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ELECTION LAW

*K C Sunny**

I INTRODUCTION

ELECTION LAWS in India are founded on certain basic values of constitutional democracy, which are considered to be fundamental in the smooth functioning of the democratic process. In order to protect these values from unnecessary executive and legislative interference the framers of the Constitution incorporated it as constitutional provisions, leaving the other aspects of election law to the wisdom of legislature and Election Commission. So when the validity of an amendment to the statutes relating to elections are challenged before the court of law it may become necessary to examine the question whether the amendment is against the basic values of democracy incorporated in the Constitution. The history of election law in India reveals that the Supreme Court is always prepared to examine the various aspects of the fundamentals of democracy reflected through the provisions of the Constitution, while deciding the validity of the amendments to the laws relating to elections.[1] The analysis of the decisions reported in 2006 reveals that this trend is continuing. Another important fact revealed is that though the Supreme Court is very keen in going to the root of the issues involved in election cases, the court prefers to keep judicial restraint while determining the validity of law enacted by Parliament.

II CORRUPT PRACTICES

Over the years cases alleging corrupt practices have been witnessing a decreasing trend. In the year under survey only two cases were reported. One of the reasons for this declining trend may be the fact that in the past years most of the election petitions containing the allegation of corrupt practices have failed. The main reason for this seems to be the strict interpretation that the Supreme Court has been giving to the relevant provisions of the R.P Act, thereby taking away several wrong practices from the purview of corrupt practices. The two cases reported in the year under survey containing the allegations of bribery and undue influence reveal this fact.

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1 See *PUCL* v. *Union of India,* AIR 2003 SC 2363 ; *Indira Nehru Gandhi* v. *Raj Narain,* AIR 1975 SC 2299.

Bribery

Though any gift offer or gratification has been treated as corrupt practice under secction 123 (1) of the R.P. Act, 1951 the effect of the provision has been diluted by the Supreme Court by introducing the principle that whether there was any "bargaining with the electors" in the form of amelioration of grievances or initiating of development work[2] as the criterion to determine bribery. The decision of the Andhra Pradesh High Court in *Mohd. Ali Shabbir* v. *Yousufi Ali*[3] clearly establishes that the criterion of "bargaining with electors" may provide an escape route to many persons who commit the corrupt practice of bribery.

The facts of the case show that the election petition contained the allegation that the returned candidate of the Telugu Desham Party, who was respondent no.1, with a view to woo the Muslim voters in Andhra Pradesh, took several measures to appease Muslims by some schemes including giving grants for construction and reconstruction of mosques etc., through A.P. Wakf Board. The respondent who was the chairman of the wakf board distributed several cheques on a date immediately preceding the election notification. The gravity of the undesirable action on the part of the returned candidate is evident from the following observation of the Andhra Pradesh High Court:[4]

> All the cheques distributed to various religious institutions admittedly bear the date 3.7.99. Admittedly the election notification was issued on 21.8.99. According to the evidence of first respondent he was selected as candidate for Kamareddy Assembly Constituency on behalf of Telegu Desham Party only on 12.8.99. All the cheques admittedly were issued in the name of Mandal Parishad Development Officer. Therefore, the question is whether issuance of cheques in the name of Mandal Parishad Development Officer, for the benefit of the institutions…allegedly distributed one day prior to the election at various mosques, would amount to corrupt practice, when both the petitioner and the first respondent are Muslims.

However, the court referred to the decision of the Supreme Court in *Harjit Singh* v. *Umarao Singh*,[5] and held that in order to constitute the corrupt practice of bribery of this nature there must be an element of bargaining. It was observed :[6]

> Since it is not the case of the petitioner, and since there is no evidence that first respondent bargained either with the persons in

2 See K.C. Sunny, *Corrupt Practices in Election Law* 20-23 (1996).
3 AIR 2007 AP 160.
4 *Id.* at 169.
5 AIR 1980 SC 701.
6 AIR 2007 AP 160 at 169.

> management of the institutions in whose name the cheques were issued or the persons of any village that in consideration of their casting of their vote in his favour he would give the cheques to the institution concerned … it cannot be said that first respondent indulged in a corrupt practice by distributing cheques dated 3.7.99 in view of the ratio in *Dhartipakar Mandan Lal Agarwal* v. *Shri Rajiv Gandhi*, AIR 1987 SC 1577, in which case one of the allegations against Rajiv Gandhi, the returned candidate, was that prior to the declaration of the election and during the election period, his workers with his consent, spearheaded the construction work of Amethi Railway Station with a view to persuade the voters to cast their vote in his favour and that act amounted to a gift to the voters.

It is relevant to note that the distribution of cheque signed by the returned candidate was proved in this case. There was no evidence suggesting that the action of the returned candidate was *bona fide*. In spite of these facts the case failed owing to the reason that " bargaining with electors" was imposed as a condition to attract the provision of R.P. Act dealing with the corrupt practice of bribery. The decision in this case clearly establishes the need to amend section 123(1) of the R.P. Act so as to plug the escape route provided by the Supreme Court through its decisions in *Harjit Singh*[7] and *Dhartipakar Mandan Lal Agarwal* v. *Shri Rajiv Gandhi*[8]

Undue influence

In *Sushil Singh* v. *Prabhu Narain Yadav*[9] the election petition contained the allegation that the returned candidate in collusion with election officials prevented voters from casting their vote. However, there was no specific statement on the part of the witnesses that they were physically obstructed and not allowed to cast their votes. All the witnesses in a single voice stated that the returned candidate and his supporters threatened them and made them to run. The counsel for the petitioner argued that the action of the returned candidate amounted to undue influence. However, the court rejected this contention pointing out that "there is no evidence whatsoever to establish physical obstructions, displaying of weapons or fire arms or creation of such an atmosphere, which may have reasonably caused apprehensions of physical abuse or threat to electors."[10]

It may be noted that all the witnesses stated that the returned candidate and his supporters threatened them and made them to run. However, the court refused to treat it as undue influence pointing out that there was no displaying of weapons or fire arms or creation of such an atmosphere, which may have reasonably caused apprehensions of physical abuse or threat to electors.

