Election Rules, 1961, and the Haryana Rules, 1994, are para materia the same. The secrecy of votes has to be maintained under the Haryana Act, 1994, as well as under the Representation of People Act, 1951.

(24) Supreme Court of India in *P. K. K. Shamsudeen* v. *K. A. M. Mappillai Mohindeen and others* (6), in a case of Gram Panchayat in the State of Tamil Nadu, applied the same principle regarding recount as had been applied in the cases under the Representation of People Act, 1951. In *P. K. K. Shamsudeen's case* (supra), the Tribunal had ordered the recount in the absence of averments in the pleadings and *prima facie* evidence to satisfy the Court to order a recount. The Supreme Court of India setting aside the order of the Tribunal, held as under :—

"The settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from hind sight and by the

(5) I.L.R. 1995 Punjab and Haryana, 165.
(6) A.I.R. 1989 S.C. 640.

result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election petitioner on the threshold before an order for recount of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is *prima facie* genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a *prima facie* case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or Court should not order the recount of votes."

It was further held as under

In the instant case, the petitioner has neither made such averments in the petition nor adduced evidence of such a compulsive nature as could have made the Tribunal reach a *prima facie* satisfaction that there was adequate justification for the secrecy of ballot being breached in the petitioner's case. Factors such as that the elected candidate had accepted the correctness of the recount, and that he had conceded his defeat and wanted a re-election to be held cannot constitute justifying materials in law for the initial order of recount of votes made by the Tribunal."

(25) The above referred case would be the nearest to the case in hand and shall apply on all forces to the facts of the case in question.

We have not referred to various judgments given by the High Courts, in view of the authorative pronouncements of the Supreme Court of India on the subject of recount of votes. In these judgments, it has been held that secrecy of ballot papers is paramount and recount of votes cannot be ordered as a matter of course and on the mere asking. Recount of votes only be ordered on the basis of material facts stated in the petition duly supported by evidence,

making out a *prima facie* case for recount, to the satisfaction of the Tribunal or Court and then, and only then, a recount can be ordered. Reasons given for the same is that the result of an election should not be tinkered with and the election petitioner should not be permitted to have a roving inquiry as the counting of the votes is done in the presence of the candidates or their election agents where they are given full opportunity to object to improper acceptance or improper rejection of votes. Thereafter, they are given full opportunity by the Returning Officer to claim a recount.

(26) In the present case, although the election petitioner has stated that a recount was claimed before the Returning Officer but the same has been denied by the writ petitioner and a copy of the application filed by the candidate or his election agent claiming a recount has not come on the record. No order passed by the Returning Officer rejecting the application has been brought on record. In the absence of this fact, it cannot be held that any of the candidates or their election agents had claimed a recount before the Returning Officer.

(27) As stated in the earlier part of the judgment, the rules regarding recount of votes under the Haryana Act, 1994, and the Conduct of Election Rules, 1901, framed under the Representation of People Act, 1951, for recount of votes are para materia to the same. The emphasis under the Haryana Act, 1994 and the Representation of People Act, 1951, regarding maintenance of secrecy of votes is also the same. The distinction drawn by the trial Court *vis-a-vis* the judgments rendered by the Supreme Court of India under the Representation of People Act, 1951, is, under the circumstances, misconceived. Election petitioner, in his application, relevant portion of which has been reproduced in the earlier part of the judgment, has stated that the voluminous evidence led by the parties was of no legal value and consequence, and prayed that the election petition be decided only on the basis of recount of the votes polloed at the time of election, irrespective of the illegalities and improprities committed in the election. In the election petition, no specific ground was set out for a recount. There was no evidence worth the name which would justify the issuance of an order of recount. The learned trial Court has in its order stated that certain evidence was led by the parties regarding recount of votes but without discussing its *pros* and *cons* or its effect, order the recount solely on the ground that the ground regarding corrupt practices having been given up, it was mandatory for the Court to order a recount under sub-clause (b) of Section 176(2) of the Haryana Act,

1994. The interpretation adopted by the learned trial Court leads to the conclusion that recount has to be ordered in every case where a petition is filed on the grounds other than corrupt practices.

(28) The expression 'validity of an election is in dispute' occuring in sub-clause (b) of Sub-Section (4) of Section 176, of the Haryana Act, 1994, has to be interpreted in the context of the Haryana Act, 1994 and the Haryana Rules, 1994. It would require the party cosing to the Court to show by cogent evidence that a *bona fide* dispute and strong grounds existed for questioning the legality of counting. The interpretation put by the trial Court that recount has to be ordered in every case where a petition is filed on the grounds other than corrupt practices as a matter of course, runs counter to the various pronouncements of the Supreme Court of India, and is therefore, liable to be set aside and over ruled.

(29) A reading of sub-clause (b) of Section 176(4) does not spell out that where-ever an election is challenged on the grounds other than corrupt practices, recount of votes has to be ordered as a matter of course and even in the absence of averments made to that effect in the election petition or any evidence in support thereof. It only states that in a cases where the validity of an election is in dispute and clause (a) of Section 176(4) of the Haryana Act, 1994, which relates to commission of corrupt practices, does not apply, the Court after scrutiny and computation of votes recorded in favour of each candidate, declare the candidate having the largest number of valid votes in his favour, to have been duly elected. It no where states that recount has to be ordered as a matter of course where the election is challenged on the grounds other than corrupt practices. It only spells out that on the basis of valid votes recorded by the Returning Officer, the person getting the largest number of votes be declared elected, but, whereever a recount has to be ordered, it is incumbent upon the election petitioner to lay a firm foundation of fact duly supported by evidence leading to making out a *prima facie* case for recount. If, the interpretation put by the trial Court is accepted, then a recount has to be ordered in every case where the election is not challenged on the ground of commission of a corrupt practice. Such an interpretation cannot be accepted as it leads to a ridiculous conclusion.

