

CHALLENGE TO AN ELECTION: THE GROUNDS AND THEIR APPLICABILITY

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Abstract

Fairness in elections is the foundation of a democracy. The requirements prescribed by the Constitution of India and the laws enacted there under must be fulfilled to achieve the fairness in elections. If the election process is vitiated, the election cannot be said to be fair. Such election is open to challenge in the court by way of an election petition. The election law lays down various grounds on which the election petition can be filed in the court. Not only that the election of the returned candidate can be called in question but the declaration for the election of other candidate can also be sought in certain circumstances. All these aspects covered under the laws dealing with the election and the expositions by the Supreme Court thereon form the subject matter of discussion in the present paper.

1. Introduction

Purity of elections can be maintained if the elections are conducted fairly. In case the election of a returned candidate suffers from constitutional or legal infirmity, it can be challenged in the High Court through an election petition. The challenge to an election can be made only on the grounds provided in the Representation of the People Act, 1951 and not otherwise. These grounds are enumerated in Sections 100 and 101 of the Act. Section 81(1) of the Act clearly lays down that an election petition calling in question any election may be presented on one or more of the grounds specified in Section 100 (1) and Section 101 of the Act. This paper clarifies the difference in the applicability of sections 100 and 101 of the Representation of the People Act, 1951. Further, the Supreme Court of India has also drawn out the difference in the applicability of clause (iv) of Section 100 (1) (d) and other clauses of Section 100 (1) (d). The present paper delves into all these dimensions.

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3. Grounds for Filing an Election Petition

Section 100(1) specifies the following grounds:

1. *Want of Qualification or Disqualification*

If the returned candidate is lacking in qualification or suffers from any disqualification, it becomes a ground for declaring his election void.¹ Under this provision, the qualification or disqualification of a candidate is ascertained with respect to 'the date of election'. The date of election of a candidate for the purpose is the date on which a candidate is declared by the returning officer under Section 53 or Section 66 to be elected to the House of the People or Legislative Assembly of a State.²

2. *Corrupt practices*³

On the ground of the corrupt practices, the election of the returned candidate is declared void in the following two cases-

(i) *Commission of Corrupt Practice by the Returned Candidate and his Election Agent* - Where the corrupt practice has been committed by a returned candidate or his election agent or any other person with the consent of a returned candidate or his election agent;⁴ or

(ii) *Commission of Corrupt Practice in the interest of the Returned Candidate by an Agent other than his Election Agent* - That the result of the election, in so far as it concerns a returned candidate has been materially affected by any corrupt practice committed in the interest of the returned candidate by an agent other than his election agent.⁵

¹Section 100 (1) (a) of the Representation of the People Act, 1951.

²Section 67 A of the Representation of the People Act, 1951.

³These are the practices as defined under section 123 of the Representation of the People Act, 1951. These include bribery; undue influence; appeal on the ground of religion, race, caste, community or language or the use of, or appeal to religious symbols or national symbols, such as the national flag or the national emblem; promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language; propagation of the practice of the commission of sati or its glorification; publication of false statements about other candidates; providing free conveyance to voters to or from polling station; procuring of assistance from Government servants; election expenditure in excess of the prescribed limit and booth capturing.

⁴Section 100 (1) (b), the Representation of the People Act, 1951.

⁵Section 100 (1) (d), (ii), *Ibid*.

However, in certain situations where the returned candidate has been guilty of a corrupt practice by an agent other than his election agent, power has been given to the High Court to declare his election not void if the High Court is satisfied that-

- (iii) No such corrupt practice was committed at the election by the returned 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;
- (iv) The candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and
- (v) In all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents.⁶

3. *Improper Rejection of any Nomination Paper*

The High Court shall declare the election of a returned candidate to be void, if it is of the opinion that any nomination paper has been improperly rejected.⁷

The word 'any' in this provision implies that even if the petitioner be a defeated candidate, he can challenge the election of the returned candidate on the ground of improper rejection of the nomination paper of any other candidate. But where the petitioner challenges on the ground of improper rejection of only his own nomination paper, the Court shall not go into the question of nomination paper of any other candidate as the Court shall not go beyond the pleadings. If the petitioner wishes to take rejection of his own as well as other candidate's nomination paper as grounds it should specifically be pointed out by him in the petition. Only then the Court will go into the question of improper rejection of other candidate's nomination paper in such petitions, otherwise not.

