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ELECTION LAW

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I INTRODUCTION

JUDICIAL DECISIONS of the Supreme Court during the year 2009 have been surveyed especially with a view to find out as to how to strengthen the electoral system by removing the defects, deficiencies, disabilities or deterrents that come to light during the process of rendering justice in conflict situations. Invariably, most of the pitfalls that have come to the fore relate to what one may term as 'operational lapses' that can be remedied with requisite training to the personnel involved in the electoral process, as distinguished from systemic failures requiring tinkering with the law or legal system itself. Such a scenario can be abstracted as under.

In *Subramanian Swamy* (*Subramanian Swamy* v. *Election Commission of India*),[1] the apex court examined whether a political party had the right to retain permanently its initially allotted 'reserved symbol'. While doing so, a situation had been noticed, which needs exploration by the Election Commission of India or Parliament, or both, for that cannot be satisfactorily answered by the existing legal framework. Under the existing provisions of the Election Symbols (Reservation and Allotment) Order, 1968, once a political party is de-recognized because of its dismal performance at elections, it loses right to exclusive claim to 'reserved symbol' despite the fact that that symbol has become completely merged, fused or identified with that party. The pointed question in this respect, therefore, is, whether such a symbol should be frozen indefinitely and thereby barring its use by any other person or political party in future, or should it be made available as 'free symbol'. The Supreme Court left this question 'open' to be answered by the Election Commission of India.

Uttamrao (*Uttamrao Shivdas Jankar* v. *Ranjitsinh Vijayasinh Mohit-Patil*)[2] is another judgement of the Supreme Court which deals with the exercise of wide statutory powers by the High Court and the returning

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1 AIR 2009 SC 110; see *infra,* part II.

2 AIR 2009 SC 2975; see *infra,* part III.

officer while rejecting a nomination paper under section 100(1)(c) of the Representation of the People Act of 1951 (Act of 1951). In this respect, the judgment is highly instructive. It gently reminds the High Courts about the pivotal role they are required to play as a court of original jurisdiction, as distinguished from the appellate jurisdiction, while trying an election petition.[3] Even in case of appellate jurisdiction, the judgment emphasises the need for the judges to update their understanding in the light of expanding principles of law.[4] For the returning officers, a close reading of *Uttamrao* presents a critique which is required to be understood, appreciated and assimilated by them. It informs them that as a statutory authority, they exercise quasi-judicial powers while rejecting the nomination paper under the Act of 1951.[5] This decision also educates them about the functional purpose of the principle of presumption in favour of validity of nomination paper, and how the non-appreciation of the same is likely to frustrate the objective of the Act of 1951.[6] Since the returning officer is obliged to examine the nomination papers and decide all objections which may be made to any nomination after holding a "summary inquiry" as he thinks necessary for the purpose under section 36(2) of the Act of 1951, it is imperative for him to comprehend various dimensions of this function. *Uttamrao* tells him clearly how not to discharge such a function.[7]

In *Rekha Rana* (*Rekha Rana, Smt.* v. *Jaipal Sharma*),[8] the Supreme Court crystallized various principles showing how, in what manner, and to what extent, a legitimate balance could be maintained between the two valuable concepts, namely secrecy of votes and purity of election. Such a balancing lesson, if clearly understood, adopted and applied in practice, should discourage frivolous litigation and thereby prevent unnecessary burdening of the apex court.

The apex court's decision in *Fulena Singh* (*Fulena Singh* v. *Vijay Kumar Sinha*)[9] is a reminder to the High Court trying election petition of the "fairly well-settled" principle that hardly needs any "restatement", namely that inspection of election papers such as packets of unused ballot papers with counterfoils attached thereto; the packets of used ballot papers whether valid, tendered or rejected; the packets of the marked copy of the electoral roll, *etc.* should not be permitted as a matter of course, for that would lead to making a roving enquiry in order to fish out the materials and derive support to one's own case. For this, a clear case is required to be made out so that, seemingly, the gloomy prospect of 'roving enquiry' is avoided.[10]

3 See *infra* notes 47-51 and the accompanying text.
4 See *infra* note 52 and the accompanying text.
5 See *infra* note 54 and the accompanying text.
6 See *infra* note 59-63 and the accompanying text.
7 See *infra* note 74 and the accompanying text.
8 AIR 2009 SC 2946; see *infra*, part IV.
9 AIR 2009 SC 2247; see *infra*, part V.
10 *Ibid*.

The Supreme Court in *G.S. Iqbal* (*G.S. Iqbal* v. *K.M. Khadar*)[11] clinched the issue of improper acceptance of nomination paper solely by raising perhaps the most crucial question, whether it materially affected the result of the returned candidate. In the instant case, the margin of votes between the returned candidate and the defeated candidate was as big as it seemed unbridgeable.[12] Noticing the 'desperate' nature of submissions made by the election petitioner, the Supreme Court not only dismissed the appeal but also burdened the petitioner with heavy costs that were quantified at Rs. 25,000/-. This is just another mode of discouraging irresponsible litigation.

Finally, in *Baldev Singh Mann* (*Baldev Singh Mann* v. *Surjit Singh Dhiman*),[13] the Supreme Court explored the issue as to when does obtaining assistance from government servants become a charge of corrupt practice under section 123(7) of the Act of 1951. For this purpose, the apex court in the first instance usefully spelled out the underlying principles of the "well-settled" law,[14] including the one that presages that the appellate court should be slow in interfering with the judgment of the High Court particularly in election matters wherein it has original jurisdiction and as the benefit of watching the demeanour or witnesses and forming first-hand opinion of them in the process of evaluation of evidence.[15] However, the parting message of *Baldev Singh Mann* is that in democracy, the will of the people is paramount and, therefore, the election of the returned candidate should not be lightly interfered with. However, such a proposition is not unqualified, for it is also equally imperative that purity of election process is fully safeguarded and maintained.[16]

II RIGHT OF A POLITICAL PARTY : TO RETAIN PERMANENTLY ITS ALLOTTED RESERVED SYMBOL

Integrity of symbol and political party

Symbols are a critical component of the Indian electoral system in which elections are fought by various political parties on the basis of their respective symbols. In fact, a symbol becomes so much ingrained in the psyche of the people that it truly represents a political party. In other words, a political party is known and identified by the millions of uneducated or illiterate people who exercise their right to franchise in favour of a particular party not as much on the basis of its pronounced policy and programmes as they do on the basis of its symbol. In functional terms, a

11 AIR 2009 SC 2116; see *infra*, part VI.
12 It was to the tune of 178610, see *infra* note 120 and the accompanying text.
13 AIR 2009 SC 1045; see *infra*, part VII.
14 These principles have been abstracted, see *infra* notes 129-235 and the accompanying text.
15 See *infra* note 144 and the accompanying text.
16 See *infra* note 145 and the accompanying text.

political party and its symbol become synonymous with its followers and supporters.

Initially, elections were fought by the various political parties, which were fewer in number, on the basis of symbols designed by them reflecting their own thrust of the political system. In that scenario, there arose no such question as to whether or not a political party can retain its symbol permanently. This continued until the year 1968, when a need was felt to regulate the increasing number of political parties and their symbols for maintaining the purity of elections both at the national and state levels. Consequently, the Election Commission of India in exercise of powers conferred upon it under article 324 of the Constitution of India read with section 29A of the Act of 1951 and rules 5 and 10 of the Conduct of Elections Rules, 1961, promulgated the Election Symbols (Reservation and Allotment) Order, 1968 (Symbols Order).

The Symbols Order classifies for the first time all 'political parties'[17] into two broad categories: 'recognized political parties' and 'unrecognized political parties.[18] Furthermore, a recognized political party, which may be either a national party or state party, has now gained a 'new concept'. This is so in respect of at least in two main respects. One, a recognized political party has now been defined in terms of an objective criterion: it gets the status of a national party or a state party if it fulfils certain conditions in terms of securing a certain minimum percentage of total valid votes polled in some minimum number of states in addition to certain number of returned candidates from one or more states.[19] Two, a recognized political

17 Under clause (h) of paragraph 2 of the Symbols Order, a 'political party' means an association or body of individual citizens of India registered with the commission as a political party under section 29A of the Representation of the People Act, 1951.

