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11
ELECTION LAW

*K C Sunny**

I INTRODUCTION

THE BASIC objective of election law in every country is to ensure free and fair elections. It intends to create and maintain that sort of atmosphere in which the electorate can choose their representatives by the exercise of free will without any pressure or hindrance or undue influence from any quarters. While interpreting any provision of law relating to elections it is the duty of the courts to ensure that the interpretation may not defeat the basic objective of election law. In the last few years the Supreme Court had taken the activist role in ensuring the purity and sanctity of election. The most effective step taken by the court was in the area of prevention of criminalization of politics. In the year under survey at least in one case there has been a set back to this process. Though there has been a substantial decrease in the number of cases on issues relating to Representation of the People Act, 1951 (RP Act) there has been an increase in the number of cases relating to local body elections.

II CORRUPT PRACTICES

Procuring the assistance of government servants

According to section 123 (7) of the RP Act, 1951 obtaining or procuring the assistance of any person in the service of the government belonging to any of the category mentioned in the section by a candidate, his election agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of election is a corrupt practice. Gazetted officers are included in the first category, enumerated in the section. Quite often, disputes arise on the question whether a particular class of government servants like part time employees or persons appointed on contract basis come within the purview of government servants under section 123(3). In *Baldev Singh Mann* v. *Surjit Singh Dhiman*[1] the election petition contained an allegation that the returned candidate procured the assistance of two persons in the service of the government. The first person was an administrative member of the Punjab State Electricity Board, whose

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1 AIR 2007 P& H 92.

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appointment was for two years. He was the chairman of a co-operative bank and also the chairman of co-operative wing of the Shiromani Akali Dal and was running the business of commission agent. The court took the view that though the person is in the service of the government he is not a gazetted officer. The second person was a member of the Punjab civil service holding the post of deputy director, panchayat. The court treated him as a person in service of the government and also a gazetted officer.

The allegation was that the gazetted officers along with the candidate sought votes and support. The court took the view that mere presence of the government servant is not sufficient to constitute corrupt practice. It was observed:[2]

> To ask for a vote is not a corrupt practice. In Section 123 (7) of the Act, what has been declared to be a corrupt practice is obtaining assistance from any one who is in service of government and is a gazetted officer. Casting a vote or asking for it does not amount to obtaining any assistance .... There must be some positive and explicit proof on the part of voters belonging to categories mentioned in Section 123 (7) (a) to (g) to constitute corrupt practice.

The court relied on the view taken by the Supreme Court that strict proof is required to prove the allegations of corrupt practices.

III PROCEDURAL ASPECTS OF ELECTION PETITIONS

Material facts

According to section 83 of the RP Act, an election petition shall contain a concise statement of material facts on which the petitioner relies. The question what constitutes material facts is very important in election cases since every year various high courts dismiss several election petitions on the ground of lack of material facts. In *Virender Nath* v *Satpal Singh*[3] C. K.Thakkar J made an attempt to find out an answer to this question. It was observed:[4]

> The expression 'material facts' has neither been defined in the Act nor in the Code. According to the dictionary meaning, 'material' means 'fundamental,' 'vital', 'basic', 'cardinal', 'central', 'crucial', 'decisive', 'essential', 'pivotal', 'indispensable', 'elementary' or 'primary'. [Burton's Legal Thesaurus, (Third edn.): p 349]. The phrase 'material facts', therefore, may be said to be those facts upon which a party relies for his claim or defence. In other words,

2 *Id*. at 100.
3 AIR 2007 SC 581.

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> 'material facts', are facts upon which the plaintiff's cause of action or the defendant's defence depends. What particulars could be said to be 'material facts' would depend upon the facts of each case and no rule of universal application can be laid down. It is, however, absolutely essential that all basic and primary facts which must be proved at the trial by the party to establish the existence of a cause of action or defence are material facts and must be stated in the pleading by the party.

The court pointed out the need to distinguish between material facts and full particulars in the following words:[5]

> A distinction between 'material facts' and 'particulars', however, must not be overlooked. 'Material facts' are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up 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.
> All 'material facts' must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial.

The above observation provides sufficient guidelines for determining the question whether the election petition lacks material facts and full particulars.

Cross examination

According to the view taken by the Gauhati High Court in *Atul Bora* v. *Akan Bora*[6] the right to cross examine of his own witness in the election petition is not necessarily confined to a case where the witness exhibits hostility or resiles from his earlier statement.

Period of limitation

Section 81 of the RP Act lays down the period of limitation for filing

4 *Id*. at 587.
5 *Id*. at 588-89.
6 AIR 2007 Gau 51.

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an election petition. The provision has two parts. The first part provides that an election petition calling in question any election could be filed by a candidate or an elector within 45 days from the date of election of the returned candidate. The second part covers those cases where there are more than one returned candidate at the election and the dates of their election are different. In such cases, the later of two dates would be the starting point of limitation for the purpose of filing petitions. In general election notification will prescribe the schedule of election for all constituencies. However, the date of declaration of result may vary from constituency to constituency. In the matter of counting of the limitation period for filing the election petition relating to an election which took place as the part of general election, whether the first part or the second part of section 81 would be applicable was the issue before the Supreme Court in *Youaraj Rai* v. *Chander Bahadur Karki*.[7] Facts of the case show that the Election Commission of India issued a notification on 16.3.2004 for holding general election to the legislative assembly for the State of Sikkim. According to the schedule, 10.3.2004 was the date of poll, if necessary and date of counting and declaration of results was 17.3.2004. The appellants filed their nominations in three different constituencies on 23.4.2004. When nomination papers were scrutinized on the next date, they were found to be defective and hence all their nomination papers were rejected. The resultant effect was that on 26.4.2004 which was the last date for withdrawal of candidature, in all the three constituencies, only one candidate was left in the field. The returning officer, therefore, declared three respondents elected (uncontested). In respect of other constituencies, however, polling was held on 10.5.2004 and after counting of votes, results were declared on 17.5.2004.All the appellants filed election petitions in the high court on 25.6.2004.If the first part of section 81 is applied the petition was not within the period of limitation and if second part is applied it was within the period of limitation. The Supreme Court took the view that since at present there are only single member constituencies regarding election to the House of the People and state legislative assemblies, part two of section 81 could not be applied in respect to such elections. C.K. Thakkar J observed :[8]