7 *Supra* note 5.
8 AIR 1987 SC 1577.
9 AIR 2007 All 187.
10 *Id.* at 198.

Imposing of such strict conditions for applying the provision of law dealing with corrupt practice may defeat the basic purpose of law.

III ELECTION PETITIONS

Legal effects of findings in election petition

The legal effects of the findings in the election petition was the issue before the Supreme Court in *Satrucharla Vijaya Rama Raju* v. *Nimmaka Jaya Raju*[11] , in the context of determination of the eligibility of a person to contest election from a constituency reserved for scheduled tribes. The appellant was the returned candidate in the election to the Andhra Pradesh Legislative Assembly, held in 1999, from a constituency reserved for scheduled tribes. The contention raised by the first respondent was that since the appellant was a "Kshatriya" he was not qualified to contest from a constituency reserved for scheduled tribes. According to respondent no. 1 the claim of the appellant that he belonged to "Konda Dora" tribe which was a notified scheduled tribe was not true. However, the appellant contended that he was neither a "Kondaraju" nor a "Kshatriya" . He pointed out that, "Kondaraju" and "Konda Dora" were synonymous and the "Konda Dora" tribe was included in the list of scheduled tribes. He further contended that his earlier election from no. 8 Naguru (ST) assembly constituency, the self same constituency, was challenged by a voter in election petition no. 13 of 1983 on the very same ground that he did not belong to the "Konda Dora" tribe. That election petition, after contest, was dismissed by the judge to whom it was assigned after a regular trial and the said decision barred a fresh enquiry into the same question in the present election petition and the decision therein was conclusive on his status.

So the crucial question was whether the finding in the earlier election petition to the effect that the appellant was a person eligible for contesting election from a constituency reserved for scheduled tribes had any binding effect on the future election petitions. For determining this issue the court considered the questions whether the principle of *res judicata* was applicable in the case, and whether the decision in the earlier election petition could be treated as a judgment *in rem* and answered in the negative. P.K. Balasubramanyan J observed:[12]

> The election petition under Section 80 of the Representation of the People Act, 1951cannot be held to lead an adjudication which declares, defines or otherwise determines the status of a person or a jural relation of that person to the world generally. It is merely an adjudication of a statutory challenge on the question whether the election of the successful candidate is liable to be void on any of the grounds available under Section 100 of the Representation of the People Act, 1951. It is not an action establishing the status of a

11 AIR 2006 SC 543.
12 *Id*.at 548 (for himself and for R.C. Lahoti CJ and C.K.Thakker J).

person.

The court considered argument of the appellant that the earlier decision could be treated as a judicial precedent and observed:[13]

> The argument that the earlier decision must be treated as a judicial precedent cannot also be accepted. The decision in the earlier election petition depended upon the pleadings and the evidence adduced in that case and their appreciation. The essential finding was that the election petitioner therein had not established the plea set up by him. It was not a case where a particular document was interpreted in a particular manner by the highest court of the land and the interpretation of the same document was again involved in a subsequent litigation between those who were not parties to the earlier litigation.

It seems that the reasoning of the court is absolutely correct. The court had gone into the root of the issue and formulated the correct principle to determine the legal effect of the findings in an election petition.

In the present case the Supreme Court went into the merit of the case and upheld the decision of the high court setting aside the election of the appellant on the ground that he was not qualified to contest election from a constituency reserved for scheduled tribes.

Voter's privilege to maintain secrecy of voting

It was to ensure that the secrecy of voting was not infringed during the course of the trial of election petitions that section 94 was included in the R.P. Act, 1951. According to this provision "no witness or other person shall be required to state for whom he has voted at an election". In *Nayini Narasimha Reddy* v. *K Laxman*,[14] the Supreme Court had an occasion to consider the scope of section 94.

The facts of the case show that the appellant was the returned candidate in the election to Andhra Pradesh Legislative Assembly with a thin margin of 240 votes. The respondent filed an election petition praying for issuance of summons to some witnesses apart from those whose names had been mentioned in the election petition. The petitioner submitted that at the time of preparing the election petition certain voters had agreed to give evidence, but they informed him that they apprehended threat and intimidation. In view of this fact the petitioner sought leave of the court not to disclose their names in the list of witnesses during the trial. The appellant raised the contention that the witnesses could not be summoned on the ground that under section 94 they shall not be required to state for whom they had voted at an election.

13 *Id*.at 548.
14 AIR 2006 SC 2050.