18 See Symbols Order, para 6.

19 *Id*., para 6A, which lays down the conditions for recognition as a National Party, provides that that a political party shall be treated as a recognized National Party if, and only if, either (A)(i) the candidates set up by it, in any four or more States, at the last general election to the House of the People, or to the Legislative Assembly of the State concerned, have secured not less than six percent of the total valid votes polled in their respective States at the general election; and (ii) in addition, it has returned at least four members to the House of the People at the aforesaid last general election from any State or States; or (B)(i) the candidates have been election to the House of the People, at the last general election to that House, from at least two percent of the total number of parliamentary constituencies in India, any fraction exceeding one-half being counted as one; and (ii) the said candidates have been elected to that House from not less than three States. Likewise Paragraph 6B, which down the conditions for recognition as a State Party, provides that that a political party, other than a National Party, shall be treated as a recognized State Party in a State or States, if, and only if either (A)(i) the candidates set up by it, at the last general election to the House of the People, or to the Legislative Assembly of the State concerned, have secured not less than six percent of the total valid votes polled in that State; and (ii) in addition, it has returned at least two members to the Legislative Assembly of the State at the last general election to that Assembly; or (B) it wins at least three percent of the total number of seats in the Legislative Assembly of the State, (any fraction exceeding one-half being counted as one), or at least three seats in the Assembly, whichever is more, at the aforesaid general election.

party becomes instantly entitled to the allotment of reserved symbol,[20] that is, the symbol that is necessarily reserved for the exclusive allotment to the candidates of a recognized political party.[21]

In fact, the Symbols Order specifically deals with the issue of choice of symbols by candidates of national and state parties and allotment thereof. It clearly stipulates that a candidate set up by a national party at any election in any constituency in India shall choose and shall be allotted the symbol reserved for that party and no other symbol.[22] Similarly, a candidate set up by a state party at an election in any constituency in a state in which such party is a state party, shall choose, and shall be allotted the symbol reserved for that party in that state and no other symbol.[23]

The proximity of a reserved symbol to a recognized political party is realized by the Symbols Order to the extent that it expressly provides that a reserved symbol shall not be chosen by, or allotted to, any candidate in any constituency other than a candidate set up by a national party for whom such symbol has been reserved or a candidate set up by a state party for whom such symbol has been reserved in the state in which it is a state party even if no candidate has been set up by such national or state party.[24] Such proximity has been further recognized and strengthened under the Symbols Order in the following three distinct ways:

(i) By imposing restriction on the allotment of symbols reserved for state parties in states where such parties are not recognized.[25]

(ii) By granting concession to candidates set up by a state party at elections in other states or union territories in which it is not a recognized state party.[26]

(iii) By granting a concession to candidates set up by an unrecognized party which was earlier recognized as a national or state party. This has been done by inserting a new paragraph 10A in the Symbols Order,[27] which provides:

> If a political party, which is unrecognized at present but was a recognized national or state party in any State or Union Territory not earlier than six years from the date of notification of the election, sets up a candidate at any election in a constituency in any State or Union Territory, whether such party was earlier recognized in that State or Union Territory or not, then such candidate may, to the exclusion of all other candidates in the

20 *Id*., para 5(1) recognizes two kinds of symbols which may be either reserved or free.
21 *Id*., para 5(2).
22 *Id*., para 8(1).
23 *Id*., para 8(2).
24 *Id*., para 8(3).
25 *Id*., para 9 (substituted by notification No. 56/97/Judl-III, dated 15.12.1997).
26 *Id*., para 10 (substituted by notification No. 56/97/Judl-III, dated 8.6.1999).
27 *Vide* Notification No. 56/2000/Judl-III, dated 1.12.2000.

constituency, be allotted the symbol reserved earlier for that party when it was a recognized National or State Party, notwithstanding that such symbol is not specified in the list of free symbols for such State or Union Territory, on the fulfilment of each of the following conditions, namely:

(a) That an application is made to the Commission by the said party for the exclusive allotment of that symbol to the candidate set up by it, not later than the third day after the publication in the Official Gazette of the notification calling the election;

(b) that the said candidate has made a declaration in his nomination paper that he has been set up by that party at the election and that the party as also fulfilled the requirements of clauses (b), (c), (d) and (e) of paragraph 13 read with paragraph 13A in respect of such candidate; and

(c) that in the opinion of the Commission there is no reasonable ground for refusing the application for such allotment;

provided that nothing contained in this paragraph shall apply to a candidate set up by the said party at an election in any constituency in a State or Union Territory where the same symbol is already reserved for some other National or State Party in that State or Union Territory.

Constitutionality of symbols order

The inserted paragraph 10A of the Symbols Order by the Election Commission of India came to be challenged before the Supreme Court in a special leave to appeal against the judgment of the High Court of Delhi in *Subramanian Swamy*.[28] In this case, the appellant-petitioner is the President of the Janata Party, which came into existence in the year 1977. Once it remained a ruling national party in Parliament and was also a recognized state party in a number of states with a reserved symbol of *chakra* and *haldar* (a farmer carrying plough within a wheel). However, it lost its status as a national party because of its poor performance in general elections in 1996, and by an order dated 27.9.2000 of the Election Commission, it ceased to be a recognized political party. As a result of de-recognition as a recognized political party, it lost its right to have exclusive symbol under the relevant provisions of the Symbols Order.

In this backdrop, the major thrust of the appellant was that paragraph 10A makes reservation of the reserved symbol for a de-recognized political party only for a limited period of six years, which is 'arbitrary' and as such did not pass the acid test of article 14 of the Constitution of India.

28 *Supra* note 1, *per* V.S. Sirpurkar, J (for himself and Ashok Bhan, J).

Accordingly, he pleaded that paragraph 10A should be struck down as unconstitutional and that "the Symbols Order should be amended so as to enable the once recognized political parties of National or State level to retain their reserved symbols permanently."[29]

The Supreme Court did recognize the value of a symbol to a political party when it observed: "There can be no doubt that a symbol particularly in case of an established political party is not only having a political implication but has also an emotional angle attached to it."[30] Nevertheless, the claim to reserved symbol was available only for the recognized political parties.[31] It was further asserted by the court that the "concept of recognition is inextricably connected with the concept of symbol of that party."[32] This implies, if there remains no recognition of a political party as envisaged under paragraphs 6A or 6B, and that the case is also not covered under paragraph 10A of the Symbols Order, the claim to reserved symbol is also lost. Such a proposition is "perfectly in consonance with the democratic principles."[33] In view of this, the apex court decisively held that a party "which remain only in records can never be equated and given the status of a recognized political party in the democratic set up."[34]

Besides, the Supreme Court found no irrationality or arbitrariness in providing six years' time as an additional period for retaining the exclusive symbol under paragraph 10A of the Symbols Order. This was held "for the simple reason that within that period there is bound to be one or more general elections on the national level."[35] "So also," the Supreme Court added:[36]

> [I]f any political party has lost its status in the State Elections, apart from the fact that up to the next general elections, there is bound to be another opportunity by way of fresh elections within six years. It is on this rationale that the period of six years is provided. This is apart from the fact that in case of Janata Party it continued to have and enjoyed the status of said National or State Party for the purposes of next general elections due to the saving clause, vide clause 7 (sic). Under such circumstances providing of six years' period in clause 10A (sic) is perfectly reasonable and cannot be said to suffer from the vice of arbitrariness.

29 *Id.* at 112 (para 5). In fact, initially this was the proposal made by the appellant before the Election Commission. On 14.7.2005, this proposal was refused by the commission relying on the judgment of the Supreme Court in *Janata Dal Samajwadi* v. *Election Commission*, AIR 1996 SC 577.