> It may also be appropriate to refer to sub section (3) of Section 4 and sub section (2) of Section 7 of the Representation of the People Act, 1950 as amended in 1975 and 1980. Sub section (3) of Section 4 states that every Parliamentary Constituency shall be a single member constituency. Likewise sub section (2) of Section 7 declares that every Assembly Constituency shall be a single member constituency.
> In view of the above provisions, in our considered opinion, the second part of Section 81 cannot apply to any election to a

7 AIR 2007 SC 561.
8 *Id*. at 56.

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> Legislative Assembly, but it would apply only to Legislative Council of a State or Council of States. The High Court was, therefore, right in holding that the relevant date for calculation of the period of limitation was 'the date of election of the returned candidate' and an election petition ought to be filed within forty five days from such date.

The court rejected the argument that election has been defined in the Act as an election to fill a seat or seats in either house of the legislature of a state and when the said expression is used in section 81, it would have the same meaning and it would include election to all constituencies in the state. It was observed:[9]

> We are unable to uphold the argument. It is true that the term "election" in Section 2(d) defines as election to fill a seat or seats in either House of Parliament or either House of the Legislature of a State. But it must be remembered that the Act deals with election of both the Houses of Parliament and State Legislatures and defines the expression "election". Moreover the opening words of Section 2 are "unless the context otherwise requires". Hence, while construing, interpreting and applying the definition clause, the Court has to keep in view the legislative mandate and intent and to consider whether the context requires otherwise.... Section 81 which is in two parts deals with different situations. The first part applies to a Legislative Assembly while the second part applies to a Legislative Council.

Another submission was that the limitation for filing an election petition should be reckoned not with reference to the date on which the candidate whose election is challenged was declared elected, but with reference to the date on which the last candidate was declared elected at a general election. It was pointed out by the court that such an interpretation "would not only make the provision cumbersome and contrary to the provisions of the Act, particularly against the scheme of amendments introduced in 1956 and 1961 but would also make the starting point of limitation uncertain, indefinite and fluctuating."[10] The court also highlighted certain practical difficulties in accepting the argument of the petitioners in the following words:[11]

> Such construction would require complete details of all returned candidates of Legislative Assembly of a State. Moreover where the challenge is to an election of a member of House of People (Lok Sabha), full particulars in different constituencies throughout the

9 *Ibid*.
10 *Id*. at 568.
11 *Ibid*.

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> country must be before the Election Tribunal (High Court). The Tribunal also is bound to inquire into such particulars with a view to ascertaining whether the election petition filed by the petitioner is or is not within the period specified in Section 81 of the Act. Again, in case of dispute or contest on the issue of limitation, the Election Tribunal is required to call for and inspect records of all constituencies. Unless compelled, a court of law would not interpret a provision in such a way which would frustrate legislative intent and make the provision unworkable and impracticable.

The court seems to have adopted the correct approach. It has taken into consideration all aspects involved in the issue and has also given reasons in an unambiguous manner.

IV WRIT JUDRSDICTION

Article 329 bars the jurisdiction of courts in electoral matters. However, courts are entertaining writ petitions regarding disputes relating to elections in exceptional cases. In *Chigurupalli Prabhakara Rao* v. *Chief Electoral Officer*[12] the petitioners approached the High Court under article 226 seeking intervention of the court for getting their names included in the electoral roll. The court allowed the writ petition and rejected the preliminary objection based on article 329 in the following words:[13]

> The relief claimed in the writ petition is only a declaration to the effect that the petitioners possess the eligibility to file their nominations in the ensuing elections. This relief, in turn, would need interpretation of Sections 21, 22 and 23 of the 1950 Act, in their general terms, without general bearing on the election programme, or the conduct of elections. Therefore, the objections raised by the respondents, as to maintainability of writ petitions cannot be accepted.

It is submitted that on the basis of the facts[14] of the case the only conclusion that can be drawn is that the view of the court is correct.

V ELECTION TO LEGISLATIVE COUNCILS

According to article 171 of the Constitution one third of the members in the legislative councils shall be elected by electorates consisting of members of municipalities, district boards and such other local authorities

12 AIR 2007 AP 171.
13 *Id*. at 173.
14 For fact of the case see *supra* note 32 and accompanying text.

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in the states as Parliament may by law specify. The list of other local authorities for this purpose is given in schedule 4 of the RP Act, 1950. Interestingly, there is a separate list for each state. Though in the list in respect of the State of Karnataka, *sarpanchas* of *grama panchayat* are included, the same have been excluded from the list in respect of State of Andhra Pradesh. In *Andhra Pradesh Sarpanches Association* v. *Union of India*[15] the Andhra Pradesh High Court considered the question whether the non inclusion of *sarpanchas* of *gram panchayat* in the electoral roll of local authorities for election to the legislative council was violative of article 14 of the Constitution and answered in the negative. It was observed:[15a]