Since the high court rejected this contention the returned candidate approached the Supreme Court

A contention was raised at the hearing of the said application for issuance of summons as to whether having regard to the provision of section 94 of the Act, providing for "no witness or other person shall be required to state for whom he has voted in an election" summons could be issued by the appellant before the high court. S.B. Sinha J examined the ambit of section 94 and observed: [15]

> Section 94 does not provide for a total embargo on a party to an election petition to cite a voter as a witness. What is prohibited is that he cannot be required to state for whom he had voted at an election.
>
> Secrecy of ballots indisputably goes to the root of democracy but the same in our opinion may not itself be a ground to refuse issue of summons to the witnesses. Section 94 of the Act merely confers a privilege upon a voter. He may even waive his right. It is not in dispute that any person can be produced as a witness by the parties to an election petition. Witnesses so produced on behalf of the parties without any summons being issued would be at liberty to disclose in the court as to in whose favour he had exercised his right of franchise. It is, therefore, evident that the question as to whether a witness will exercise his right/privilege conferred in terms of Section 94 of the Act is a matter of volition.
>
> It is one thing to say that the civil court while issuing a summon must exercise its jurisdiction in terms of sub-rule 20 of Rule 1 of Order XVI of the Code of Civil Procedure but it is another thing that the court would refuse to summon the witness only because a question as regards exercise of the privilege of the witness may arise. The court may not refuse to exercise its jurisdiction only on the ground that by reason thereof the privilege of a voter may be violated.

In the concurring judgment P.K.Balasubramanyan J pointed out that the issue would have to be approached from two angles. According to him the initial question was whether the witness would have to incriminate himself while giving evidence. Tracing answer to this question the judge observed:[16]

> The privilege against self incrimination is to be claimed by the witness. The right becomes available only after the witness has taken the stand and a question that offends the privilege is put to him. A prospective witness or some other person (as in the present case) cannot raise such an issue in anticipation of an apprehended breach of privilege against self incrimination.

15 *Id*. at 2052-53.
16 *Id*. at 2055.

According to the judge "it is clear that Section 94 of the Act only confers a privilege on the witness and that he would be at liberty to waive it and give evidence on his electoral preference[17] ."

The judge identified that the second question was whether, the evidence of the witness would breach the secrecy of the election process. On this point Balasubramanyan J agreed with Sinha J and observed:[18]

> The purity of the election process is more important than the privilege conferred by Section 94 of the Act. This Court has recognized that the secrecy of voting could be breached to subserve a larger public good, namely, to prevent a fraud on the election process. My learned brother has dealt with this aspect and I am in agreement with him.

It appears that the court had approached the issue in the correct perspective. Had the contention of the appellant been accepted it would become impossible to prove almost all corrupt practices in election owing to the reason that most of the witnesses in election cases are persons who had exercised their right to vote.

Material facts

It is the law that an election petition shall contain a concise statement of the material facts on which the petitioner relies and shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full as possible, the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice.[19] In *Harkirat Singh* v. *Amarinder Singh*[20] the Supreme Court considered the distinction between "material facts" and "particulars" and observed:[21]

> "Material facts"are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set by him either to prove his cause of action or defence. "Particulars" on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear, and more informative. "Particulars" thus ensure conduct of fair trial and would not take the opposite party by surprise.

The facts of the case show that the election petition contained the allegation that the returned candidate had resorted to several corrupt practices.

17 *Ibid.*
18 *Ibid.*
19 See, s. 83 of the R P Act, 1953.
20 AIR 2006 SC 713.
21 *Id*. at 723. C.K.Thakker J (for himself and for Y.K. Sabharwal CJ and P.K. Balasubramanyan J).

One of the allegations was that one Mr.Chahal who was a gazetted officer of class I rank in the Government of Punjab assisted the returned candidate by doing several acts. It was further alleged that a police officer, Mr.Mehra who was holding the post of superintendent of police helped the respondent by organizing a meeting and by distributing posters. Another allegation was that correct and proper accounts of election expenses have not been maintained by the returned candidate. Though details like place and time of the commission of all corrupt practices were given in the petition, the Punjab and Haryana High Court dismissed the petition on the ground of lack of material facts and full particulars about the commission of corrupt practice, pointing out that certain other details should have been furnished by the election petitioner. However, on appeal Supreme Court took a different view . It was observed: [22]

> The High Court, in our opinion was wholly unjustified in entering into the correctness or otherwise of facts stated and allegations made in the election petition and in rejecting the petition holding that it did not state material facts and thus did not disclose a cause of action. The High Court, in our considered view, stepped into prohibited area of appreciating the evidence and by entering into merits of the case which would be permissible only at the stage of trial of the election petition and not at the stage of consideration whether the election petition was maintainable.

The observation is very relevant considering the fact that in every year substantial number of election petitions have been dismissed *in limine,* for want of material facts and full particulars of corrupt practices alleged. Quite often while determining the question whether there are sufficient material facts and particulars the high courts may adopt the standards for the appreciation of evidence for proving the case. It seems that the observation of the Supreme Court provides sufficient guidelines in this regard.

IV ELECTION COMMISSION

Model code of conduct

In the past few years the Election Commission has been enforcing the Model Code of Conduct very strictly. It had become the practice of the commission to prevent all governmental actions, except normal government work, during the period of election. In the year under survey there are two decisions of the Kerala High Court expressing disagreement with this practice.

In *K.M. Babu* v. *Election Commission of India*[23] the matter of dispute was the decision of the state government to implement pay revision of state employees, on the basis of pay commission report, on the eve of election to

22 *Id.* at 730.
23 AIR 2006 Ker 226.

the state legislative assembly elections. Though the decision was taken after the notification of the election, in an earlier occasion through budget speech the government had announced that the pay commission report would be implemented. There was a unanimous resolution of the state legislative assembly requesting the Election Commission to grant permission to implement pay revision. The Election Commission directed the state to put on hold the decision. This direction of the commission was challenged before the Kerala High Court. The court took the view that the restriction imposed by the Election Commission on the basis of the Model Code of Conduct would not stand.