30 *Id.* at 115 (para 12).

31 *Id.* at 116 (para 14).

32 *Id.* (para 15).

33 *Id.* at 116 -17 (para 15).

34 *Ibid*.

35 *Id.* at 117 (para 17).

36 *Ibid*.

Whether symbol a 'property' of political party

The Supreme Court in *Subramanian Swamy* also dealt with the issue whether the reserved symbol amounted to a 'property' and, therefore, a political party could be deprived of the same.[37] The court's response on this count was:[38]

> A symbol is not a tangible thing nor does it generate any wealth, it is only the insignia which is associated with the particular political party so as to help the millions of illiterate voters to properly exercise their right to franchise in favour of the candidate of their choice belonging to a particular party.... However, all that it provides is the essential association that it has with a particular party. The concerned party would have a legal right to exclusively use the same but that is not, in our considered opinion, a property of the party and, therefore, the Election Commission which is required to ensure free, fair and clean elections have every right to deprive a particular party with a dismal performance of that symbol.

Thus, under the Symbols Order, the concept of reserved symbols, unlike free symbols, is integrally linked with the concept of recognized political party. If the recognized political party because of its dismal performance is de-recognized, it is no more entitled to the exclusive privilege of having allotted 'reserved symbol'. The relationship between the two is snapped, resulting into 'the reserved symbol' falling into the class of 'free symbols'.[39] In view of this perspective, the appellant's claim to permanency of the reserved symbol became untenable.

A lingering question

There is, however, one lingering question that remains to be considered. Once it is realized that there is close proximity between the recognized political party and the allotted reserved symbol, and such a proximity grows with the passage of time. This has been instanced in the case of Janata Party which enjoyed this closeness for more than 20 years. The question, therefore, is if such a party loses recognition because of its dismal performance at the elections, should the 'reserved symbol' become a 'free symbol' to be allotted to anyone? The Symbols Order recognises only two classes of symbols, namely, reserved and free. It does not envisage any third category. Should there be a third category of 'frozen' symbols; that is, the symbols which should not be allotted to anybody except the original

37 *Id.* at 118 (para 22).
38 *Id.* at 119 (para 23).
39 *Id.* at 117 (para 18): "[I]f a particular symbol is not a reserved symbol, meaning thereby that it is not meant for a recognized political party, such symbol automatically become a free symbol...."

political party in case it regains its status of recognized national or state party. In *Subramanian Swamy*, the Supreme Court left this question open to the appellant to raise it before the Election Commission.[40]

III IMPROPER REJECTION OF NOMINATION PAPERS

Ambit of respective statutory powers of returning officer and High Court

This issue came to the Supreme Court by way of an appeal against the judgment of the Bombay High Court in *Uttamrao Shivdas Jankar*.[41] This case reveals rather a queer fact situation. The appellant filed his nomination papers in the prescribed form in the office of the returning officer within the stipulated time period. As is required, his name was proposed by ten voters of the constituency. All the proposers signed the nomination papers in the presence of each other as also that of the appellant. The candidates took part in the scrutiny of nomination papers. At the time of scrutiny, however, the respondent raised an objection to the nomination of the appellant on the premise that two named proposers out of ten had not signed the nomination papers. A written objection to the same effect was also filed before the returning officer. Interestingly, both the named proposers reinforced the assertion of the respondent by submitting letters containing identical contentions that they had not signed the nomination papers of the appellant and, therefore, the same should be rejected. As if to buttress their stand, they also filed affirmed affidavits contending, *inter alia*, that their signatures in the nomination papers were forged.

In response to the above, the appellant filed three affidavits; first, affirmed by himself, second, jointly affirmed by five of his proposers; and third, affirmed by the brother of one of the two proposers who stated that their signatures were (not) forged. He also adduced the 'attendance sheets' (bearing the signatures of the two said proposers) of the local municipal council of which the two proposers were the members, for showing the genuineness of their signatures.

The returning officer, however, noting the express denial of the two said proposers, supported by their sworn affidavits, and comparing their signatures with the adduced sample document, held that the signatures of the two proposers were not genuine. Accordingly, the nomination paper of the appellant was rejected. By a separate order, on similar ground, the nomination of another election candidate was also rejected. The third election candidate withdrew his candidature. Consequently, the respondent was declared elected unopposed in terms of section 53(2) of the Act of 1951 read with rule 11(1) of the Conduct of Election Rules, 1961. This eventually led the appellant to file an election petition for getting the election of the respondent declared null and void on the ground that his

40 *Id.* at 119-120 (para 24).

41 *Supra* note 2, per S.B. Sinha, J (for himself and on behalf of Mukundakam Sharma, J).

nomination paper was "improperly rejected"[42] or that the result of the election, insofar as it concerned the respondent (the returned candidate) had been materially affected by "non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act."[43]

The pivotal point for consideration before the Bombay High Court was whether the enquiry conducted by the returning officer resulting into the rejection of petitioner-appellant's nomination was in accordance with the provision of section 36(2)(c) of the Act of 1951,[44] which specifically requires him to determine the 'genuineness' of the signatures of the proposers on the nomination papers. However, during the course of arguments, the counsel of the appellant focused his challenge to the very 'decision-making process' of the returning officer. In this respect, the question arose whether the appellant could still raise the contention that the signatures of the named proposers were "in fact genuine." This question was answered in the negative by the High Court, and, thus, the election petition was dismissed by opining that the returning officer had not committed any error in his decision-making process in rejecting the said nomination paper. The main reasons adduced by the High Court can be abstracted as follows:[45]

(a) In view of the difference in two sets of signature, albeit slight', the returning officer was right in rejecting the appellant's nomination.

(b) The returning officer was well within his right to adopt the approach of relying on the statement made by the proposers before him in person in preference to the affidavits of the parties.

(c) The standard of interference in the decision-making process of the returning officer is the same 'as comes within the purview of the power of judicial review of the high court.'

(d) It appears that the adoption of the standard of 'judicial review' in the dismissal of election petition led the High Court to observe:

> "While I intend dismissing the petition, I wish to make it expressly clear that my decision to dismiss this petition ought not to be construed as my having disbelieved the Petitioner's case … that the said two proposers had in fact signed his nomination papers or my having believed that Respondent's case or the case of the said two proposers that they had not signed the Petitioner's nomination forms."

42 Act of 1951, section 100 (1) (c).
43 *Id*. section 100(1)(d)(iv).
44 This was one of the issues framed by the high court for deciding the election petition, see *Uttamrao* at 2978 (para 13).
45 *Id*. at 2982 (para 24).

The appellant, in the exercise of his statutory right under section 116A of the Act of 1951,[46] preferred an appeal in the Supreme Court against the judgment of the High Court. The apex court allowed the appeal holding the decision of the High Court to be 'unsustainable' on the following critical counts:

(a) Construction of the provision, 'improper rejection of any nomination,' as envisaged under section 100(1)(c) of the Act of 1951 providing a ground for declaring an election void

> The implication of the provision, 'improper rejection of any nomination,' is of wide amplitude. This is essentially for two reasons. One, the High Court while deciding an election petition under the Act of 1951 acts as a court having original jurisdiction. "It should be borne in mind," cautioned the Supreme Court in *Birad Mal Singhvi*,[47] "that the proceedings in an election petition are not in the nature of appeal against the order of the returning officer."[48] "It is an original proceeding."[49] In this respect, the amplitude of its powers is extremely wide, and the court is expected to take into account every piece of evidence that is necessary to render justice. It is open to the election petitioner to place material before the High Court to show that the candidate who was qualified and his nomination papers were improperly rejected.[50] A plain reading of the provision, "improper rejection of a nomination," "would not mean that for the said purpose an election petitioner can only show an error in the decision making process by a Returning Officer but also the correctness of the said decision."[51]

Two, even if the court is acting as an appellate court and exercising the power of judicial review, the ambit of its power is not limited: "Even in applying the standard of judicial review, we are of the opinion that the scope thereof having been expanded in recent times, *viz.* other than, (i) illegality, (ii) irrationality and (iii) procedural impropriety, an error of fact touching the merit of the decision *vis-a-vis* the decision making process would also

46 Under the provisions of section 116A of the Act of 1951, it is expressly provided that notwithstanding anything contained in any other law for the time being in force, an appeal shall lie to the Supreme Court on any question (whether of law or fact) from every order made by the high court, *inter alia*, 'dismissing the election petition" under section 98 of the Act of 1951.