4. *Improper Acceptance of any Nomination Paper*

Improper acceptance of any nomination paper is also a ground for election petition.⁸ The election of a returned candidate can be declared to be void on the ground of improper

⁶Section 100 (2), *Ibid.*

⁷Section 100 (1) (c), *Ibid.*

acceptance of a nomination paper. There is a difference in the grounds of improper rejection of a nomination paper and the improper acceptance of a nomination paper.

In the former case, improper rejection of a nomination paper is by itself a ground to set aside an election without anything more, i.e., without further proof of the result of the election of the returned candidate having been materially affected by such improper rejection. Whereas in the latter case, it is necessary to prove further that the result of the election, in so far as it concerns a returned candidate has been materially affected by such improper acceptance of a nomination paper.

5. *Improper reception, refusal or rejection of any vote or the reception of any void vote*

Improper reception, refusal or rejection of any vote or the reception of any vote which is void is also a ground for declaring the election to be void.⁹ This ground is available with the condition that the result of the election, in so far as it concerns the returned candidate, has been materially affected.¹⁰

For the sake of convenience, the provision may be divided in two parts-

(A) *Improper reception, refusal or rejection of any vote-*

When a vote worthy of rejection is treated as valid by the returning officer, a case of 'improper reception of vote' is made out. When the returning officer wrongfully refuses the casting of a vote in contravention of the rules, it's a case of 'improper refusal of vote'. If a valid vote is wrongfully rejected, it's a case of improper rejection of a vote.

In *H.V. Kamath v. Syed Ahmed Ishaque*,¹¹ the returned candidate won the election by a margin of 174 votes over the defeated candidate. The Court came to the conclusion that the returning officer in declaring the returned candidate duly elected had accepted 301 votes which were to be rejected under Rule 47 (at present Rule 57). This acceptance of 301 votes

⁸Section 100 (1) (d) (i), the Representation of the People Act, 1951.

⁹Section 100 (1) (d), (iii) the Representation of the People Act, 1951.

¹⁰*Ibid.*

¹¹AIR 1955 SC 233.

by the returning officer in favour of the returned candidate was held to be 'improper reception' and was declared to be void as it had materially affected the result of the election.

If after the calculation, the returned candidate continues to maintain the lead, the election cannot be declared to be void as the result of the election has not been materially affected.

(B) *Reception of any void vote-*

A vote cast in violation of Section 62 of the Representation of the People Act, 1951 and votes susceptible to rejection under Rules are void votes. These include-

- (i) Vote cast by a person whose name is not entered in electoral rolls of a Constituency in an election in that Constituency.¹²
- (ii) Vote by a person disqualified under Section 16 of the Representation of the People Act, 1950,¹³ viz.,
 - (a) Vote cast by a person who 'is not a citizen of India',¹⁴
 - (b) Vote cast by a person who is of unsound mind and is so declared by a competent Court.¹⁵
 - (c) Vote cast by a person disqualified due to commission of a corrupt practice or any other offence in connection with elections.¹⁶
- (iii) Votes by a person in more than one constituency of the same class at a general election render such votes in all such constituencies as void.¹⁷ This will not be so when he is authorized under the R. P. Act, 1951 to act as a proxy for a voter and acts as such.¹⁸

¹²Section 62 (1), the Representation of the People Act, 1951.

¹³Section 62 (2), *Ibid.*

¹⁴Section 16 (1) (a), the Representation of the People Act, 1951.

¹⁵Section 16 (1) (b), *Ibid.*

¹⁶Section 16 (1) (c), *Ibid.*

¹⁷Section 62 (3), the Representation of the People Act, 1951.

¹⁸Section 62 (6), *Ibid.*

- (iv) Votes cast by a person in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for the constituency more than once. All such votes cast by him in that constituency become void.¹⁹ However, this will not be so when he is authorized under the Representation of the People Act, 1951 to act as a proxy for a voter and acts as such.
- (v) Vote cast by a person who is confined in a prison (whether under a sentence of imprisonment or transportation or otherwise) or is in lawful custody of the police; but not those under preventive detention under any law for the time being in force.²⁰
- (vi) A vote entailing rejection under the Rules, i.e., the Conduct of Election Rules, 1961.

6. *Non-compliance with the provisions of the Constitution or the Representation of the People Act, 1951 or of any Rules or Orders made under the said Act*²¹

Cases relating to qualification/disqualification of a candidate, improper acceptance/ rejection of nomination paper, impropriety in allotment of symbols, improper refusal, reception or rejection of any vote, improper counting, or other illegalities during election are covered under this head. Thus, the same act may offer a ground to challenge the election under more than one heads of Section 100 of the Representation of the People Act, 1951.