In *I..D. Systems (India) Pvt Ltd* v. *Chief Election Commissioner*[24] the Kerala High Court took the view that "the object of the model code of conduct is not to stop all governmental activities in the State pending elections."[25]

The approach of the court seems to be correct. Only those actions which may directly influence a section of electors need to be prevented.

V DISQUALIFICATIONS

Office of profit

Holding of office of profit is a disqualification for being a member of the legislative assembly. Article 191(a) of the Constitution provides that a person shall be disqualified for being chosen as or for being a member of the legislative assembly or legislative council of a state "if he holds any office of profit under the Government of India, or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder." The explanation to the clause states that "a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State". In *Chandrakant Uttam Chodankar* v. *Dayanand Rayu Mandrekar*,[26] the election of the returned candidate to Goa Legislative Assembly was challenged on the ground that he was holding an office of profit as contemplated by article 19(1) (a) of the Constitution, having been the chairman of the Goa Khadi and Village Industries Board Act, 1965, on the date of nomination, as well as on the date of election. The respondent who was the returned candidate contended that since no salary or honorarium was fixed by the government nor any accommodation was provided to the post of chairman, it could not be treated as an office of profit. However, the court rejected this contention pointing out that the respondent enjoyed the privilege of a chauffeur driven car with unrestricted use of petrol although the respondent attended office of the board only twice or thrice a week and considering the distance which the respondent had to cover not more than 60

24 AIR 2006 Ker 229.
25 *Id.* at 236.
26 AIR 2007 Bom 16.

litres of petrol would be required, by him in a month. The petitioner, however, had proved that the respondent consumed 386.88 litres of petrol for the period from 9.2.02 to 28.2.02 at the cost of Rs. 10,600/- and 482.45 litres. of petrol for the period from 1.3.02 to 31.3.02 at the cost of Rs. 12,900/-.

Though the returned candidate claimed that he was not disqualified since in1982 the office of chairman of the Goa Khadi and Village Industries Board has been declared by law not to disqualify its holder, the court refused to accept the contention pointing out that "the Act of 1982 was passed by the then Legislative Assembly of Goa, Daman and Diu under Section 14 of the Government of Union Territories Act 1963, and not under Article 19 *1(1)* (a) of the Constitution for the protection of its members, namely the members of the Legislative Assembly of the Union Territory[27] ". It was observed:[28]

> It was certainly not the law passed by the provisional Legislative Assembly as declared by Section 13 of the Act of 1987. Admittedly, also there was no adaptation order made by the government pursuant to the legislative powers given under Section 67 of the Act of 1987. In my humble opinion, the Act of 1982 being a law passed by the Legislative Assembly of the then Union Territory of G.D.D. for the protection of its own members, under Section 14 of the Act of 1963 even in case it had a territorial extension by virtue of Section 66 of the Act of 1987, would be insufficient to provide protection from disqualification to the members of the Legislative Assembly of the State of Goa. Since it was not the law made by the Legislative Assembly of the State in terms of Article 191*(1) (a)* of the Constitution.

Subsistence of contract with government

According to section 9-a of the RP Act, 1951 a person shall be disqualified for being chosen as and for being a member of either House of Parliament or of legislative assembly or legislative council of a state "if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to, or for execution of any works undertaken by, that Government." According to section 7(a) of the Act " appropriate government" means in relation to any disqualification for being chosen as and for being a member of either House of Parliament, the Central Government and in relation to any disqualification for being chosen as and for being a member of Legislative Assembly or Legislative Council of a State, the State Government."

In *Srikant* v. *Vasantrao*[29] the Supreme Court had the occasion to consider the question whether meaning of the term government is restricted

27 *Id*. at 30.
28 *Ibid*.
29 AIR 2006 SC 918.

to the organs directly under its control or may be extended to all authorities, instrumentalities and agencies coming under the concept of state under article 12 of the Constitution.

The facts of the case show that the returned candidate in the election to Maharashtra State Legislative Council had entered into a contract dated 19.5.96 with the state government, which stood transferred to "Godawari Marathwada Irrigation Development Corporation (GMIDC) , an authority constituted under the Maharashtra Godawari Marathwada Irrigation Development Corporation Act, 1998 (for short MG MIDC Act) with effect from 1.10.1998. In addition contracts dated 31.12.1998 and 2.4.1999 were entered into with Maharashtra Jeevan Pradhikaran (MJP), an authority constituted under the Maharashtra Jeevan Authority Act, 1976 (MJA Act) and not with the state government. According to the petitioner these two contracts should be treated as contracts with the state government, which is the appropriate government for the election to the state legislative council. However, the returned candidate contended that the two statutory authorities viz, Marathwada Irrigation Development Corporation and Maharashtra Jeevan Pradhikaran could not be treated as appropriate governments for the purpose of section 9-A of the RP Act, 1951. The Supreme Court accepted this contention and observed:[30]

> This Court has consistently refused to apply the enlarged definition of 'State' given in Part III (and Part IV) of the Constitution, for interpreting the words 'State" or State Government" occurring in other parts of the Constitution. While the term "State" may include a State Government as also statutory or other authorities for the purposes of Part III (or Part IV) of the Constitution, the term "State Government" in its ordinary sense does not encompass in its fold either a local or statutory authority. It follows, therefore, that though GMIDC and MJP may fall within the scope of "State" for purposes of Part III of the Constitution, they are not "State Government" for the purposes of Section 9-A (read with Section 7) of the Act.