> The most significant difference between the local bodies operating in the urban areas i.e., Municipal Corporations, Municipalities and Nagar Panchayats and similar bodies operating in the rural areas i.e., Gram Panchayats, Mandal Parishads and Zilla Parishads is that the geographical areas of urban bodies as well as their electors are distinct and separate whereas the area of the Mandal Parishads is inclusive of various villages for which separate Gram Panchayats are constituted and the area of every Zilla Parishad is a district , which comprises of the villages of different Mandals constituted in the particular district. The Electoral College which elects the members of the Gram Panchayat and the Sarpanch and Members of Mandal Parishads and Zilla Parishads is the same.… It is thus evident that while the Municipal Corporations, Municipalities and the Nagar Panchayats are representative of different segments of the Urban area and different sets of people living in those geographical constituencies, the Gram Panchayats, Mandal Praja Parishads and Zilla Praja Parishads represent the same.

It seems that the reasoning of the court is absolutely correct. However, it is an anomaly that in some other states *gram panchayats* are included in the list of other local bodies for the purpose of legislative council. It is better to amend schedule 4 of the RP Act so as to exclude *gram panchayats* from the list of other states also.

VI RESERVATION OF SEATS FOR SC AND ST

One of the peculiar features of election laws in India is the reservation of seats for Scheduled Castes and Scheduled Tribes (SC and ST) in the lower house of Parliament and state legislative assemblies. The Constitution prescribes that the number of seats reserved for SC and ST in the lower house of Parliament shall be proportional to their population.[16] Usually the number

15 AIR 2007 AP 273.
15*a* *Ibid*.
16 See arts 330 and 332 of the Constitution.

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of seats to be reserved for SC and ST shall be determined by the Delimitation Commission. However, when new states are formed this power may be given to the Election Commission by the concerned statute for reorganization of state. Uttar Pradesh Re-organization Act, 2000 conferred such power on the Election Commission. The commission while exercising this power increased the reserved seats for scheduled tribes in the State of Uttaranchal. In *Anand Singh Kunwar* v. *Election Commission of India*[17] a writ petition was filed before the Uttaranchal High Court in public interest, *inter alia*, praying for issuance of a writ of *certiorari* or any other appropriate writ, direction or order to quash the notification of the Election Commission increasing the seats reserved for STs. It was pointed out that the notification was issued under sub section (5) of section 22 of the Uttar Pradesh Re-organization Act, 2000 in respect of the delimitation of assembly constituencies in the State of Uttaranchal and by that order the number of seats in the legislative assembly was fixed at 70 by the Election Commission and it had determined the number of seats to be reserved for the SCs and STs in the legislative assembly as twelve and three respectively . The main contention of the petitioner was that as per the census data the population of STs was three per cent of the total population of Uttaranchal and under article 332 (3) the number of seats to be reserved was to the extent of three per cent of the total 70 seats in the state. That came to 2.1 which was nearer to two seats than to three seats, but the Election Commission had fixed three seats for STs which was beyond the provisions of the Constitution.

However, subsequently the Election Commission realizing its mistake reduced the number of seats reserved for STs from three to two and the notification to this effect was issued. Though the issue had, thus, become an academic one, the Supreme Court made some relevant observations which reads thus:[18]

> The mandate of Article 332(3) of the Constitution of India should always be kept in mind. Article 332(3) mandates that the reservation must be made in proportion to the population of the Scheduled Castes and Scheduled Tribes of the State. This should be the paramount consideration of the Election Commission and not any other consideration. We need not make any observation but the consideration for increasing the seats of Scheduled Tribes from two (2) to three (3) was not at all warranted as it is in violation of Article 332(3) of the Constitution of India. The mandate of the Constitution is supreme and the Election Commission has no scope to go beyond the Constitution. Therefore, we hope and trust that when any notification is issued, the Election Commission shall confine itself to the mandate of the provisions of the Constitution of India and will not be swayed by any other consideration.

17 (2007) 7 SCC 234.
18 *Id*. at 236.

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VII DISQUALIFICATION

Disqualification and expulsion

There are elaborate provisions in the Constitution dealing with disqualification for being a member and for being chosen to be a Member of Parliament[19] and state legislatures.[20] In the case of an elected representative the question regarding disqualification for being a Member of Parliament or state legislature shall be determined by the high court through an election petition and the disqualification for being the Member of Parliament or state legislature shall be determined by the President or the concerned state Governor on the basis of the advice given by the Election Commission of India. In both the cases the legislator may lose his membership in the elected body if the concerned authority decides that he suffers from some disqualifications under the Constitution. There is one more situation in which an elected representative may lose his membership in Parliament or state legislature, namely, through expulsion by the exercise of the privileges of the house. In *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha*[21] while upholding the right of the *Lok Sabha* to expel some of its members on the ground of committing the misconduct of receiving bribes for asking questions, the Supreme Court explained the difference between disqualification and expulsion in the following words:[22]

> These terms have different meanings and they do not overlap. Disqualification strikes at the very root of the candidate's qualification and renders him or her unable to occupy a Member's seat. Expulsion, on the other hand, deals with a person who is otherwise qualified, but in the opinion of the House of the legislature, unworthy of membership. While disqualification operates to prevent a candidate from re-election, expulsion occurs after the election of the member and there is no bar on re-election. As far as the term "vacancy" is concerned, it is a consequence of the fact that a Member cannot continue to hold membership. The reason may be any one of the several possible reasons which prevent the member from continuing membership, for example disqualification, death or expulsion.