In *Durga Shankar Mehta v Raghuraj Singh*,²² the nomination of a candidate who was under age was accepted in violation of Article 173 of the Constitution. The apex court held that even though a candidate is declared to be elected, but if he is lacking the eligibility criterion to stand for election, there is non-compliance with the provisions of the Constitution materially affecting the result of the election. Thus, the election of such candidate becomes void. The apex court observed that there is no difference between 'non compliance' and 'non-observance' or 'breach'. This provision can be treated as a 'residuary clause' to cover such cases as are not covered by other heads in this Section but wherein the violation of the Constitution or the statutory provisions has taken place.

¹⁹Section 62 (4), *Ibid.*

²⁰Section 62 (5), *Ibid.*, read with the Proviso to it.

²¹Section 100 (1) (d), (iv) of the Representation of the People Act, 1951.

²²AIR 1954 SC 520.

In *Mohinder Singh Gill v. Chief Election Commissioner*,²³ the Apex court observed that where the Chief Election Commissioner exceeds jurisdiction in the garb of exercise of power under Art. 324, it is violation of Art. 324 and hence a 'non-compliance' under this provision. Delivering the majority judgment of the Constitution Bench of five judges, Krishna Iyer, J., clarified that Section 100 of the Representation of the People Act, 1951 has been designedly drafted to embrace all conceivable infirmities which may be urged. To make the project fool-proof, Section 100 (1) (d) (iv) has been added to absolve everything left over. Similar view was taken by the Apex court in *Roop Lal Sethi v. Nachhattar Singh Gill*,²⁴ wherein it observed that any irregularity in the allotment of symbols by the returning officer in violation of the Symbols Order issued by the Election Commission under Article 324 of the Constitution read with rules 5 and 10 of the Conduct of Election Rules, 1961 is 'non-compliance' for the purposes of Section 100 (1) (d) (iv) of the Representation of the People Act, 1951.

Section 101 of the Representation of the People Act, 1951 provides the grounds for which a candidate other than the returned candidate may be declared to have been elected. This provision entitles an election petitioner to make a claim for a declaration that he himself or any other candidate has been duly elected. He can lay this claim in addition to the specific grounds under section 100. As per Section 101, if any person, who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the High Court is of opinion that in fact the petitioner or such other candidate received a majority of the valid votes; or that but for the votes obtained by the returned candidate by corrupt practices, the petitioner or such other candidate would have obtained a majority of the valid votes, the High Court shall, after declaring the election of the returned candidate to be void, declare the petitioner or such other candidate, as the case may be, to have been duly elected.

²³AIR 1978 SC 851.

²⁴AIR 1982 SC 1559.

3. Difference in Applicability of Clause (iv) of S.100 (1) (d) and other Clauses of Section 100 (1) (d)

In *Uma Ballav Rath v. Maheshwar Mohanty*,²⁵ nomination papers were filed by the appellant and a respondent as official candidates of the Janata Dal, which carried authorization in prescribed form from the party President. In the absence of any communication regarding the official candidature of one out of the two candidates before the last date of withdrawal, the returning officer treated both of them as the independent candidates and allotted free symbols to them. Challenge to the order of the returning officer was made before the Election Commission under rule 10 (5)²⁶ of the Conduct of Elections Rules, 1961. The Election Commission received a representation by the President, Janata Dal that the appellant had acted fraudulently as no form as produced by the appellant had ever been supplied to him by the party. On this, the Election Commission of India opined that after 'reconsideration of the matter'; the respondent could undoubtedly be treated as the official candidate of the Janata Dal.

The respondent was, thus allotted the reserved symbol of Janata Dal and the appellant was treated as an independent candidate and allowed the free symbol. The Election Commission decided the matter without issuing any notice to the appellant and without giving him any opportunity of being heard.

The respondent won the election on the tickets of Janata Dal. The appellant challenged his election by way of election petition on the ground, among others, that the result of the election, in so far as it concerned the respondent, had been materially affected by non-compliance with the Constitution, the Act and the rules made thereunder.²⁷ The High Court, after conducting the trial, dismissed the petition. Hence the appeal to the Supreme Court.

²⁵AIR 1999 SC 1822.