47 *Birad Mal Singhvi* v. *Anand Purohit* (1988) Supp SCC 604, cited in *Uttamrao* at 2984 (para 28); see also, *Sushil Kumar* v. *Rakesh Kumar* (2003) 8 SCC 673; *Pothula Rama Rao* v. *Pendyhala Venkata Krishna Rao* (2007) 11 SCC 1.

48 *Ibid*.

49 *Ibid*.

50 *Ibid*.

51 *Uttamrao* at 2982 (para 27).

come within the purview of the power of judicial review,"[52] Be that as it may, improper rejection of nomination paper entails serious consequences because in that case the High Court while acting as election tribunal has no other option but to set aside the election of the winning candidate. For this reason alone, the High Court is required to "take within its umbrage not only the decision making process but also the merit of the decision."[53]

(b) Returning officer, as a statutory authority, exercises quasi-judicial power while rejecting the nomination paper under the Act of 1951

This is so because, while exercising powers under section 36 of the Act of 1951, which deals with the scrutiny of nomination, the statute mandates the returning officer to take a "decision."[54] In order to effectuate this purpose, the Election Commission of India has issued a *Handbook for Returning Officers*, containing detailed instructions, which, being statutory in nature, are binding on the returning officers.[55] These instructions, *inter alia*, provide as to how the scrutiny of nominations is to be carried out by them.[56] It provides, for instance, how the objections are to be met by holding a summary enquiry:[57]

(i) If any objection is raised to any nomination paper, the Returning Officer is mandated to hold a summary inquiry to decide the same and to treat the nomination paper to be either valid or invalid.

(ii) The Returning Officer is required to record his decision in each case, giving brief reasons, particularly where an objection has been raised or where he is rejecting the nomination paper.

(iii) Here it is implied that opportunity is to be given to a candidate to rebut the objections by placing sufficient material on record.[58]

(iv) The objector may be supplied with a certified copy of his decision accepting the nomination paper of a candidate after

52 *Id*. at 2982-83 (para 27). In support of the widened ambit of power of the returning officer in deciding the issue of acceptance or rejection of nominations, the Supreme Court has cited *Cholan Roadways Ltd.* v. *G. Thirugnanasambandam* (2005) 3 SCC 241; *S.N. Chandrashekar* v. *State of Karnataka* (2006) 3 SCC 208; *Indian Airlines Ltd.* v. *Prabha D. Kanan* (2006) 11 SCC 67 and *Meerut Development Authority* v. *Association of Management Studies* 2009 (6) SCALE 49.

53 *Id.* at 2983 (para 28), citing *N.T. Veluswani Thevar* v. *G. Raja Nainar,* 1959 Supp (1) SCR 623.

54 *Id.* at 2983.

55 *Id.* at 2984 (para 30), citing *Rakesh Kumar* v. *Sunil Kumar* (1999) 2 SCC 489.

56 See *Handbook for Returning Officers, Chapter VI.*

57 See *Id.*, chapter VI, para 5.

58 See *Uttamrao*, at 2984 (para 29).

overruling the objections raised by him, if he applies for it. This would enable the objector to challenge the decision of the Returning Officer in an election petition, if he so desired.

(v) Even if no objection has been raised to a nomination paper, the Returning Officer is required to satisfy himself that the nomination paper is valid. In this respect, there is a presumption in favour of validity of every nomination paper unless the contrary is prima facie obvious or has been made out.[59]

(vi) The presumption principle is expounded further by stating that in case of a reasonable doubt as to the validity of a nomination paper, the benefit of such doubt must go to the candidate concerned and the nomination paper should be held to be valid.[60]

(vii) For educating and enlightening the Returning Officers about the presumption principle, they are reminded by the Election Commission about the instant serious consequences that would flow from 'improper rejection' of any nomination: "Remember that whenever a candidate's nomination paper has been improperly rejected and he is prevented thereby from contesting the election, there is a legal presumption that the result of the election has been materially affected by such improper rejection and the election will, therefore, be set aside."[61] They are also told by way of abundant caution that there is no such legal presumption necessarily in the converse case where a candidate's nomination paper has been 'improperly accepted', and, therefore, "it is always safer to be comparatively more liberal overlooking minor technical or clerical errors rather than strict in your scrutiny of the nomination paper."[62]

(viii) There is one more functional purpose underlying the principle of presumption: when there exists a presumption in favour of one party, it is for the other party to adduce evidence.[63]

(ix) The returning officers are also told in no mistaken words that while holding scrutiny of nomination papers, they are performing "an important quasi-judicial function," and, therefore, they must discharge this function "with complete judicial detachment and in accordance with highest judicial standards."[64] They must not, for instance, allow any personal

59 See s*upra* note 56, chapter VI, para 6.
60 *Ibid.*
61 *Ibid*.
62 *Ibid*.
63 See *Uttamrao* at 2984 (para 31).
64 *Supra* note 56, chapter VI, para 7.

or political predilections to interfere with the procedure that they follow or the decisions they take in any case.[65]

(c) Purport of summary nature of inquiry under section 36(2) of the Act of 1951

The returning officer is obliged to examine the nomination papers and decide all objections which may be made to any nomination after such "summary inquiry" as he thinks necessary for the purpose of rejecting any nomination. This is the mandate of section 36(2) of the Act of 1951. One of the accepted modes of conducting summary inquiry is through sworn affidavits. "Evidence by way of an affidavit is one of the modes of proving a question of fact both under the Code of Civil Procedure as also under the Code of Criminal Procedure besides other special statutes recognizing the same", stated the Supreme Court.[66]

(d) Conclusion

If the legislative principles and the detailed statutory instructions as identified above are taken as the basis for decision-making, both the returning officer and the High Court have missed to comprehend and translate them into practice. The returning officer, for instance, failed to appreciate the functional purpose of the principle of presumption in favour of validity of nomination paper.[67] The absence of this appreciation led him to shift the burden of proof in the instant case on the appellant rather than on the person who disputed the validity of nomination.[68] Similarly, non-appreciation of presumption principle prevented the returning officer to construe the "subtle differences" in the two sets of signatures of each of the disputed proposers in favour of the defendant-appellant,[69] which was clearly wrong. On this count the Supreme Court said:[70]

65 *Ibid*.

66 See *Uttamrao* at 2986 (para 38).

67 "Before the returning officer, two sets of signatures were available. He could not have, on his own showing, arrived at any conclusion on that basis, particularly when *prima facie* he did not find the signatures of the concerned proposers to be discrepant on the basis of the naked eye comparison of their admitted signatures and the ones appearing in the registers of the Municipal Council," per S.B. Sinha, J at 2985 (para 33).

68 The returning officer in his order of rejection of nomination paper noticed that the defendant-appellant "could not produce any evidence which would have conclusively proved that the disputed proposers had originally signed but changed their mind later on. The point made by the defendant that the disputed proposers had initially proposed the name but changed their mind later on cannot be considered for want of unambiguous and conclusive proof." See *Uttamrao*, at 2985 (para 32). This approach was a clear negation of the obligation on the part of the returning officer "to draw a presumption" in favour of the appellant in the instant case, see *id*. at 2985 (para 34).

69 *Id*. at 2985 (para 32).

70 *Id*. at 2985(para 35).