The court examined the question whether termination of membership in Parliament could be effected only in the manner laid down in articles 101 and 102 and answered in the negative pointing out that article 105 (3) dealing with privileges of Parliament is also equally important. It was observed:[23]

19 Art. 102.
20 Art.191.
21 (2007) 3 SCC 184.
22 *Id*. at 284.
23 *Id.* at 284-859. Art 101, deals with vacation of seats, and art 102, deals with disqualification for membership.

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> While these articles do speak of qualifications for and continuation of membership, in our view they operate independently of Article 105(3). Article 105(3) is also a constitutional provision and it demands equal weight as any other provision, and neither being 'subject to the provisions of the Constitution", it is impossible to accord to one superiority over the other. We cannot accept the submission that the provisions in Article 101 or 102 restrict in any way the scope of Article 194 (3)[24] . There is no reason for them to do so. Though disqualification and expulsion both result in the vacancy of a seat, there is no necessity to read one in a way that restricts the scope of the other. The expulsion on being found unfit for functioning within the House in no way affects the qualifications that a Member must fulfil and there is no reason for the latter to affect expulsion. Both of the provisions can operate quite harmoniously. We fail to see any inconsistency between the two. Nor do we find any reason to support the claim that provisions under Article 101 and 102 are exhaustive and for that reason, Article 105(3) be read as not to include the power of expulsion. Further, death as a cause for vacancy of a seat is also not mentioned in the relevant provisions. Similarly, it is not necessary for expulsion to be mentioned, if there exists another constitutional provision that provides for such a power. It is obvious that upon expulsion, the seat of the Member is rendered vacant and so no specific recognition of this provision is necessary within the provision relating to vacancy. Thus, the power of expulsion cannot be held to be inconsistent with these provisions

The court rejected another contention that in the democratic set up adopted by India, every citizen has a right to vote and to be duly represented. One of the arguments of the petitioners was that expelling a member who has been elected by the people would violate the democratic principles and the constituency would go unrepresented in Parliament. It was submitted that the right to vote ought to be treated as a fundamental right. However, the court accepted the argument on behalf of the Union of India that the right to be represented is not an absolute right, and that expulsion does not create a bar for re-election. It was observed:[25]

> While it is true that the right to vote and be represented is integral to our democratic process, it must be remembered that it is not an absolute right. There were certain limitations to the right to vote and be represented. For example, a citizen cannot claim the right to vote and be represented by person who is disqualified by law or the right

24 It would seem that reference here is to art 105(3).

25 *Id.* at 288.

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> to be represented by a candidate he votes for, even if he fails to win the election. Similarly, expulsion is another such provision. Expulsion is related to the conduct of the member that lowers the dignity of the House, which may not have been necessarily known at the time of election. It is not a capricious exercise of the House, but an action to protect its dignity before the people of the country. This is also an integral aspect of our democratic set up. In our view, the power of expulsion is not contrary to a democratic process. It is rather part of the guarantee of a democratic process. Further, expulsion is not a decision by a single person. It is a decision taken by the representatives of the rest of the country. Finally, the power of expulsion does not bar a Member from standing for re-election or the constituency from electing that Member once again.

It seems that the interpretation given by the court may enable Parliament itself to take adequate measures against those members who are engaged in certain illegal actions which could not be justified on any legal and ethical standards. Such action is essential for preventing the entry of unscrupulous persons into electoral politics.

Conviction for crime

According to section 8 of the RP Act conviction for committing a crime is a disqualification for being a candidate in an election. Quite often, a person convicted by the trial court and so disqualified at the time of scrutiny of nominations may be acquitted of the offence by the appellate court by the time the election petition is disposed of. In such a situation if the candidate is able to get his nomination accepted by the returning officer, during the trial of election petition he can claim that he was not disqualified on the date of scrutiny of nominations since the effect of acquittal by an appellate court is that in the eye of law the acquitted person never committed the offence. However, if the crucial date for determining the eligibility of a candidate is taken as the date of scrutiny, without taking into account of the developments between the date of scrutiny and the date of disposal of the election petition, this anomaly could be rectified. However, in the earlier decisions the Supreme Court had taken a contrary view.

The ultimate effect of this approach was that if a convicted person could manage to get his nomination accepted by the returning officer, he could contest the election and if elected could continue in office, provided his conviction was set aside by the appellate court. But if the returning officer rejected his nomination his wish to contest election would not be materialized. So the crucial factor in determining the eligibility of such a candidate was the attitude of the returning officer. In *K. Prabhakaran* v. *P. Jayarajan*[26] the Supreme Court took a pragmatic view of this aspect and held

26 (2005) 1 SCC 329.

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that the crucial date to determine the eligibility of the candidate was the date of scrutiny. So if the nomination of a convicted person was accepted by the retuning officer the high court would set aside his election on the ground of disqualification under section 8, irrespective of the fact whether his conviction was subsequently set aside or not by the appellate court. It appears that a correct approach has been taken by the Supreme Court since the decision had plugged the loophole which helped entry of criminals into politics.