Bigamy

In *T.R. Baalu* v. *S.Purushothoman*[31] the election petition contained the allegation that the returned candidate was a person who contracted a bigamous marriage. The petitioner contended that since the fact of contracting bigamous marriage, which is an offence under the Indian Penal Code, was admitted by the returned candidate himself through the affidavit submitted at the time of filing the nominations his election should be declared void. However, the Madras High Court dismissed the petition pointing out that the returned

30 *Id*. at 925 Raveendran J (for himself and for Y.K. Sabharwal CJ and B.N. Srikrishna J).

31 AIR 2006 Mad 17.

candidate was never prosecuted or stood charged, tried, found guilty or sentenced to imprisonment

VI NOMINATIONS

Nomination paper

Scrutiny of nomination paper is a crucial step in the election process since the qualification of a person to contest election is determined at that stage. Section 33 of the RP Act, 1951 deals with the rules governing the scrutiny of nominations. It is the duty of the returning officer to ensure that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls. According to the proviso to the section " no misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposer or any other person, or in regard to any place, mentioned in the electoral roll or the nomination paper and no clerical, technical or printing error in regard to the electoral roll numbers of any such person in the electoral roll or the nomination paper, shall affect the full operation of the electoral roll or the nomination paper with respect to such person or place in any case where the description in regard to the name of the person or place is such as to be commonly understood; and the returning officer shall permit any such misnomer or inaccurate description or clerical, technical or printing error to be corrected and where necessary, direct that any such misnomer inaccurate description, clerical, technical or printing error in the electoral roll or in the nomination paper shall be overlooked."

The scope and extent of the power of the returning officer was the issue in *Trilok Chand Jain* v. *Md. Azimuddin.*[32] The facts of the case disclose that the petitioner had challenged the election of the returned candidate on the ground that the election in question was materially affected due to wrong and improper acceptance of nomination paper of the returned candidate. According to the petitioner there was substantial defect in the filling up of the nomination paper of the returned candidate inasmuch as he furnished serial number and part number of voter list of the year 2003 and also filed certified copy of voter list of 2003 instead of voter list of 2002 which was effective at that point of time. At that point of time the voter list of 2003 was pending for final publication. Therefore, the nomination paper of the returned candidate being not properly filled up suffered from incurable defect and was fit to be rejected. The returning officer, however, illegally and improperly and against the provision of the Representation of the People Act accepted his nomination paper which materially affected the election. He, therefore, prayed that the election of returned candidate be declared as void under section 100 of the Representation of the People Act, 1951.

However, the Patna High Court rejected this contention pointing out that the returning officer has the power to permit the candidate or his proposer to

32 AIR 2006 Pat 128.

correct misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposer or any other person, or in regard to any place, mentioned in the electoral roll. It was observed:[32a]

> On careful perusal of section 33(4) of the RP Act it appears to me that the dominant purpose of the provision is that the Returning Officer must be satisfied about the genuineness of the candidate and his proposer as voter and once he is satisfied after enquiry he may either overlook the error of the nature mentioned in the proviso or may allow the candidate to get the same corrected. Therefore, once the nomination paper is accepted after getting the error removed as permitted in proviso it cannot be called in question as being improperly accepted.

The decision appears to be correct. However, it is not clear whether the petitioner can challenge the election on the ground that the returning officer had permitted to correct major error relating to the electoral roll under the pretext of minor error.

VII DUTY TO CAST VOTE

In *Sushil Singh* v. *Prabhu Narain Yadav*[33] one of the allegations contained in the election petition was that in the election to U P Legislative Assembly no polling was recorded at booth Nos. 291 and 292 at Sisaura Kalan since electors of village Sisaura Kalan did not choose to exercise their right to vote. On evidence it was found that the electors were allowed to cast their vote. The Allahabad High Court rejected the contention of the petitioner that the election should have been adjourned since no vote was recorded. It was observed the electors are allowed free and fair right to vote in favour of a candidate. There is, however, no corresponding duty that the electors must exercise their franchise.[34]

VIII ELECTION TO THE COUNCIL OF STATES

In the year under survey the Supreme Court had an occasion to consider two important aspects of the election to the Council of States viz (1) whether the representative of a particular state in the Council of States should be a person domiciled in that state; and (2) whether the concept of secrecy of ballot should be retained in the case of election to the Council of States. The court made an attempt to trace the nature of the representation of the people reflected in the constitutional provisions dealing with the elections to the council of

32a *Id*. at 132.
33 AIR 2007 All 187.
34 *Id*. at 199.

states on the basis of the constitutional history of India and the nature of the representation of the people in the upper chambers in other countries like USA, Canada and Australia and answered both the questions in the negative.

Residential qualification

In India the upper house of Parliament, known as Council of States consists of not more than 12 members nominated by the President and not more than 238 representatives of the state and of union territories.[35] According to article 80(2) of the Constitution the allocation of seats to be filled by representatives of the states and of union territories shall be in accordance with the provisions in that behalf contained in the Fourth Schedule. The representatives of each state in the Council of States shall be elected by the elected members of the legilative assembly of the states in accordance with the system of proportional representation by means of single transferable votes[36] and the representatives of the union territories shall be chosen in such manner as Parliament may by law prescribe.[37]

Provisions of article 84(a) and (b) of the Constitution prescribe citizenship, oath or affirmation, *inter alia*, of faithfulness and allegiance to the Constitution and the prescription about minimum age of 30 years as qualification for being chosen to fill a seat in the Council of States. Article 84(c) prescribes that a person shall not be qualified to be chosen to fill a seat in Parliament unless he possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament. According to section 3 of the RP Act, 1951 (prior to the amendment introduced in 2003) " a person shall not be qualified to be chosen to fill seat as any representative of any State or Union Territory in the Council of States unless he is an elector for a Parliamentary constituency in that State or Territory". The amendment Act of 2003 amended this provision, with effect from 28.8.2003, so as to substitute the words 'in that State or Territory" with the words "in India." The amended provision reads as under:

