

Birad Mal Singhvi

Vs

Anand Purohit

Civil Appeal No. 574 (NCE) of 1987

(K. N. Singh, E. S. Venkataramiah JJ)

02.08.1988

JUDGMENT

SINGH, J. -

1. This appeal under Section 116-A of the Representation of the people Act, 1951 (hereinafter referred to as 'the Act') is directed against the judgment and order of the High Court of Rajasthan dated February 18, 1987 setting aside the election of the appellant to the State Legislative Assembly of Rajasthan from Jodhpur City Assembly Constituency.

2. Election to the State Legislative Assembly of Rajasthan from the constituency No. 183 Jodhpur City was held in the year 1985; nomination papers were filed by February 8, 1985 and the date of scrutiny was February 9, 1985. In all 45 candidates filed their nominations. After scrutiny and withdrawal 21 candidates contested the election, after polling and counting of votes the appellant was declared elected having obtained majority of votes. Anand Purohit, respondent who is an elector in the Jodhpur city Constituency No. 183 filed an election petition before the High Court challenging the appellant's election, on the ground that the result of election was materially affected on account of improper rejection of nomination papers of three candidates namely, Smt. Umrao Ben, Hukmichand and Suraj Prakash Joshi. The respondent pleaded that Smt. Umrao Ben was an elector in Sardarpura Assembly Constituency, the returning officer wrongly rejected her nomination paper, without affording opportunity to her to produce a copy of the electoral roll. He further pleaded that Hukmichand, and Suraj Prakash Joshi both were more than 25 years of age on the date of their nomination, yet the returning officer rejected their nomination papers on the ground that they were not qualified to be a candidate as they were below 25 years of age. The appellant contested the election petition. He asserted that Umrao Ben had failed to file a certified copy of the relevant entry in the electoral roll of Sardarpura constituency along with her nomination, she further failed to produce copy of the electoral roll at the time of scrutiny and therefore the returning officer rightly rejected her nomination paper. As regards Hukmichand and Suraj Prakash Joshi, the appellant pleaded that neither of the two candidates was present before the returning officer at the time of scrutiny and since the entries contained in the electoral roll indicated that they were below 25 years of age the returning officer rightly rejected their nomination papers. The appellant further asserted that the rejection of the three nomination papers was proper and the result of the election was not materially affected on account of the rejection of the aforesaid three nomination papers. The High Court held that the nomination paper of Smt. Umrao Ben was validly rejected as she had failed to comply with Section 33(5) of the Act inasmuch as she had failed to produce a copy of the electoral roll or a certified copy of the relevant extract relating to entry of her name in the electoral roll in Sardarpura constituency. The High Court further held that nomination papers of Hukmichand and Suraj Prakash Joshi had been rejected improperly by the returning officer as both the candidates

had attained the qualifying age of 25 years on the date of nomination. On these findings the High Court set aside the appellant's election by its judgment and order dated February 18, 1987. Aggrieved by the said judgment the appellant has preferred this appeal under Section 116 of the Act.

3. The controversy in the present appeal relates to the validity of the orders of the returning officer rejecting the nomination paper of Smt. Umrao Ben, Hukmichand and Suraj Prakash Joshi. We would first examine the validity of the order of the returning officer rejecting Smt. Umrao Ben's nomination paper, which was questioned by the respondent before us. There is no dispute that Umrao Ben was not an elector in the Jodhpur City Assembly Constituency. In her nomination paper she had given the details of the relevant entry contained in the electoral roll of Sardarpura Assembly Constituency, but her nomination paper was not accompanied by a certified copy of the relevant entry in the electoral roll of Sardarpura Constituency nor she had produced a copy of the electoral roll or the relevant part thereof before the returning officer at the time of scrutiny. Therefore the returning officer rejected her nomination paper. The High Court held that the returning officer had rightly rejected the nomination paper of Umrao Ben and there was no question of improper rejection of her nomination paper. Shri G. L. Sanghi, learned counsel for the respondent challenged the correctness of the High Courts findings on this question. He urged that since the returning officer who was holding the scrutiny of nomination papers relating to the Jodhpur Assembly constituency was also the returning officer of Sardarpura Assembly Constituency, he should have verified the entry of Umrao Ben's name from the electoral roll of Sardarpura Assembly Constituency which must have been with him. He urged that Umrao Ben's request to verify entries relating to her name from the electoral roll of Sardarpura Assembly constituency was ignored by the returning officer, and further her request for grant of time to produce electoral roll was also rejected. He urged that object of Section 35 of the Act was merely to ascertain as to whether a candidate whose nomination paper was scrutinised was an elector or not and since the electoral roll of Sardarpura Assembly Constituency was already with the returning officer he could have verified the entries from that electoral roll. The returning officer had acted in an unreasonable manner in refusing to do that and in rejecting her nomination paper. We find no merit in these submissions.