However, two decisions of the Supreme Court in the year under survey has opened another escape route to the persons convicted for crimes, in respect of right to contest elections. In *Ravikant S Patil* v. *Sarvabhouma S. Bagali*,[27] the appellant was convicted and sentenced to imprisonment for seven years by the sessions court. Pending the appeal stay of the execution of the sentence was granted by the Bombay High Court. During this period election to the Karnataka Assembly was notified. The appellant moved an application in the pending appeal, for stay of the order of conviction pending appeal. The High Court granted the stay of conviction and subsequently the appellant filed nomination. The respondent raised an objection to the acceptance of nomination, contending that the appellant was disqualified under section 8 of the RP Act. However, the returning officer accepted the nomination. The election of the appellant was challenged by the respondent before the Karnataka High Court on the ground that the appellant was not qualified to contest elections. When this election petition was pending the appellant's appeal against conviction was allowed by the Bombay High Court. However, relying on the decision in *K. Prabhakaran* v *P. Jayarajan*[28] the Karnataka High Court came to the conclusion that the appellant was disqualified to contest election, in view of the fact that on the date of nomination, there was a conviction against the appellant which had not been set aside by the higher court. So the court ordered to set aside the election. But on appeal the Supreme Court took a different approach. Giving over emphasis to the fact that the conviction itself had been stayed by the high court, the Supreme Court arrived at a conclusion that the appellant was not disqualified at the time of filing nominations.

A similar approach has been taken by the Supreme Court in *Navjot Singh Sidhu* v. *State of Punjab*.[29] The facts of the case show that the appellant, a sitting Member of Parliament, was convicted under section 304 of IPC and sentenced to imprisonment for three years. Immediately after the pronouncement of judgment by the high court, he resigned from the membership of the *Lok Sabha*. The appellant filed a special leave petition in which leave was granted and he was released on bail and thus the execution of the sentence imposed upon him was suspended. The appellant also moved an application for suspending the order of conviction passed against him by

27 (2007) 1SCC 673.
28 *Supra* note 26.
29 AIR 2007 SC 1003.

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the high court. It was stated in the application that for maintaining probity and moral values in public life he resigned from the membership of the *Lok Sabha* after his conviction. However, he wanted to remain in public life and therefore, wanted to contest the election again and face the electorate in the changed scenario.

On behalf of the state it was submitted that the appellant having given up his rights under sub section (4) of section 8 of the RP Act and having himself resigned from the membership of Parliament, could not again come back to Parliament, until the appeal was decided in his favour. However the Supreme Court rejected this contention and observed:[30]

> The argument that the appellant having given up his right under sub section (4) of Section 8 should not be permitted to offer himself as a candidate again is wholly misconceived. If a person convicted of any offence enumerated in subsection (1) (2) and (3) of Section 8 of the Act files an appeal within three months he continues to remain a Member of Parliament or Legislature of a State on the basis of protection afforded by sub section (4), but not on any moral authority because the electorate had exercised their franchise prior to the order of conviction and not when he had become a convict. But a person who resigns from the Parliament or the Assembly and seeks a re-election, if elected, will have greater moral authority to represent the constituency.

It was added:[31]

> In the present case the appellant has sought the stay or suspension of the order of conviction passed against him by the High Court on the ground that he was a sitting Member of Parliament on the date of the conviction and though he would not have incurred any disqualification and could have continued to remain as Member of Parliament by merely filing an appeal within three months and the protection would have enured to his benefit till the decision of the appeal but in order to set high standards in public life he immediately resigned from the membership of the Lok Sabha. He now wants to seek a fresh mandate from the electorate and wants to contest the election for membership of the Lok Sabha which is due to take place shortly on account of his resignation. Keeping in view the said fact the present application needs consideration.

It is submitted that the above two decisions of the Supreme Court had nullified the effect of the decision in *K. Prabhakaran* v. *P. Jayarajan*.[32]

30 *Id*. at 1010.
31 *Id*. at 1007.
32 *Supra* note 26.

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Now any person convicted by a court can approach the appellate court and get his conviction suspended and contest election. It may be noted that the Supreme Court itself had taken some effective steps for excluding criminals from the election arena. The direction given to the Election Commission to direct the candidates to furnish the criminal antecedents at the time of filing the nomination was a bold step in this regard. Through the decision in *K. Prabhakaran* the benefit given to the persons who are the members of Parliament and legislative assemblies to escape from the disqualification to contest election imposed by section 8 of the RP Act was confined to till the dissolution of that particular House. However, after the decision in *Ravikant S Patil*[33] any convicted person can contest election till the conviction is affirmed by the Supreme Court, by way of obtaining the suspension of conviction from the appellate court. The decision in *Navjot Singh Sidhu*[34] shows that the Supreme Court is taking a lenient view in the matter of suspension of conviction, so as to enable a person to escape from the disqualification under section 8.

In *Angad Yadava* v. *Election Commission of India*[35] the Allahabad High Court quashed the decision of the returning officer in disqualifying a candidate from contesting elections for a period of six years on the ground of conviction for committing crimes. The decision is absolutely correct since the power of the returning officer is confined to the rejection of nomination paper. The court examined another question regarding the power of the returning officer to review his decision on the eligibility of a person who stands convicted and answered in the negative.

VIII NOMINATIONS

Improper acceptance of nomination paper

According to section 36(2) of the RP Act, 1951 improper acceptance of nomination paper is a ground for setting aside the election, provided the result of the election has been materially affected by such rejection. In *Pothula Rama Rao* v. *Pendyala Venkata Krishna Rao*[36] the contention of the appellant was that the nomination of respondent no. 1 ought to have been rejected since his name was entered in more than one place in the electoral roll. The high court rejected this contention. Applying the docrine formulated in the earlier decision in *Baburao* v. *Manikrao*[37] the Supreme Court affirmed the decision. K.G. Balakrishnan C J observed:[38]

> In that case, a candidate's name was entered in the electoral rolls of two constituencies. This Court held that the mere fact that a person's

33 *Supra* note 27.
34 *Supra* note 29.
35 AIR 2007 All 72.
36 AIR 2007 SC 2924.
37 AIR 1999 SC 2028.
38 AIR 2007 SC 2924 at 2028.