(30) The next question which requires consideration is—Can a recount be ordered on a concession made by the contesting candidates, in the absence of adequate pleadings and the evidence to support such pleadings.

(31) In some of the cases, trial Court had ordered the recount on a concession given by the contesting candidate on the specific understanding that the election petitioner given up all the grounds for challenging the election except the recount.

(32) Counsel appearing for the petitioner argued that no recount can be allowed on the basis of the statement of the parties. It was contended that where the election petition does not disclose any cause of action of where there was no evidence to support the allegations made in the election petition for a recount, no recount can be ordered because any statement made by the returned candidate, agreeing for a recount, will be against law and, therefore, cannot be acted upon. As against this, the stand taken by the counsel appearing for the respondents is that the compromise regarding recount is a valid agreement and binding between the parties.

(33) Whether a recount can be ordered on the basis of an agreement between the parties, came up for consideration before the Supreme Court of India in *Sukhand Rai Singh* v. *Ram Harsh Misra and others* (7). Supreme Court of India ordered recount on the basis of agreement between the parties. While considering such an agreement, it was held by their Lordship that/(Emphasis supplied) *"This agreement, we may add, does not violate any of the provisions of the Representation of People Act, 1951, including Section 97 thereof."*

(34) Thereafter, this matter was considered by a learned Single Judge of this Court in *Shri Mahender Singh* v. *Shri Hukam Singh and others* (8), and it was held that an agreement between the parties for having a test check to trace out any irregularity is not against law and recount could be ordered on the basis of such an agreement. It was held as under :—

> "The agreement entered into between the parties at election petition for having a test check to trace out any irregularity is not against law. There cannot be any better evidence than admission of the parties, which is implicit in the agreement itself to make out a *prima facie* case

(7) A.I.R. 1977 S.C. 681.
(8) A.I.R. 1993 Punjab and Haryana 172.

for recounting if irregularities and illegalities were committed during counting of votes. The inspection of the ballot papers as a test check re-enforces the implicit admission. . The respondent-returned candidate after accepting of his free will the recount after the best check, under the advice of a senior counsel available to him, cannot be stated to be in ignorance of law. It would be highly unjust rather perpetuating injustice if the returned candidate is allowed to take shelter under the grab of secrecy of ballots and use this principle as a shield for perpetuating the errors in the counting. Apart from this the cimpliciter recount does not violate the secrecy of ballots. The returned candidate has chosen a particular mode for the disposal of the election petition as well as the recrimination petition and this matter dragged on for almost a year on one ground or the other. At this belated stage. the returned candidate cannot be permitted to take a somersault and having once given up his preliminary objections-impliedly and expressly and by his own act and conduct, he cannot retract when he found that the resultant effect of the test check in terms of a compromise/ agreement going against him. If he is allowed to do so. it would result in the draconian rule of law and permitting him to play the game of hide and seek with the court which is solemn place for doing justice to the parties. No game of hide and seek can be permitted in courts. The returned candidate cannot be permitted to go back from his statement or agreement unless he is able to prove that he would suffer irreparable injustice because of any wrong statement given and acted upon not by the petitioner alone but by the Court too."

(35) For the reasons stated above. Civil Writ Petitions No. 5690, 6541, 9671, 10058 and 12267. all of 1995 are accepted. Impugned order of the trial Court ordering a recount is set aside. It is held that recount cannot be ordered as a matter of course in the absence of pleadings and cogent evidence making out a *prima facie* case for a recount. The case is remitted back to the trial Court to proceed in accordance with law.

(36) Civil Writ Petition Nos. 7270, 7665 and 10610 all of 1995. are dismissed because the contesting candidates i.e. the writ petitioners had agreed for a recount and they are bound by the same.

PUNJAB CASES :

(37) In the Punjab Act, 1994, there is no provision regarding filing of an election petition or ordering a recount. The Punjab Legislature has enacted the Punjab State Election Commission Act, 1994, which contains the provisions for appointment of a State Election Commission, the detailed procedure for conducting the election, counting of votes and filing of election petitions. Section 66 of the Punjab State Election Commission Act, 1994, deals with counting a votes, declaration of result and publication of result. It is para materia to the Representation of People Act, 1951, and the Rules framed thereunder. Section 73 of the Punjab State Election Commission Act, 1994, deals with filing of election petitions. The procedure regarding filing of the pleadings, trial of election petitions, procedure before the election Tribunal and the grounds for declaring the election to be void are the same as under the Representation of People Act, 1951. Judgments rendered by the Supreme Court of India regarding recount of votes, reference to which has been made in the foregoing paragraphs, would, thus, be applicable with full force under the Punjab Act, 1994.

(38) Recount of the votes has been ordered by the Tribunal constituted under the Punjab State Election Commission Act, 1994, only on the ground that if the recounting is done, no prejudice to the opposite party would be caused and, rather, a clear picture would emerge before the Tribunal. Recount has been ordered by the Tribunal without taking any evidence. The order passed by the Tribunal runs counter to the various judgments referred to in the earlier part of the judgment in which it has been held that recount cannot be ordered as a matter of course and the same can only be ordered on material facts stated in the petition duly supported by contemporaneous evidence leading to making out a *prima facie* case for recound. The order passed by the Tribunal also runs counter to the judgment of this Court, and the same is liable to be set aside and over ruled.

(39) Accordingly, Civil Writ Petitions No. 5862, 6234 and 6532, all of 1995 are allowed. The case is remitted back to the authority under the Punjab State Election Commission Act, 1994, to redecide the matter in accordance with law and in the light of the observations made in this judgment.

S.C.K.

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