> The presumption of correctness of the nomination paper being statutory in nature, as intention of the Parliament as also the Election Commission was that even if somebody had filed an improper nomination, but for which he can be given benefit of doubt being a possible subject matter of an election petition where the question would be gone into in details, it was for the respondent herein to prove that the nomination paper prima facie did not contain the signatures of the proposers and, thus, were liable to be rejected.

He also completely missed the ambit of the nature of 'summary inquiry.' The returning officer rightly began to examine and explore the validity of nomination papers of the appellant on the basis of filed affidavits by all concerned persons. However, he fell into trap by refusing to go into the merits of those documents by simply noticing that "it was not possible to arrive at a conclusion on this basis," and that "[a]ll the disputed propoers have appeared before him and filed their affidavits," and "there is no reason to set aside their affidavits."[71] This stance was adopted all in the name of 'summary inquiry.' In fact, the Supreme Court said, "while deciding an issue of fact," the returning officer, as a quasi-judicial authority, "may not insist upon a conclusive proof."[72] "While doing so, he has to form a prima facie view."[73] Again, "while holding the summary inquiry in the matter of taking a decision on the objection as to whether the same is valid or not, he is not only required to record his brief decision for the same but further in case of doubt the benefit must go to the candidate and the nomination paper should be held to be valid although his views may be *prima facie* a plausible view or otherwise bona fide."[74]

The whole approach of the High Court in the instant case was clearly held to be "unjustified" by the Supreme Court, because it "acted illegally in treating its power only as an appellate authority and not as an original authority, for it only proceeded to try and determine as to whether or not decision making process is legal."[75] In other words, the High Court, despite being the court of original jurisdiction, acted as a court of appellate jurisdiction and dismissed the petition without allowing the parties to produce evidence in support of their contention.[76] Since the whole matter was not adjudicated "on merits," the Supreme Court set aside the judgment and the order passed by High Court and remitted the matter to the High Court

71 *Ibid*.
72 *Id*. at 2985 (para 36).
73 *Ibid*.
74 *Ibid*.
75 *Id*. at 2986 (para 40). In an election petition, the high court acts as a court of original jurisdiction and the election petition is a civil trial and the jurisdiction in such a trial, *stricto sensu*, cannot be said to be appellate in nature.
76 *Ibid*.

to proceed in accordance with the law as abstracted above and decide the dispute as expeditiously as possible.[77]

IV 'SECRECY OF VOTING' AND 'PURITY OF ELECTION'

Underlying objective of 'secrecy of voting'

The Act of 1951, *inter alia*, mandates that 'secrecy of voting' shall not be infringed. Section 94 of the Act specifically provides: "No witness or other person shall be required to state for whom he has voted at an election." There is an added proviso to this provision, which states: "This section shall not apply to such witness or other person where he has voted by open ballot." In other words, this lays down that except in case of voting by open ballot, no witness or other person shall be required to tell for whom he has voted.

The object of the aforesaid provision is to protect to the voter so that he could vote freely without any apprehension of disclosure against his will. He is, thus, not obliged to disclose how he voted, or for whom he voted. The use of the expression 'shall be required' rules out the element of compulsion, direct or indirect. Incorporation of this provision was necessitated because section 132 of the Indian Evidence Act, 1872 would require a voter to answer all questions, including his choice of voting, put to him during the trial of an election petition. This right to 'secrecy of voting' is in the nature of a personal privilege, and, therefore, there is nothing that can prevent a person from waiving the privilege and voluntarily disclosing for whom he voted.[78] The essence of this right is that he cannot be compelled by any authority to disclose as to whom or for whom he voted. In this respect, section 94 needs to be compared and contrasted with the provisions of section 128 of the Act of 1951, which also deals with 'maintenance of secrecy of voting' by persons who are connected with the process of election.

Sub-section (1) of section 128 provides that every officer, clerk, agent or other person who performs any duty in connection with the recording or counting of votes at an election shall maintain, and aid in maintaining, the secrecy of the voting and shall not (except for some purpose authorized by or under any law) communicate to any person any information calculated to violate such secrecy.[79] A plain reading of this sub-section reveals that it casts an obligation of secrecy on all those persons who are connected with

77 Since an election petition is required to be decided within period of six months, the Supreme Court advised the high court that it should make an endeavour to complete the trial within a period of six months from the date of judgment, if necessary, by holding a day-to-day trial. *Id.* at 2986-87 (para 40).

78 See, for instance, *Ragbbir Singh Gill* v. *Gurcharan Singh Tohra,,* AIR 1980 SC 1362.

79 However, there is a *proviso* appended to this sub-section which reads:
Provided that the provisions of this sub-section shall not apply to such officer, clerk, agent or other person who performs any such duty at an election to fill a seat or seats in the Council of States.

the election process. Any person who contravenes this obligation "shall be punishable with imprisonment for a term which may extend to three months or with fine or both."[80] Thus, section 128 of the Act of 1951 casts an obligation on persons connected with election process not to disclose 'secrecy of voting', whereas no such obligation is appended on the voter not to disclose, if he desires to do so.

Ambit of 'secrecy of voting'

It is axiomatic to state that the right to 'secrecy of voting' as envisaged under section 94 of the Act of 1951 is a very valuable right. It enables a voter to cast his vote without any fear or favour. However, the question has arisen whether this right is absolute or there are certain situations or circumstances under which a person may be required to unfold the cover of secrecy. This question, though not *res integra*, has arisen before the Supreme Court in *Rekha Rana, Smt.*[81] In this case, the election of the appellant, who was declared elected from a particular state assembly constituency by a narrow margin of 26 votes, was challenged by respondent, who secured the next highest number of votes. The challenge was mainly on the ground that the appellant was the beneficiary of a large number of votes cast in her favour by impersonating electors, who were either not available in the constituency on the date of election or had died much prior to the date of election or were serving jail sentences or were abroad on the relevant date. The details of alleged impersonation were specifically mentioned, supported by affidavits, in the election petition.[82] However, the *factum* of casting votes by a particular voter could be proved only on the basis of 'marked electoral rolls.' In the course of recording of evidence, the counsel for the election petitioner desired a witness to make a statement after opening the marked electoral rolls, which were available in the court but in sealed cover. The High Court of Punjab and Haryana allowed the petitioner to make a reference to the electoral rolls after opening the sealed cove. The appellant instantly resisted this move chiefly on the ground as that would violate the basic tenet of 'secrecy of voting' given under section 94 of the Act of 1951. This led the winning candidate to come to the apex court by special leave to appeal against the interlocutory order of the High Court.

80 Sub-section (2) of s.128 of the Act of 1951.

81 *Supra* not 8, *per* D.K. Jain J (for himself and R.M. Lodha, J).

82 For instance, the allegations included: (i) 96 voters had cast their votes twice during the process of polling; (ii) 29 votes had been cast in favour of the appellant by way of impersonation on behalf of the persons who were not available in the constituency on the date of polling; (iii) 53 votes had been cast in favour of the appellant by way of impersonation on behalf of persons who had died prior to the date of polling; and (iv) 10 votes had been cast in favour of the appellant on behalf of two persons who were serving sentences in jail and on behalf of 8 persons who were abroad on the date of polling. See *Id*. at 2948 (para 3).