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> name, finds place in more than one constituency, does not automatically entail disqualification under section 16 of the 1950 Act. Be that as it may. The High Court, therefore, rightly held that even if the allegations were accepted as true, that would not constitute improper acceptance of nomination and therefore, would not constitute a ground for declaring the election as void. Para 9 of the election petition was rightly struck of, as not disclosing a cause of action.

Candidate set up by political party

In the matter of filing the nomination paper the question whether the candidate is set up by a political party or not is significant, since under section 33 (1) of the RP Act only one person need to be signed as proposer in the nomination paper submitted by the candidate of a recognized political party. In other cases there shall be ten proposers. In *Pothula Rama Rao* v. *Pendyala Venkata Krishna Rao*[39] the returning officer in the State of Andhra Pradesh accepted nomination of candidate set up by Bahujan Samaj Party, though only one person put his signature in the nomination paper. In the election petition it was contended that since BSP is not a recognized party in the State of Andhra Pradesh the nomination should have been rejected. The Supreme Court rejected this contention and observed:[40]

> But the Election Commission of India recognized BSP as a national party ….the Symbols Order provides that a recognized political party shall either be a national party or a state party. As BSP is recognized as a national party, there is no need for the said party to be recognized as a 'state party.' The term 'recognized political party' in the proviso to sub section (1) of Section 33, refers to a recognized national party as also to a 'recognized state party'. The High Court, therefore, rightly held that para 10 of the election petition, does not disclose any cause of action.

IX ELECTORAL ROLL

The question whether the name of a person is included in the electoral roll of a constituency is crucial in determining the eligibility to contest election. There are elaborate provisions in the RP Act, 1950 dealing with the preparation and revision of electoral roll. Though the Act provides adequate opportunity to get a person's name included in the electoral roll, due to the lapse on the part of the Election Commission the right to be included in the electoral roll may be denied. In *Chigurupalli Prabhakara Rao* v. *Chief Electoral Officer*[41] it was the common case of the petitioners that their

39 *Supra* note 36.
40 *Id* . at 2928-29.
41 AIR 2007 AP 171.

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names were included in the electoral roll of the respective legislative assembly constituencies up to the year 2003 and in the subsequent revision, their names were deleted. All of them submitted their applications to the respective registering authorities for inclusion of their names. In some cases applications were acted upon and names of the applicants were included by the registering authorities, and in other cases applicants approached the high court by filing writ petitions. All the petitioners intended to file their nominations for elections to the legislative councils. When the writ petition was pending the Election Commission issued a circular directing that the voter's list published in the year 2006 shall constitute the basis, and directed postponement of the on going revision of the said lists. Apprehending that their nominations may not be accepted on the ground that their names did not find place in the voters' list of 2006 the petitioners again approached the high court. On behalf of the Election Commission it was contended that unless an electoral roll is published, it does not become operational and any additions or deletions made thereafter, cannot be taken into account for the purpose of elections. However, the high court rejected this contention and observed:[41a]

> Acceptance of such a contention would virtually render the facility created under Section 23, nugatory. The very purpose of enabling the inclusion of a name of the individual in the electoral roll, till the last date of filing the nominations, is to enable him to take part in the election in the concerned constituency. Further, the publication is required only when the electoral roll is prepared for the first time or revised under Section 21. The very fact that the Parliament did not provide for publication of the corrections or inclusions under Sections 22 and 23, respectively, indicates that they become enforceable without any publication. Whenever any correction under Section 22 or inclusion under section 23 takes place, it dates back to the publication of the concerned electoral roll. Therefore, the necessity as to correction or exclusion, once again, does not arise.

It appears that the approach of the court is correct. Section 21 of the RP Act, 1951 is related to the preparation and revision of electoral roll. But section 22 deals with correction of entries in the electoral roll and section 23 is on inclusion of names in the electoral roll. Under section 21 the process is one initiated by the Election Commission and under section 22 the process is one initiated by the elector. In short the proceeding under section 21 is the exercise of discretionary power of the commission in relation to revision of electoral roll and proceeding under section 23 is an attempt on the part of the elector to exercise his right to be included in the electoral roll. So it is the duty of the Election Commission to conclude the proceedings under section 23 without any delay since sub section (3) of

41*a* *Id.* at 175.

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section 23 prohibits any amendment, transposition or deletion of any entry in the electoral roll of any constituency after the last date for making nominations for election in that constituency. In the present case it appears that there is a total lapse on the part of the commission in performing their statutory duty. However, the interference on the part of the high court had enabled petitioners to exercise their right to be included in the electoral roll.

In *Shyam Sundari* v. *State of UP*[42] a public interest litigation was filed before the Allahabad High Court seeking the intervention of the court for including the name of certain persons in the electoral roll. However, the petition was dismissed pointing out that the non inclusion or exclusion of names in the voters list is permissible after the date of making the nominations.

X ELECTION DUTY

During elections members of civil service and employees of public undertakings and nationalized banks will be deputed for election duty. Absence from election duty may be treated as a serious misconduct having the consequence of dismissal from service. In *Govt of AP* v. *Mohd. Taher Ali*[43] the Supreme Court emphasized the need to take strong disciplinary action against persons who are abstaining from election duty. The facts of the case show that departmental action was taken against a police man who had withdrawn from election duty. After conducting the enquiry compulsory retirement was ordered as punishment. The affected person approached the administrative tribunal. The tribunal did not interfere with the finding of fact but remitted the matter to the disciplinary authority for reconsideration on the question of punishment. Though the high court affirmed the decision of the tribunal the Supreme Court took a different view. It was observed:[44]

> It is an admitted position that the respondent was appointed on election duty but he absented himself from election duty. It seems that the respondent did not consider the election duty to be an important business which is very important for the whole nation. The respondent was appointed on election duty and was deputed to take security arrangement but absented himself from duty. This is a very serious lapse on the part of the respondent. The police force is a disciplined force and the respondent was detailed for such an important duty of election. He absented himself from election duty. Such kind of serious lapse cannot be treated lightly. It is a very important function and if the incumbent avoided the duty of election, he cannot escape from the liability of the penalty of compulsory retirement. We fail to understand the reason for the Administrative Tribunal or for the High Court to have remitted the matter back to

42 AIR 2007 All 187.

43 (2007) 8 SCC 656.