Qualification for membership of the Council of States – A person shall not be qualified to be chosen as a representative of any State or Union Territory in the Council of States unless he is an elector for a Parliamentary Constituency in India

In *Kulip Nayar* v. *Union of India*[38] the validity of this amendment was challenged. The main contention of the petitioner was that impugned amendment to section 3 of the RP Act, 1951 offends the principle of federalism, the basic feature of the Constitution, since it seeks to change the character of republic which is the foundation of our democracy and that it distorts the balance of power between the union and the states and is, therefore, violative of the provisions of the Constitution. It was urged that since the Council of

35 Constitution of the India, art. 81(1).
36 *Id*. art 81(4).
37 *Id*. art 81(5).
38 A1R 2006 SC 3127.

States is a House of Parliament constituted to provide representation of various states and union territories its members have to represent the people of different states to enable them to legislate after understanding their problems. It was further argued that the nomenclature. "Council of States" indicates the federal character of the house and a representative who is not ordinarily resident and who does not belong to the state concerned cannot effectively represent the state. According to the petitioner, since India has adopted parliamentary system of democracy in which the union legislature is a bi-cameral legislature, legislature should represent the will of the people of the state whose cause has to be represented by the members. So it was pointed out that the impugned amendments removes the distinction in the intent and purpose of *Lok Sahba* and *Rajya Sabha* and that the mere fact that there exists numerous instances of infringement of the law concerning the requirements of residence cannot constitute a valid object or rational reason for deleting the requirement of residence.

After examining the legislative history of the provision the Supreme Court arrived at the conclusion that "unlike USA, residence is not a constitutional requirement" and "in the context of Indian Constitution, residence/ domicile is an incidence of federalism which is capable of being regulated by the Parliament as a qualification".[39] So the court rejected the contention of the petitioner. Regarding the arguments based on the concept of federalism, Y.K. Sabharwal CJ observed:[40]

> It can be safely said that as long as the State has a right to be represented in the Council of States by its chosen representatives, who are citizens of the country, it cannot be said that federalism is affected. It cannot be said that residential requirement for membership to the Upper House is an essential basic feature of all Federal Constitutions. Hence, if the Indian *Parliament, in its wisdom* has chosen not to require residential qualification, it would definitely not violate the basic feature of Federalism. Our Constitution does not cease to be a federal Constitution simply because a Rajya Sabha Member does not "ordinarily reside" in the State from which he is elected.

Another submission was that section 3 of RP Act, 1951 as it stood before amendment, read with article 80(4) had ensured the "representation of States" in Parliament. So an amendment to the Constitution rather than an amendment to the R.P. Act is necessary to change the representation of the state. Referring to proviso (d) in article 368(2), dealing with the amendment to the Constitution, it was argued that even a constitutional amendment making any change in

39 *Id.* at 3144.

40 *Id.* at 3154 (for himself and on behalf of K.G. Balakrishnan, S.H. Kapadia, C.K. Takkar and P.K. Balasubramanyan JJ) [emphasis added].

representation of states in Parliament cannot be effectuated without the ratification by one half of the state legislatures. The court rejected this contention, highlighting the difference between "representatives of States" and "representation of States" in the following words:[41]

> The argument is without merit in the context in which it has been made. The expression "representatives of States" as used in Article 80 and the expression "representation of States" as used in proviso (d) of Article 368 (2) are not synonymous or employed in same sense. These expressions are materially different and used in different contexts in the two provisions. This is clear from the simple fact that Article 80 is talking of "representatives" of States in the Council of States while proviso (d) of Article 368(2) pertains to "representation" of States in Parliament. The first provision is of limited import while the latter has a wider connotation

Another submission was that whilst it is open to Parliament to prescribe by laying down the qualifications for being chosen to the Council of States, the prescribed qualifications must be such as to ensure that the person so chosen is a representative of that state, the assembly of which has elected him. It was argued that the use of the word "each" in article 80(4) in relation to representation of states in the Council of States was not without significance, inasmuch as the stress is on providing representation to "each State" so as to give to the house the character of a body representing the states. The court rejected this argument also. It was observed:[42]

> The employment of the word "each" preceding the word "State" in the context of representation in the Council of States, is meant only to underscore the fact that the Legislative Assembly of each State was intended to be a separate electoral college for returning a member to fill in the seat allocated to the particular State as specified in the Fourth Schedule. Nothing more and nothing less. This is more so, in view of the fact that the expression "representatives of the States" had already occurred twice earlier in the preceding clauses of the same Article. The word "each" was not required to be used in the context of Part C States (now Union Territories) in Article 80(5) as originally provided or even later amended, since the manner of representation of such units of the Union of India was left to be prescribed by the Parliament and since each such unit was not intended at that time to be provided with its own Legislative Assembly.