Secrecy of voting' *versus* 'free and fair election'

The issue before the apex court in *Rekha Rana* was about the true ambit of 'secrecy of voting' under section 94 of the Act of 1951 and whether it counteracted the basic objective of 'free and fair election'. Since this issue is not *res integra*, the apex court crystallized the following principles in the light of relevant case law, which may be abstracted as follows:

(a) The principle of 'secrecy of voting' or 'secrecy of ballot' has always been the hallmark of the concept of free and fair election, so very essential in the democratic principles adopted by our polity.[83]

(b) If the 'secrecy of ballot' principle in its operation is allowed to be used "to suppress a wrong coming to light and to protect a fraud on the election process or even to defend a crime," then the provision of section 94 of the Act of 1951 should be interpreted in a manner so that it promotes free and fair election rather than subverting it.[84]

(c) The principle of 'secrecy of ballot' cannot stand aloof or in isolation and in confrontation to the foundation of free and fair elections, namely, purity of elections, and, therefore, it should be interpreted in a manner so that both can "coexist."[85]

(d) If the principle of 'secrecy of ballot' proves destructive of 'purity of election' principle, then the former must yield to the latter "in the larger public interest" and also for the reason that 'secrecy of ballot' is only "a privilege of the voter" and therefore "not inviolable" to "ensure free and fair election and to unravel foul play."[86]

(e) Moreover, 'secrecy of ballot' "presupposes a validly cast vote, the sanctity and sacrosanct of which must in all events be preserved."[87] This simply implies that the exercise of extrication of void votes under section 62(4) of the Act of 1951 would not in any manner impinge on the secrecy of ballot especially when void votes are those which have to be treated as no votes at all.[88]

'Secrecy of voting': an adjunct of 'free and fair elections'

In the light of the guiding principles and also the facts of the case in hand as abstracted above, the Supreme Court clinched the issue by stating

83 *Id.* at 2949 (para 9).

84 *Id*. at 2949 (para 10), citing *Ragbbir Singh Gill*.

85 *Ibid*.

86 *Id*. at 2949-50 (para 10).

87 *Id*. at 2950 (para 11), citing *A. Neellalohitadasan Nadar* v. *George Mascrene*., 1994 Supp (2) SCC 619.

88 *Ibid*. Sub-sections (4) and (5) of s.62 of the Act of 1951 respectively bar double voting and voting by a person who is confined in a prison for any reason and a vote cast by any such person shall bed treated as void.

that the 'marked electoral rolls,' as such, do not violate the 'secrecy of voting,' because from the marked electoral rolls "it is only possible to ascertain whether or not a vote has been cast in the name of a voter from a particular polling booth, but it is never possible to decipher therefrom as to who is the beneficiary of the said vote as there is no indication of the electoral roll showing for whom the voter had cast his vote."[89] Accordingly, an access to the 'marked electoral rolls' for inspection has been held to be not violating the principle of 'secrecy of voting.'

The Supreme Court has also dealt with the cognate argument emanating from rule 93 of the Conduct of Election Rules of 1961, which provides that certain documents mentioned in sub-rule (1) thereof shall not be opened and their contents shall not be inspected by, or produced before, any person or authority except under the orders of the competent court. Clause (d) of sub-rule (1) of rule 93 specifically refers to the marked copy of the electoral roll which is not accessible as a matter of course. The "settled" principle in this respect is that a prayer for inspection of documents mentioned in rule 93(1) of the said rules must be refused by the court if it is satisfied that in the garb of inspection, a defeated candidate is indulging in a roving enquiry in order to fish out materials for getting the election set aside.[90] Stated positively, the inspection under the said rule may be allowed by the election court if the two conditions are satisfied: one, the material facts on the basis of which inspection of documents is sought must be clearly and specifically pleaded; and two, the court must be satisfied, even if in the form of affidavit, that it is necessary to allow inspection in the interest of justice.[91] In case the court allows access to the said document, recording of reasons is a 'pre-requisite' for exercise of power under the said rule.[92]

In the instant case, the election petitioner specifically mentioned the names of the persons who had been impersonated or had double voted, and the High Court had also recorded a categorical finding that the election petitioner had placed sufficient material to substantiate the allegations made in the election petition. Twin conditions envisaged in rule 93, thus, stood satisfied. In this view of the matter, the Supreme Court did not find any merit in the appeal, and dismissed the same "with costs."[93]

V ELECTION PAPERS CANNOT BE OPENED AS A MATTER OF COURSE UNDER RULE 93(1)

Pre-conditions for production and inspection of election papers

The list of election papers that cannot be opened or examined as a matter

89 *Id.* at 2950 (para 13).
90 *Id.* at 2951 (para 15).
91 *Ibid.* citing *Hari Ram* v. *Hira Singh,* AIR 1984 SC 396.
92 *Ibid*.
93 *Id.* at 2951 (paras 16 and 17).

of course are specifically mentioned in clauses (a) to (e) of sub-rule (1) of rule 93 of the Conduct of Elections Rules, 1961. These include the packets of unused ballot papers with counterfoils attached thereto; the packets of used ballot papers whether valid, tendered or rejected; the packets of the marked copy of the electoral roll or, as the case may be, the list maintained under sub-section (1) or sub-section (2) of section 152 of the Act of 1951; the packets containing registers of voters in form 17A; and the packets of the declarations by electors and the attestation of their signatures. All these papers while in the custody of the district officer or, as the case may be, the returning officer, "shall not be opened and their contents shall not be inspected by, or produced before, any person or authority except under the order of a competent court."

All other papers relating to election shall be open to public inspection, and copies thereof shall on application be furnished, of course subject to such conditions and to payment of such fee as the Election Commission may direct.[94]

Denial of access to election papers as a matter of course

In this respect, a question relating to the inspection of registers of voters in form 17A came to the Supreme Court by way of special leave to appeal in *Fulena Singh*.[95] The Patna High Court in an election petition through an interlocutory order permitted the respondent-election petitioner (the defeated candidate by a narrow margin of 82 votes in assembly elections) to examine the said election paper in order to prove his charge of 'irregularities and illegalities' alleged to have been committed by the appellant, the returned candidate. This order was challenged before the Supreme Court which set aside the impugned order and remitted the application filed by the respondent-petitioner for the consideration of the High Court by acting on the "fairly well-settled" principles that hardly needed "restatement" afresh.[96] Two such related principles are: one, that inspection of election papers mentioned in detail in rule 93(1), from clauses (a) to (e), is not a matter of course, and, therefore, "inspection of those papers cannot be ordered and parties cannot be permitted to inspect the same for the purposes of making a roving enquiry in order to fish out the materials and to derive support to one's own case;"[97]and two, "that a *clear case is required to be made* out for ordering the production and inspection of election papers by the parties,"[98] so that, seemingly, the gloomy prospect of 'roving enquiry' is avoided.

Had the respondent-election petitioner succeeded in making out a 'clear case' for production and inspection of registers of voters in form 17A in

94 See sub-rule (2) of Rule 93 of the Conduct of Elections Rules of 1961.
95 *Supra* not 9, *per* B. Sudershan Reddy, J (for himself and Lokeshwar Singh Panta, J).
96 *Id.* at 2248 (para 10).
97 *Ibid*.
98 *Ibid*. (Emphasis added).

the instant case? For answering this crucial question, the Supreme Court reproduced the following version of his allegations:[99]

> It is alleged that the election of the appellant may have to declared void 'on the solitary ground that there are large number of voters roughly about 600 [who] were enrolled as voters from more than one place and majority of such voters have voted twice in favour of respondent No. 1. In this regard, it is curious to indicate that there are 250 persons of family of respondent No. 1 including *gotias* (agnates) and co-villagers who were supporters of respondent No. 1have voted twice from both the places in favour of respondent No. 1. Thus, 250 persons who are family members as well as agents (sic – agnates?) and co-villagers and the supporters of respondent No. 1 and enrolled in more than two places in voter's list in the same constituency and they have cast votes at both the places and as such 500 void votes have been counted in favour of respondent No. 1 and if such void votes are deleted by simple arithmetical calculations, respondent No. 1 has secured less number of votes than the petitioner and therefore on this ground alone the election of respondent No. 1 is not only fit to be set aside but on the other hand the election petitioner is entitled to declare election (sic - elected?) in place of respondent No.1.'