44 *Id.* at 657.

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the disciplinary authority for reconsideration of the punishment of compulsory retirement imposed on the respondent.

The decision clearly establishes that the court is very particular in giving full support to the smooth conduct of election process. Had a lenient view been taken it may cause to create a tendency among the civil servants to abstain from election duty.

XI ELECTION TO LOCAL BODIES

In the year under survey there is substantial increase in the number of reported cases relating to elections to local bodies. The general approach of the judiciary is to apply principles of general elections for resolving the disputes relating to local body elections.

Electoral rolls

The Representation of the Peoples Act, 1950 contains elaborate provisions regarding the inclusion and exclusion of names in the electoral roll. According to section 20 of the Gujarat Panchayats Act, 1993 "the electoral roll of Gujarat Legislative Assembly prepared under the provisions of the Central Act, for the time being in force for such part of the constituency of the Assembly as included in the relevant electoral division, shall, subject to any amendment" be the list of voters of that electoral division. In *Bashir Adamji Adat* v. *State of Gujarat*[45] the election petition contained the allegation that names of 597 persons were deleted from the electoral roll without giving individual notice as prescribed under section 22 of the RP Act, 1950. The Gujarat High Court treated this action illegal and directed to conduct the elections on the basis of the earlier electoral roll.

Eligibility to contest in reserved seats

In *Manju* v. *State of H.P.*[46] the Himachal Pradesh High Court had the occasion to consider the question whether a non tribal woman who married a person belonging to scheduled tribe was entitled to the benefit of reservation of seats in the local body election available to the members of the scheduled tribes. Applying the earlier decisions of the Supreme Court the question was rightly answered in the negative .

Eligibility to become gram mukhiya

In *Shailendra Pratap Singh* v. *State of Bihar*[47] the Patna High Court considered the question whether for election as *mukhiya* of *gram panchayat*, the candidate should be the voter of that *gram panchayat*. Citing article 243 C (2) of the Constitution, which provides that all seats in the

45 AIR 2007 Guj 161
46 AIR 2007 H.P. 74
47 AIR 2007 Pat 155

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panchayat shall be filled by persons chosen by direct election from territorial constituencies in the *panchayat*-area, the Patna High Court answered the question in the affirmative.

Pre election disqualification

It is an established principle of law that the question regarding the qualifications and disqualifications of candidate shall be settled through election petitions. However, there may be disputes relating to disqualifications, incurred after the election. Usually, the state may prescribe mode of determination of post election disqualifications. In *Sameera Banu* v. *State of Rajasthan*[48] the question was whether the issues relating to pre election disqualification could be resolved through the manner prescribed by law for resolving the questions relating to post election disqualifications. The full bench of the Rajasthan High Court by majority took the view that the pre election disqualification could be adjudicated only in election petition.

Improper rejection of nomination paper

Improper rejection of a nomination paper by the returning officer is a ground for setting aside the election. In *Ram Narain* v. *Goverdhan Singh*[49] the Rajasthan High Court considered the question whether the rejection of nomination paper at the time of scrutiny alone could be treated as improper rejection of nomination paper. The facts of the case show that in the election to the post of *sarpanch* of *gram panchayat* the nomination of the respondent was accepted by the returning officer. However, his name was not included in the final list of contesting candidate. The contention of the returning officer was that the respondent had withdrawn his nomination. During the trial of election petition it was proved that in the withdrawal form the forged signature of the respondent was used. So whether the withdrawal of nomination using forged signature would come within the purview of improper rejection of nomination was the issue before the court. The court took the view that the improper rejection of nomination would mean improper exclusion of any candidate from contesting elections. It seems that a purpose oriented interpretation has been given by the court. If literal interpretation is given to the concept of improper rejection of nomination there is no need to include this sort of things within the purview of this concept since there is no proof to show the positive action on the part of the returning officer to reject the nomination. However ultimate effect was the denial of the right to contest election by the person. It appears that the court had arrived at a conclusion taking into account the basic objective of election law.

48 AIR 2007 Raj 168.
49 AIR 2007 Raj 217.

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Right to vote

It is an accepted principle of election law that once the name of the person has been included in the electoral roll he can exercise his right to vote and his qualification to be included in the electoral roll cannot be questioned either when he tries to cast his vote or when he stands for election or even after election is over. The Punjab and Haryana High Court reiterated this principle in *Joginder Kaur* v. *Anju*[50] in the context of election to municipal council and rejected the contention that the votes of two persons should be rejected on the ground that they did not attain the minimum age for being included in the electoral roll.