4. Section 33 of the Act provides for presentation of nomination paper and it further lays down the requirements of a valid nomination. Sub-section (5) of the Section 33 is as under :

Where the candidate is an elector of a different constituency, a copy of the electoral roll of that constituency or of the relevant part thereof or a certified copy of the relevant entries in such roll shall, unless it has been filed along with the nomination paper, be produced before the returning officer at the time of scrutiny.

5. The above provision requires a candidate who is an elector of a different constituency, to file a copy of the electoral roll of constituency or a relevant part of that roll or a certified copy of the relevant entries along with his nomination paper. These documents are necessary to show that the candidate is an elector of a different constituency, and he eligible to contest the election. If a candidate is unable to comply with these requirements at the time of filing the nomination paper he is afforded another opportunity to prove his eligibility by producing a copy of the electoral roll of the constituency or the relevant part thereof or a certified copy of the relevant entries of the roll before the returning officer at the time of scrutiny. The legislature provides two opportunities to such a candidate for proving his eligibility to contest the election, one at the stage of filing the nomination paper and the other at the stage of scrutiny. If the candidate fails to avail either of the two opportunities his nomination paper is liable to be rejected. Section 36 of the Act provides that

on the date of scrutiny of nomination papers the returning officer shall examine the nomination papers and shall decide all objections which may be made to any nomination and he may either on objection or on his own motion, after holding such summary inquiry, if any, reject any nomination on the grounds specified in clauses (a), (b) and (c) of sub-section (2). Section 36(2)(b) provides for the rejection of the nomination paper on the candidate's failure to comply with any of the provisions of Section 33 or Section 34 of the Act. Section 33(5) read with Section 36(2)(b) makes it apparent that if a candidate who is an elector of a different constituency fails to prove his eligibility in the manner prescribed by Section 33(5) of the Act, his nomination paper is liable to be rejected for the non-compliance of Section 33(5) of the Act. These provisions are plain which admit of no other interpretation. Non-compliance with Section 33(5) is fatal to the nomination and no other mode is prescribed by the Act for proving the eligibility of the candidate. Section 35(5) prescribes a particular mode to prove eligibility of a candidate to contest election and Section 36(2)(b) provides penal consequences. Therefore Section 35(5) is mandatory in nature. There is no dispute that Umrao Ben failed to comply with the requirement of Section 33(5) of the Act as she had neither filed a copy of the electoral roll of the constituency or the relevant part thereof, or the certified copy of the relevant entries along with her nomination paper. Nor she had produced any of the three documents before the returning officer at the time of scrutiny. In the circumstances the returning officer rightly rejected Umrao Ben's nomination paper.

6. Shri G. L. Sanghi, learned counsel then urged that Section 33(5) of the Act was directory and it was open to a candidate to prove his eligibility by any other mode. He urged that Umrao Ben's request to the returning officer to verify her entry from the electoral roll of Sardarpura Assembly Constituency which was in his custody (as he was the returning officer of Sardarpura Assembly Constituency also) was ignored and he refused to grant her time to produce the necessary documents. In the election petition there was no pleading that Umrao Ben had made any such request or that the returning officer had refused to grant her time. The High Court has no appreciation of evidence held that no request for time was made by Smt. Umrao Ben and no request for verifying the entry relating to her from the electoral roll of Sardarpura Assembly Constituency was made. But even assuming that the returning officer had refused to verify the relevant entries relating to Umrao Ben from the electoral roll of Sardarpura Assembly Constituency, he had acted in accordance with law. No exception could be taken to his conduct. Section 33(5) of the Act lays down a mandatory requirement for a valid nomination. The purpose of Section 33(5) of the Act is to satisfy the returning officer that the candidate is eligible to contest the election and if he fails to satisfy the returning officer in the manner prescribed by Section 33(5) of the Act, the penalty and the consequences which are specified in Section 36(2)(b) must follow. Section 33(5) is not directory instead it is mandatory in nature. An elector of a different constituency is under a mandatory duty to prove his eligibility in the manner prescribed by Section 33(5) of the Act and if he fails to do that, he must suffer the consequences contemplated by Section 36(2)(b) of the Act. It is not open to a candidate who fails to comply with Section 33(5) of the Act to put the blame on the returning officer for rejecting his nomination paper. The returning officer is under no legal obligation to make amends for the omissions of a candidate, especially when the omission relates to a mandatory requirement. Apart from this legal aspect, even on facts, the returning officer, in his testimony before the High Court, had stated that the electoral roll of Sardarpura Assembly Constituency was not with him at the time he had taken up the scrutiny of nomination paper of Jodhpur City Constituency. The law does not enjoin the returning officer to send for the electoral roll from his office to verify the eligibility of a candidate. The law casts a duty on the candidate to satisfy the returning officer by the following one of the three modes prescribed in Section 33(5) of the Act and if he fails to do that the returning officer is bound to reject the nomination paper, he was no option

in the matter. The law does not require the returning officer to send for the electoral roll of a different constituency for the purpose of verifying the eligibility of a candidate.