Another argument was that the expression "representatives of the States" as used in article 80(1) (b) and article 80(2) and the expression "representatives

41 *Id.* at 3162.
42 *Id.* at 3168.

of each State", as employed in article 80(4) have been left to be defined by Parliament "by Law" made under article 84(c) which requires Parliament to prescribe as to what "such other qualification" a person must possess in order to qualify to be chosen as a member of Parliament, that is, qualifications other than those given in article 84 (a) and(b) that relate to citizenship of India, oath or affirmation, *inter alia*, of faithfulness and allegiance to the Constitution and the prescription about minimum age. The court rejected this contention and observed:[43]

> Regarding the words in Article 80(4) of the Constitution, viz., "the representatives of each State", … we are not impressed with the submission that it is inherent in the expression "representative", that the person, in order to be a representative, must first necessarily be an elector in the State. If this concept were to be stretched further, it might also require birth in the particular State, or owning or having rented property or belonging to the majority caste, etc. of that State. Needless to mention, no such qualification can be added to say that only an elector of that State can represent that State. "The representative" of the State is the person chosen by the electors who can be any person who, in the opinion of the electors, is fit to represent them. There is absolutely no basis for the contention that a person who is an elector in the State concerned is more "representative" in character than one who is not.

The court pointed out the fact that "if the Parliament *in its wisdom has chosen* to do away with the domiciliary requirement as qualification for contesting an election to fill a seat as representative of a particular state in the Council of States, fault cannot be found with such decision of Parliament "on the ground that difficulty to define what was meant by the expression "ordinarily resident" was not an honest ground ".[44]

It seems that the judicial approach is to keep aloof from the areas of election law which are assigned to Parliament. It is relevant to note that in the last few years the Supreme Court did not hesitate in taking bold steps for electoral reforms like issuing directions to disclose the criminal background, assets and educational qualification of the candidates. Such activist role is not displayed in the present case. One of the reasons is the fact that the present issue is not related to the malpractices in election, but related to the eligibility criterion of the candidate. So one may arrive at a conclusion that the judiciary may keep judicial restraint except in issues having the nature of purity of election.

43 *Id.* at 3171-72.
44 *Id.* at 3181(emphasis added).

Open voting

According to section 59 of the RP Act, 1951 (prior to the amendment introduced through Act No.40 of 2003) "at every election where a poll is taken votes shall be given by ballot in such manner as may be prescribed and no votes shall be recorded by proxy." The amendment introduced through Act No.40 of 2003 added a proviso to the section which reads :

> Provided that at every election to fill seat or seats in the Council of States shall be given by open vote.

Corresponding changes were introduced in other two provisions dealing with secrecy of voting viz, sections 94 and 128. In addition a new clause was added to the Conduct of Election Rules, 1961 to the effect that in the election to the Council of States, before the elector inserts his ballot paper into the ballot box, the authorized agent of the political party shall be allowed to verify as to whom such an elector casts his vote. In case such an elector refuses to show his marked ballot paper, the same shall be taken back and will be cancelled by the presiding officer on the ground that the voting procedure had been violated.

In *Kuldip Nayar* v. *Union of India*[45] these amendments were challenged on the ground that it violates the Constitution, which recognizes the right to vote as a constitutional right, a facet of article 19(1) (a) and the secret ballot preserving this right. It was contended that secret ballot is an adjunct of free and fair election and therefore, a part of a parliamentary democracy and, therefore, taking away of voting right by secret ballot affects the basic feature of the Constitution. It was submitted that the open ballot system, coupled with the looming threat of disqualification under the Tenth Schedule reduces the election to a show of strength of the political party considering the fact it can issue a whip to ensure the success of its candidate. This, according to the petitioners, will result in people with moneybags occupying the seats in the Council of States. The Supreme Court rejected all these contentions and observed:[46]

> By the amendment, the right to vote is not taken away. Each elected member of the Legislative Assembly of the concerned State is fully entitled to vote in the election to the Council of States. The only change that has come owing to the impugned amendment is that he has to disclose the way he has cast the vote to the representative of his Party. Parliament would justify it as merely a regulatory method to stem corruption and to ensure free and fair elections and more importantly to maintain purity of elections. This Court has held that secrecy of ballot and purity of elections should normally coexist. But in the case of the Council of States, the *Parliament in its wisdom* has

45 *Supra* note 38.
46 *Id.* at 3218 (emphasis added).

> deemed it proper that secrecy of ballot should be done away with in such an indirect election, to ensure purity of election.
> In view of it not being the requirement of the Constitution, as in the case of the President and the Vice President, it was permissible for Parliament when passing legislation like the Representation of the People Act to provide otherwise, that is to choose between the system of secret ballot or open ballot. Thus, from this angle, it is difficult to hold that there is Constitutional infirmity in providing open ballot system for the Council of States.

In the judgment the court made an attempt to examine the nature of the parliamentary democracy and the electoral system in India. The developments in other democratic countries were also taken into account. However, judicial reasoning is founded on the fact that the Constitution had provided the power to Parliament to make such provisions. It is relevant to note that though such powers were not expressly conferred, the court was prepared to accept a legislative measure adopted on the basis of the implied power conferred on Parliament. Since no express power was conferred on Parliament in this regard there was scope for declaring the amendment invalid. However, the court preferred judicial restraint. The reason for this restraint may be the submission on behalf of the Union of India that the amendment is a remedial measure suggested by the Ethics Committee of Parliament in 1996 to the undesirable practice of cross voting in the elections to the Council of States.