In view of the above allegations, the trial judge, after examining seven witnesses on behalf of the election-petitioner, stated that all the witnesses "have supported the allegation of double voting at more than one booth by relations and supporters of respondent no. 1."[100] "Some of the witnesses have specifically given the names of such voters whose names appear in voters' list at more than one place," he further added.[101]

In the opinion of the Supreme Court, "all the discussion about the evidence and material available on record" does not seem to suffice to make out a 'clear case' for production and inspection of the said election papers.[102] The trial judge, for instance, "did not assign any reason whatsoever in support of his conclusion permitting the parties to inspect the registers of voters in Form 17A."[103] He "allowed the application as a matter of course."[104] In the presence of such scanty treatment, the Supreme Court found it "very difficult to sustain such laconic and unreasoned order which

99 *Id*. at 2247 (para 4).
100 *Id*. at 2248 (para 11).
101 *Ibid*.
102 *Ibid*.
103 *Ibid*.
104 *Ibid*.

may have a serious bearing on the questions that arise for consideration in the main petition which is still awaiting trial and disposal."[105]

Refreshing contrast with *Rekha Rana, Smt.* v. *Jaipal Sharma*[106]

The entire approach of the Patna High Court in *Fulena Singh* may be compared and contrasted with the approach of the Punjab and Haryana High Court in *Rekha Rana*. Both the courts seemingly acted in the light of the principle "settled" by the Supreme Court., namely that a prayer for inspection of such documents as mentioned in rule 93(1) of the Conduct of Election Rules, 1961 must be refused by the court if it is satisfied that in the garb of inspection, a defeated candidate is indulging in a roving enquiry in order to fish out materials for getting the election set aside. For objective decision-making in this respect, the High Courts are encouraged to allow production and inspection of 'election papers' subject to the fulfilment of two conditions: one, the material facts on the basis of which inspection of documents is sought must be clearly and specifically pleaded; and two, the court must be satisfied, even if in the form of affidavit, that it is necessary to allow inspection in the interest of justice.[107] In case, the court allows access to the said document, recording of reasons is a 'pre-requisite' for exercise of power under the said rule.[108]

With this perspective in view, in *Rekha Rana*, the election petitioner had *specifically* mentioned the names of the persons who had been impersonated or had double voted, and the High Court of Punjab and Haryana had also recorded a categorical finding that the election petitioner had placed sufficient material to substantiate the allegations made in the election petition. Accordingly, the Supreme Court did not find any merit in the appeal, and dismissed the same. In contrast, in *Fulena Singh*, as evident from the statement of allegations, the pleadings were bereft of specificity and the High Court of Patna allowed the application "as a matter of course." with awfully inadequate supporting analysis.[109]

VI IMPROPER ACCEPTANCE OF NOMINATION PAPER

Impact on result of returned candidate

This issue came to be re-visited in an appeal before the Supreme Court against the judgment of the Madras High Court in *G.S. Iqbal* v. *K.M. Khadar*.[110] In this case, the appellant-election petitioner challenged the election of the respondent, the returned candidate in a parliamentary

105 *Ibid*.
106 For the analysis of this case, see *supra* part II : 'Secrecy Of Voting' *And* 'Purity Of Election'.
107 See *Hari Ram* v. *Hira Singh,* AIR 1984 SC 396.
108 *Ibid*.
109 *Supra* note 95.
110 *Supra* not 11, *per* R.M. Lodha, J. (for himself and D.K. Jain, J) s.100 (1)(d)(i).

election, on ground of 'improper acceptance' of his nomination[111] and also on ground of 'non-compliance with the provisions of the Constitution' or of the provisions of the Act of 1951 or of 'any rules or orders' made under the Act of 1951.[112] The petitioner set up his case by mainly alleging:

(a) that the returned candidate who fought election on the symbol of the DMK party falsely represented that he was a member of DMK at the time of filing his nomination papers inasmuch as he belonged to the Indian Union Muslim League which was a registered as well as recognized political party in the State of Kerala with a reserved symbol of 'Ladder' and also the President of the Tamil Nadu Indian Union Muslim League, and as such, his nomination paper suffered from violation of section 13[113] of the Election Symbols (Reservation and Allotment) Order, 1968, and, thus, improper acceptance of the same by the returning officer;[114]

(b) that the returned candidate because of the deception played through misrepresentation on the electorate of the constituency, the result of the election was materially affected, and thereby liable to be declared void under section 100(1)(d)(i) and (iv) of the Act of 1951.

The designated election judge, after hearing the parties and examining all the witnesses, relevant documents, and the settled principles, found that the nomination filed by the returned candidate was perfectly valid and its acceptance by the returning officer was in accordance with the 'prescribed rules and regulations and the provisions of the Act of 1951.[115] He also did not find that presentation and acceptance of nomination of the returned candidate in any way materially affected the result of the elections.[116] Accordingly, he dismissed the election petition.

In appeal, the Supreme Court affirmed the decision of the designated election judge on all counts. It, *inter alia*, observed: (i) After careful sifting of the evidence, the designated election judge reached the conclusion that the nomination papers of the returned candidate were complete on the date of scrutiny and that there was no false declaration by him.[117] (ii) The designated election judge also concluded that the returned candidate had not

111 Act of 1951, s.100 (1)(d)(i).
112 S.100(1)(d)(iv).
113 Under the provisions of section 13 of the Order of 1968, a candidate shall be deemed to be set up by a political party for the purposes of election from any Parliamentary or Assembly constituency to which this Order applies if, and only if, "the candidate is a member of that political party and his name is borne on the roll of members of the party."
114 *Supra* note 110 at 2117 (para 5).
115 *Ibid.* (paras 7, 8 and 9).
116 *Ibid*.
117 *Id.* at 2118 (para 14).

violated any of the provisions of the symbols order and there was absolutely no illegality, infirmity or impropriety in the acceptance of the nomination papers of the returned candidate.[118] "Having considered the matter thoughtfully," the Supreme Court categorically stated, "we find no justifiable reason to take a view different from that of the designated Election Judge."[119] The argument that the result of the returned candidate has been materially affected by the non-compliance of the provisions of the Act of 1951 was clinched by noticing that the margin of votes between the returned candidate and the defeated candidate was to the tune of 1,78,610.[120] Noticing the 'desperate' nature of some of the submissions of the election petitioner, the Supreme Court dismissed the appeal.

VII OBTAINING ASSISTANCE FROM GOVERNMENT SERVANTS

When does taking assistance from government servants become a corrupt practice?

A bare perusal of sub-section (7) of section 123 of the Act of 1951 reveals that if the election candidate or his agent or any other person with the consent of such candidate or his election agent, obtains or procures any assistance (other than the giving of vote) "for the furtherance of the prospects of that candidate's election from any person in the service of the Government", it amounts to corrupt practice under this sub-section, and consequently, the election won by committing such a corrupt practice may be declared void and set aside in an election petition by the High Court under the relevant provisions of the Act. However, this ground for declaring an election void is subject to at least three conditions. One, the assistance for furtherance of the election prospects in order to become a corrupt practice must have been sought *after* a person has been "duly nominated as a candidate" at an election.[121] Two, the said assistance must have been provided not by any government servant but only the ones who fall in the category of specifically defined "classes," both in terms of inclusion and exclusion.[122] Three, even if any assistance is provided by a government servant falling in the defined "classes" but in the discharge of his official duty, such as making any arrangements or extending any facilities in relation

118 *Ibid*.
119 *Ibid*.
120 *Id*. at 2122 (para 30).
121 Act of 1951, 7 section 79(b). See also, *Smt. Indira Nehru Gandhi* v. *Raj Narain*, AIR 1975 SC 2299.
122 The specifically defined "classes" of government servants under section 123(7) include: (a) gazetted officers; (b) stipendiary judges and magistrates; (c) members of the armed forces of the Union; (d) members of the police forces; (e) excise officers; (f) revenue officers other then village revenue officers known as lambardars, malguzars, pagtels, deshmukhs or by any other name, whose duty is to collect land revenue and who are remunerated by a share of, or commission on, the amount of land revenue collected by them but *who do not discharge any police functions*; and (g) such other class of persons in the service of the Government as may be prescribed. [Emphasis added]

to such election candidate irrespective of the fact whether that candidate holds any "office," the same "shall not be deemed to be assistance for the furtherance of the prospects of that candidate's election."[123]