Manner of voting

In the election to the posts of chairman of the local bodies the rules may prescribe the manner of voting. The question may arise whether the votes marked not in accordance with the mode prescribed by the rules may be rejected, even if the intention of the voter is clear from the ballot. In *Balbir Bagga* v. *Financial Commissioner (Revenue)*[51] the rules governing the election to the post of chairman and vice chairman of *zilla parishad* prescribed that the voters should put cross (x) against the candidate for whom he wishes to vote. However, there was one vote cast by putting horizontal line across the cross mark. The Himachal Pradesh High Court took the view that the vote should be rejected on the ground that it had not been cast in accordance with the provisions of relevant rule and it contained visible representation by which elector could be identified. The view appears to be in tune with the established principles of election law.

Recount of votes

In *Baldev Singh* v. *Shinder Pal Singh*[52] in the election held for *sarpanch* and *panchas* of *gram panchayat* under the Punjab Panchayat Raj Act, 1994, total votes polled were shown to be 836. The returning officer found that both the appellant and the first respondent had polled 412 votes each. Respondent 2 was said to have got 4 votes and 8 votes were rejected. Thereupon allegedly, a recounting of votes was done. The result of recounting was the same as that of the first one. In terms of rule 35 of the Punjab Panchayat Election Rules, 1994 the returning officer drew lots with the written consent of both the candidates i.e., the appellant and respondent I. The appellant was declared elected as *sarpanch* of the *gram pamnchayat*. However, immediately prior thereto, the supporters of the first respondent allegedly raised a hue and cry, as a result whereof, the returning officer could not enforce his decision. He immediately sent a fax message to the deputy commissioner, seeking his advice in the matter. The deputy commissioner forwarded the said fax message to the sub-divisional magistrate for necessary

50 AIR 2007 P&H 144.
51 AIR 2007 HP 83.
52 (2007) 1 SCC 341.

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action, who , in turn informed him that the decision taken should be enforced. An endorsement to that effect was also made by him. The result of the election was thereafter declared. The respondent then filed an election petition challenging the election and, *inter alia*, contending that only 821 votes had been polled out of which the appellant had secured only 397 votes whereas he secured 412 votes; that two votes were kept aside illegally and unjustly by the presiding officer; that two votes were initially counted as valid but were later on declared as invalid, and that rejection of eight votes was improper. The respondent also averred that he had requested for recounting of votes but the returning officer/polling officer did not pay any heed thereto and thus mandatory requirement of rule 35 of the rules had not been complied with.

The tribunal ignoring the oral evidence of the responsible officers, directed recounting opining that "There is no documentary evidence regarding conducting of toss. Neither is there consent of the parties nor any 'parchi' which shows that toss was conducted. Both the petitioner and Respondent 1 allegedly secured 412 votes to conclusive evidence and satisfaction of the petitioner. Therefore, in the circumstances it has become necessary to have recounting of votes in the presence of both the parties, to put the issue beyond doubt as also to meet the ends of justice". Upon recounting, the first respondent was stated to have received 412 votes, whereas the appellant was said to have received 398 votes. The first respondent was declared to have been elected. The appeal preferred by the appellant was dismissed by the high court. However, the Supreme Court set aside the decision of the tribunal and the high court. Examining the facts of the case it was held that there was no case for ordering recounting.

Election Commission

Though the Constitution itself confers wide powers on the State Election Commission more powers may be conferred by the relevant state statutes dealing with local body elections**.** In *Punam Kumari* v. *State Election Commission , Bihar*[53] the Patna High Court had an occasion to consider the question whether the State Election Commission can refuse to exercise the statutory power vested in it. The facts of the case disclose that Bihar Panchayat Raj Act, 1993 conferred jurisdiction on the State Election Commission to decide the question whether a member of *panchayat* at any level or *mukhiya* of *gram panchayat* was before the election or after the election has been subjected to any disqualifications mentioned in sub-section (1) of section 136. However, when a complaint containing the allegation that a candidate was disqualified under section 136 was filed before the State Election Commission, an order was issued directing the petitioner to go before the election tribunal. The Patna High Court quashed the decision of the commission pointing out that the Election Commission

53 AIR 2007 Pat 186.

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"cannot shrink its responsibility by relegating a person to the Election Tribunal when the legislature has conferred jurisdiction on the Commission itself".[54]

Election petition

The decision of the Supreme Court in *Baldev Singh* v. *ShinderPal Singh*[55] may be a land mark in the history of election petitions relating to local body elections owing to the reasons that the Supreme Court had formulated some guiding principles regarding the procedural aspects. S. B. Sinha J highlighted the need to verify the election petitions strictly in terms of the provisions of the Code of Civil Procedure and observed:[56]

> The verification of an election petition, it was trite, must be done strictly on terms of Order 6 Rule 15 of the Code of Civil Procedure. It was, thus, incumbent on the part of the respondent herein to specifically state as to which statements made in the election petition were true to his knowledge and which are true to his belief. A factual averment made in the election petition cannot be both true to the knowledge and belief of the deponent.

The court further held that in the absence of cross examination of the witness who examined themselves the averments made in the election petition must be deemed to have been admitted.

XII CONCLUSION

In the last few years judiciary has been playing a creative role in ensuring free and fair elections. The involvement of judiciary intending to promote the spirit of democracy through smooth working of the electoral system is not confined to the adjudication of election disputes alone. There are several instances in which the writ jurisdiction of the high court and the Supreme Court has been used for conduct of election so as to ensure true representation of the people. In the year under survey though this trend is continued there is an instance of aberration. In the matter of disqualification on the ground of conviction for crimes the new escape route provided in the form of suspension of conviction is not in tune with the general approach that role of criminals in the election process should be reduced. However, in all other areas the judicial decisions clearly establish the commitment of judiciary in making the electoral system more effective so as to make the democratic form of governance more fruitful.

54 *Id*. at 187.
55 *Supra* note 52.
56 *Id.* at 350.

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