IX ELECTION TO LOCAL BODIES

Writ jurisdiction on election disputes

Article 243–O of the Constitution imposes bar to interference by courts in matters relating to the election to local bodies. In *Harnek Singh* v. *Charanjit Singh*[47] the election to the post of chairman *panchayat samati* was postponed by the returning officer owing to law and order problem and he himself fixed the date of next election . Through a writ petition the order of the returning officer was challenged not only on the ground of lack of legal authority of the returning officer to fix the fresh date of election but also on the ground of improper rejection of valid votes by the retuning officer. Though the Punjab and Haryana High Court entertained the writ petition, the Supreme Court took a different approach. According to the court the prayers like "issue writ, order or direction declaring the petitioner elected as Chairman of the Block Samati on the basis of votes cast in his favour if necessary by calling for the records of the election and ballot papers" could not have been granted in favour of the petitioner, by the high court in exercise of its jurisdiction under article 226 of the Constitution of India. S.B. Sinha J observed that article 243-O of the Constitution of India mandates that all election disputes must be

47 AIR 2006 SC 52.

determined only by way of an election petition. This by itself may not *per se* bar judicial review which is the basic structure of the Constitution, but ordinarily such jurisdiction would not be exercised. There may be some cases where a writ petition would be entertained but in the instant case there was no such question.

However, in *Jayrajbhai Jayantibhai Patel* v. *Anilbhai Nathubhai Patel*[48] the Supreme Court upheld the decision of the Gujarat High Court in setting aside the election to the office of the president of municipality on the ground that there was abuse of power on the part of the government in the form of arresting two councilor-voters and detaining them in the police custody during the time of election. According to the court the doctrine of *res ipsa loquitur* is applicable in the case.

Interference by high court

According to the view taken by the Supreme Court in *Gursewak Singh* v. *Avtar Singh*[49] the high court should examine a case closely before interfering with the findings of election tribunal. In this case the high court reversed the order of the tribunal in granting the application for recounting of votes. On appeal the Supreme Court directed the high court to consider the matter afresh pointing out that the earlier finding of the high court was not supported by any cogent reason and material .

Recounting

In the year under survey the Supreme Court had considered the issue of ordering of recounting by the election tribunals and issued certain guidelines in this regard. According to the view taken by P.K.Balasubramanyan J in *Tanaji Ramachandra Nimhan* v. *Swati Vinayak Nimhan*[50] recounting could be ordered only if material facts detailing irregularities in counting were pleaded.

In *Sadhu Singh* v. *Darshan Singh*[51] the Supreme Court held that the following factors were relevant for directing re-counting of votes : (i) prima facie case must be established; (ii) material must be pleaded stating irregularities in counting; (iii) a roving and fishing enquiry shall not be directed by way of an order for recounting of votes; (iv) an objection to the said effect should be raised ; and (v) secrecy of ballot papers should be maintained.

Eligibility to contest by a person married to a scheduled caste

Whether a person who acquired membership in a scheduled caste by marriage is eligible to contest election from a constituency reserved for scheduled caste was the issue in *Meera Kanwaria* v. *Sunita.*[52] The Supreme

48 (2006) 8 SCC 200.
49 AIR 2006 SC1791.
50 AIR 2006 SC 1218.
51 (2006) 6 SCC 255.
52 AIR 2006 SC 597.

Court took the view that in order to acquire the status of the member of a scheduled caste a high caste woman who married a member of the scheduled caste should show strict proof of acceptance by the community of the husband. It was held that mere acceptance by the family of the husband is not sufficient. S.B.Sinha J observed:[53]

> A person who is a high caste Hindu and not subjected to any social or educational or backwardness (sic) in life ; by reason of marriage alone cannot ipso facto become a member of Scheduled Caste or Scheduled Tribe. In absence of any strict proof he cannot be allowed to defeat the very provision made by the State for reserving certain seats for disadvantaged people.

The view appears to be correct and in inconsonance with the very purpose of reservation of seats to scheduled castes or scheduled tribes.

Disqualification on ground of dismissal from service

Dismissal from government service is a disqualification for being a member of the local body in almost all states. Whether the dismissal of a temporary servant without holding disciplinary proceeding would attract the provision of law imposing disqualification on the ground of dismissal from government service was the issue in *Arun Singh* v. *State of Bihar*.[54] The court rightly answered this question in the negative pointing out that such provisions should be construed strictly.

X CONCLUSION

Since the beginning of 1990s the Supreme Court had taken active interest in matters relating to elections and played an activist role in ensuring free and fair elections. The court had never hesitated to invalidate legal provisions which may adversely affect basic purpose of election law viz, ensuring of free and fair elections. However, in the year 2006 the Supreme Court established that the court prepared to keep restraint while determining the validity of a provision enacted by Parliament if the provision had no adverse effect on the proper functioning of democratic process. In *Kuldip Nayar* v. *Union of India*,[55] while determining the validity of the provisions of R.P.Act 1951 relating to the election to the Council of States after making a detailed examination of the various aspects of the issue the Supreme Court upheld the amendments. It is relevant to note that the court expressly stated that *Parliament in its wisdom*[56] had enacted such a provision. So it has been

53 *Id.* at 601.
54 AIR 2006 SC 1413.
55 *Supra* note 38.
56 See s*upra* notes 40, 44 and 46.

established that Indian judiciary is not interested to enter into the zone assigned to Parliament though the Supreme Court is very keen that the electoral system should operate so as to ensure the real representation of the people. Another visible trend is the interest shown by the Supreme Court in disputes related to the election to local bodies. Though there is no statutory right to appeal to Supreme Court in the matter of disputes relating to the elections to the local bodies several appeals under article 226 of the Constitution were entertained. The ultimate result is the emergence of new legal principles like application of the principle of *res ipsa loquitur* for issuing writs to prevent abuse of power in the election of the chairperson of local bodies.[57]

57 See *Jayrajbhai Jayantibhai Patel* v.*Anilbhai Nathubhai Patel, spura* note 48.