²⁶Rule 10 (5) of the Conduct of Elections Rules, 1961 states that the allotment by the returning officer of any symbol to a candidate shall be final except where it is inconsistent with any direction issued by the Election Commission in this behalf in which case the Election Commission may revise the allotment in such manner as it thinks fit.

²⁷Section 100 (1) (d) (iv), the Representation of the People Act, 1951.

The Supreme Court held that the review of the revisional order by the Election Commission was 'illegal' and 'without any jurisdiction'. In reconsidering the matter in pursuance to the representation of Janata Dal President, the Election Commission exceeded its jurisdiction while exercising its powers under Article 324 of the Constitution read with rule 10 (5), as the Commission acted in violation of principles of natural justice when it conducted the review of its revisional order without giving the appellant any notice and an opportunity of being heard.

The Court further held that though indeed, there has been non-compliance with the provisions of the Constitution and of the Representation of the People Act and the rules and orders made thereunder, but the evidence led by the appellant (at the trial of the election petition) falls absolutely short of establishing *that the result of the election, in so far as it concerns the returned candidate, had been materially affected thereby*. The evidence on record does not show that the result of the election had been materially affected by the action of the Election Commission and the returning officer or by the allotment of the party's reserved symbol to the respondent.

Similar view was taken by the Constitution Bench of three judges of the Supreme Court in *L.R Shivaramagowda v. T.M. Chandrasekhar*,²⁸ wherein the Court (M. Srinivasan, J. for the Bench) held that absence of specific averment in the petition that the result of the election has been materially affected due to the said corrupt practice vitiated the petition.

Thus, clause (iv) of Section 100(1) (d) seems to stand on different footing from clause (i), (ii), & (iii) of the same as in rest of the three clauses, dealing with improper acceptance of a nomination or improper reception, refusal or rejection of any vote or the reception of any vote which is void, the calculus of addition and subtraction of votes can be said to have a bearing on the conclusion whether or not the result of the election has been materially affected; which is not so in case of clause (iv).

The language of sub-clause (iii) and (iv) of Section 100 (1) (d) clearly points out that the former is specific as it refers specifically to the improper reception, refusal or rejection of any vote, whereas the latter is of general nature as it refers to the non-compliance with the

²⁸AIR 1999 SC 252.

provisions of the Constitution or of the Representation of the People Act or any rules or orders made there under. To what extent is the essential difference in two clauses is the determinant of the purview of the election court, came for the consideration of the Supreme Court in *T. A. Ahammed Kabeer v. A. A. Azeez*²⁹ In this case, the appellant, in his election petition had challenged the election of the respondent, the returned candidate and also sought a declaration of his own election. The respondent filed the written statement and a recrimination notice as per Section 97 (1) of the Representation of the People Act, 1951. The pleadings from both the sides were found to be complete in all respects. After the conduct of trial with due consideration of all evidence, the election judge ordered recount and in section of votes, i.e. deciding of votes cast through electronic voting machines. The decoding and recount could not establish that the result of the election has been materially affected in so far as the returned candidate was concerned and as such, the election petition was dismissed. Hence the appeal before the Supreme Court. One of the questions before the Supreme Court was whether in the matter of decoding and consequent recount, the Court had the power to go beyond the specific pleadings in the recrimination petition and adjudicate upon the validity/invalidity of votes other than those specifically pleaded in the recrimination petition. The appellant contended that the Court did not have any such power within the ambit of Section 100 (1) (d) (iii).

The Court first stated that to permit or not to permit a recount is a question involving jurisdiction of the Court. Recount is not to be ordered merely for the asking or merely because the Court is inclined to hold a recount. A recount is to be permitted by the Court only upon a clear case in that regard having been made out. Once the jurisdiction to order recount has been rightly exercised by the Court, then it is the truth as revealed by the result of recounting that has to be given effect. Once the Court enters into scrutiny of the votes polled, followed by recount, under Section 100 (1) (d) (iii) read with Section 97, it cannot refuse to give effect to the result of its findings as to the validity/invalidity of the votes for the purpose of finding out true result of recount though the actual finding as to validity or otherwise of the votes by reference to number may be at variance with the pleadings. Once a recount has been

²⁹AIR 2003 SC 2271.

allowed, the Court cannot shut its eyes on the result of recount on the ground that the result of recount as found is at variance with the pleadings.