In the light of this exposition of section 123(7) of the Act of 1951, the issue before the Supreme Court in an appeal against the judgment of the High Court of Punjab and Haryana in *Baldev Singh Mann*[124] was whether the 'support' extended by the two named officers amounted to the commission of corrupt practice rendering the election of the returned candidate void under section 100(1)(b) of the said Act.[125] The appellant in this case, who lost to the respondent by a small margin of less than 1000 votes in state assembly elections, contended that the two named persons who extended unwarranted support to the returned candidates were *gazetted* government officers. Such a charge was, however, counteracted by the returned candidate by specifically stating that "he had neither sought nor got any assistance for any purpose, much less for the furtherance of the prospects of his election" from either of the named persons.[126]

The High Court examined the status of the two named persons in order to find out if either of them fell into the 'class' of '*gazetted*' government servants as envisaged under section 123(7) of the Act of 1951. After perusing the relevant judicial decisions, the High Court came to the conclusion that it was difficult to hold that one of them, who was administrative member of the Punjab electricity board, "was a gazetted officer though he was in the service of the Government."[127] In appeal, the Supreme Court instead of pursuing this status issue thought it "necessary to examine the specific allegations of corrupt practice" and to find out "if proof of allegations either through direct, circumstantial or corroborative evidence was forthcoming."[128] For undertaking this exercise, the apex court in the first instance spelled out the principles of "well-settled" law in this respect, which may be abstracted as follows:

(a) A trial of an election petition though within the realm of civil law is akin to trial on criminal charge.[129]

123 See proviso to section 123(7) of the Act of 1951.

124 *Supra* not 13, per Dalveer Bhandari, J (for himself and Harjit Singh Bedi, J).

125 S.100, which stipulates the grounds for declaring election to be void, provides in clause (b) of its sub-section (1): if the High Court is of opinion that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent, the High Court shall declare the election of the returned candidate to be void.

126 *Supra* note 124 at 1048 (para 15).

127 *Id*. at 1049 (para 23 read with para 13). So far as the status of other person was concerned, it seems, the High Court accepted that any person in the position of a deputy director of any department of the Punjab Government is not a gazetted officer. See, *Id*., at 1048 (para 14).

128 *Ibid*.

129 See, a three-Judge bench decision in *Jeet Mohinder* v. *Harminder Singh Jassi* (1999) 9 SCC 386, cited in *Baldev Singh Mann*, at 1051 (para 27).

(b) The charge of corrupt practice under section 123(7) of the Act of 1951 in an election petition is "quasi criminal in character."[130] It should, therefore, be proved "almost like the criminal charge," implying thereby that the "standard of proof is high and the burden of proof is on the election petitioner."[131] Accordingly, "[m]ere preponderance of probabilities is not enough, as may be the case in a civil dispute."[132]

(c) "Allegations of corrupt practices should be clear and precise and the charge should be proved to the hilt as in a criminal trial by clear, cogent and credible evidence."[133]

(d) The success of a candidate who has won at an election "should not be lightly interfered with," because "the setting aside of an election involves serious consequences not only for the returned candidate and the constituency, but also for the public at large inasmuch as re-election involves an enormous load on the public funds and administration."[134]

(e) Notwithstanding these propositions, it is also to be borne in mind that the purity of election process has to be safeguarded and the court shall be vigilant to see that people do not get elected by flagrant breaches of law or by committing corrupt practices.[135]

Bearing these well-settled propositions in mind, the apex court gave a second look at the fact matrix of *Baldev Singh Mann*. In this case, the sum and substance of allegations of the petitioner was that the returned candidate was moving from village to village asking for vote and in this process he had taken help of the two named government servants for canvassing for votes in his favour.[136] Agreeing with the High Court, such kind of allegations did not fall within the ambit of section 123(7) of the Act of 1951, for there must be "some positive and explicit proof on the part of voters (to be read as

130 *Id.* at 1051 (para 26).

131 *Id.* at 1050 (para 24).

132 *Ibid.*

133 *Ibid.*

134 *Id*. at 1050-1051 (para 25), citing *Jeet Mohinder*; *Jagan Nath* v. *Jaswant Singh*, 1954 SCR 392: *Gajanan Krishnaji Bapat* v. *Dattaji Raghobaji Megha* (1995) 5 SCC 347. For the returned candidate, not only his election is set aside, but he is also disqualified to contest election for a certain period. Moreover, it may also entail extinction of his public life and political career. The Supreme Court has expressed similar opinion in *Quamarul Islam* v. *S.K. Kania*, (1994) Supp (3) SCC 5; *F.A. Sapa* v. *Singora* (1991) 3 SCC 375; *Manohar Joshi* v. *Damodar Tatyaba & Others* (1991) 2 SCC 342; *Ram Singh and Others* v. *Col. Ram Singh* (1985) Supp SCC 611; and *Kripa Shankar Chatterjee* v. *Gurudas Chatterjee* (1995) 5 SCC 1, cited in *Baldev Singh Mann*, at 1051 (para 28).

135 *Id.* at 1050-1051 (para 25), citing *Jeet Mohinder*. See also *Ram Phal Kundu* v. *Kamal Sharma* (2004) 2 SCC 759, in which the apex court reiterated that though the election of the returned candidate should not be lightly interfered with and yet at the same time the purity of the election process has to be maintained. See, *id*. at 1051 (para 29).

136 *Id*. at 1052 (para 32).

government servants) belonging to categories mentioned in section 123(7)(a)-(g) to constitute corrupt practice."[137] Raising of such allegations by a candidate who loses election by a slight margin is not uncommon, because he finds it hard to accept the defeat; he makes all efforts and gathers all kind of material against the elected candidate and levels all kinds of allegations of corrupt practices whether substantiated or not.[138]

Moreover, the Supreme Court itself "carefully re-assessed and re-evaluated the entire evidence on record," and thereby came to the conclusion, as arrived earlier by the High Court, that "the appellant has failed to prove the basic ingredients of corrupt practices under section 123(7) of the said Act,"[139] namel "it is obtaining or procuring of assistance for the furtherance of prospects of the candidate which constitutes main ingredient of corrupt practice."[140] "The assistance has to be procured from a person who is in the government service and who additionally is a gazetted officer."[141] In view of all this, the apex court found that the appeal was "devoid of any merit" and accordingly dismissed the same.[142]

For its concurrence with the analysis and opinion of the High Court, the Supreme Court also reminded to itself[143] what was already enunciated by it only relatively recently in *Gajanan Krishnaji Bapat*:[144]

> [T]he appellate court attaches great value to the opinion framed by the Trial Judge more so when the Trial Judge recording findings of fact is the same who had recorded evidence. The Appellate Court shall remember that jurisdiction to try an election petition has been vested in a Judge of the High Court. Secondly, the Trial Judge had the benefit of watching the demeanour or witnesses and forming first-hand opinion of them in the process of evaluation of evidence.

To cap it all, the Supreme Court finally added as a perennial reminder:[145]

> Before parting with the case, we would like to reiterate that in a democratic country the will of the people is paramount and the election of elected candidate should not be lightly interfered with," but at the same time bearing in mind that "it is also the bounden duty of the court to ensure that purity of election process is fully safeguarded and maintained.

137 *Id*. at 1052(para 33).
138 *Id*. at 1052(32).
139 *Id*. at 1052 (para 36).
140 *Id*. at 1050 (para 24).
141 *Ibid*.
142 *Id*. 1052 (para 36).
143 See, *Id*. at 1052 (para 34).
144 See, s*upra* note 134.
145 *Baldev Singh Mann*, *supra* note 124 at 1052 (para 37).