The underlying principles laid down by the majority opinion are as follows-

1. In a case where a single relief for declaration of election of the returned candidate as void on the ground under Section 100 (1) (d) (iii) is claimed, the enquiry is restricted only into two questions-(a) to find out any votes having been improperly cast in favour of the returned candidate, and (b) to find out any votes having been improperly refused or rejected in regard to any other candidate. The enquiry can't go beyond these questions, for instance, it can't delve into questions:(a) to find out any votes having been improperly cast in favour of any candidate other than the returned candidate, or (b) that any votes were improperly refused or rejected in regard to the returned candidate. So limited relief calls for limited enquiry.
2. In case of composite relief, i.e., where in an election petition, an additional declaration of the election of any candidate other than the returned candidate is also claimed, the returned candidate or any other party can file a recrimination petition under Section 97 (1).

Thus, if the enquiry is to be conducted into questions- (a) to find out that any votes have been improperly cast in favour of any candidate other than the returned candidate or (b) to find out that any votes have been improperly refused or rejected in regard to the returned candidate, the election Court can exercise jurisdiction only if two conditions are fulfilled- (i) a composite relief of additional declaration of election of any candidate other than the returned candidate is claimed and (ii) the recrimination petition under Section 97 (1) is filed.

3. The requirements for a recrimination petition regarding pleadings, signing and verification are the same as in the case of an election petition under Section 83 of the R.P.Act, 1951 and requirements regarding furnishing of security are also same as in case of an election petition under Sections 117 and 118 of the Act.

The bar on enquiry imposed by Section 97 read with Section 100 (1) (d) (iii) becomes operative when the question of validity of votes is to be adjudged or the question of improper reception, refusal or rejection of any vote/reception of any vote which is void is to be adjudicated.

The bar does not operate in a case where merely a question of correct counting of the votes without going into propriety/ impropriety /validity of acceptance/rejection/reception of any vote is involved. Thus, a distinction is to be drawn between a situation requiring a mere mechanical process of recount and that involving adjudication of validity/invalidity of votes. Where on a recount the election Judge finds the result of recount to be different from the one arrived at by the returning officer or when the election judge finds an error of counting, the bar does not apply as the Court in a purely mechanical exercise of recount is not adjudicating upon any issue as to improper reception/refusal/rejection of any vote or reception of any void vote but is merely performing the mechanical process of counting or recounting by placing a vote at the place where it ought to have been placed, treating the votes as valid/invalid consistently with the decision of the returning officer and without testing the correctness of such decision. The Court is simply correcting the error detected at the recount. Such a case would be covered by Section 100 (1) (d) (iv) and not by Section 100 (1) (d) (iii) of the Representation of the People Act, 1951 as the error in counting amounts to non-compliance with the provisions of the Act and rules and orders made thereunder. In view of this distinction, a recrimination notice under Section 97 (1) is required in the former case but not in the latter. This also implies that a case covered by Section 100 (1) (d) (iii) would not be covered by Section 100 (1) (d) (iv) as the special provision excludes the general.

4. Conclusion

The lack of qualification, commission of corrupt practices, improper rejection/ acceptance of nomination paper, improper reception/refusal/ rejection of any vote or the reception of any void vote and non-compliance with the provisions of the Constitution or the Representation of the People Act, 1951 or any Rules or Orders made under the Act are the grounds laid down by Section 100 of the Representation of the People Act, 1951 on which the election of a returned candidate can be questioned in the High Court. While questioning the election of

returned candidate, an additional declaration for election of other candidate, who would have otherwise obtained a majority of valid votes, can also be sought from the High Court under Section 101 of the Act. In *Durga Shankar Mehta and Mohinder Singh Gill*, the Supreme Court has clarified that the clause (d) (iv) of Section 100 providing for the ground of 'non-compliance with the provisions of the Constitution or the Representation of the People Act, 1951 or any Rules or Orders made under the Act' is to be treated as a 'residuary clause' to include cases not covered in other clauses of Section 100. In *Uma Ballav Rath and L. R. Shivaramagowda*, the Apex Court highlighted that even in cases covered under 100 (d) (iv), if the result of the election is not materially affected, the petition gets vitiated. In *T. A. Ahammed Kabeer*, the Supreme Court laid down that in case of claim for single relief, the propriety/ impropriety or validity/ invalidity of the votes is not adjudged whereas it is so adjudged in case of claim for composite relief. The Court also drew distinction between the mechanical exercise of recount which is covered under Section 100 (d) (iv) and the situation involving adjudication of validity/ invalidity of votes covered under other clauses of Section 100.