7. In *Baru Ram v. Shrimati Prasanni* (1959 SCR 1403 : AIR 1959 SC 93 : 16 ELR 450) this Court interpreted Section 33(5) and Section 36(2)(b) and observed as under :

Section 33(5) requires the candidate to supply the prescribed copy and Section 36(2)(b) provides that on his failure to comply with the said requirement his nomination paper is liable to be rejected. In other words, this is a case where the statute requires the candidate to produce the prescribed evidence and provides a penalty for his failure to do so. In such a case it is difficult to appreciate the relevance or validity of the argument that the requirement of Section 33(5) is not mandatory but is directory, because the statute itself has made it clear that the failure to comply with the said requirement leads to the rejection of the nomination paper. Whenever the statute requires a particular act to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence it would be difficult to accept the argument that the failure to comply with the said requirement should lead to any other consequence.

8. Repelling the argument that failure to comply with the requirement of Section 33(5) was not a defect of substantial nature and the returning officer could be satisfied by other modes that the candidate's name was entered as an elector in another constituency, the court held that the satisfaction of the returning officer was required to be made in accordance with the statutory requirement and if a candidate failed to comply with that requirement the returning officer could not be satisfied by any other mode. The court further held that the failure to comply with the failure to comply with the requirement of Section 33(5) was a defect of substantial nature which could not be ignored under Section 36(4) of the Act. The view taken in *Baru Ram* case (1959 SCR 1403 : AIR 1959 SC 93 : 16 ELR 450) has been followed in *Narbada Prasad v. Chhagan Lal* ((1969) 1 SCR 499 : AIR 1969 SC 395), *Parmar Himatsingh v. Patel Harmanbhai Narsibhai* ((1974) 3 SCR 453 : (1974) 2 SCC 115) and *Avadh Raj Singh v. Jugal Kishore Gupta* ((1979) 4 SCC 328). Learned counsel for the respondent sought support from a Constitution Bench decision of this Court in *Ranjit Singh v. Pritam Singh* ((1966) 3 SCR 543 : AIR 1966 SC 1626 : 28 ELR 169) for his submission that failure to comply with Section 33(5) was not defect of substantial character. We have carefully gone through the decision but we do not find anything therein to support the respondent's contention instead it supports the view taken by us. In *Ranjit Singh* case ((1966) 3 SCR 543 : AIR 1966 SC 1626 : 28 ELR 169) a candidate who was not an elector of the constituency had filed three nomination papers. Along with one of his nomination papers he had filed a copy of the electoral roll of the constituency where his name was entered as an elector, with a view to comply with the requirement of Section 33(5) of the Act. He had not filed similar copies along with other two nomination papers. The nomination paper with which the candidate had filed a copy of the electoral roll was rejected on the ground of some technical defect but the other two nominations were rejected on the ground that copy of the electoral roll was not filed along with them. This Court held that the returning officer was wrong in not looking at the copy of the electoral roll filed with one of the nomination papers. The court further held Section 33(5) did not require that a copy must be filed with each nomination paper or that any copy should be filed at all as it was open to a candidate to produce the copy before the returning officer at the time of scrutiny. The court held that the purpose of filing the copy is to ensure that the returning officer was able to check whether the candidate concerned was qualified or not and that purpose would be effectively served even if only one copy was filed with one nomination paper and no copies were filed along with the other nomination

papers. While considering Sections 33(5) and 36(4) of the Act the Constitution Bench held that Section 33(5) required that it was the copy produced by the candidate which should show that he was qualified or not and for that purpose a copy produced by the candidate should be complete whether it was of the roll or of the relevant part thereof. To such a case Section 36(4) had no application. Section 36(4) provided that returning officer should not reject any nomination paper on the ground of any defect which was not of a substantial character. Non-production of copy of the relevant part was a defect of a substantial character for it made it impossible to decide whether the candidate was qualified or not. Since qualification for contesting election was a matter of substantial character, the failure to produce a copy of the electoral roll which was incomplete was a defect of a substantial character it would invalidate the nomination paper. In this view we agree with the High Court that there had been no improper rejection of the Umrao Ben's nomination paper, as the accidental circumstance that the returning officer was also the returning officer of the other constituency should not make any difference.

9. As regards the rejection of the nomination paper of Hukmi Chand and Suraj Pradash Joshi are concerned the High Court has held that neither of the two candidate was present before the returning officer at the time of scrutiny nor any person on their behalf was present. In his nomination paper Ex. 2 Hukmi Chand had give a declaration that he had completed 26 years of age while Suraj Prakash Joshi had given declaration in his nomination paper Ex. 3 that he had completed 25 years of age. At the time of scrutiny no objection was raised against their nomination paper by any party and none appeared on behalf of the aforesaid two candidates. The returning officer found that according to the entries in the electoral roll the age of Hukmi Chand was 23 years similarly in the case of Suraj Prakash Joshi the entry in the electoral roll indicated that on the relevant date his age was 22 years. On the basis of the entries contained in the electoral roll the returning officer held that the two candidates did not possess the requisite qualification of age as required by Article 173 of the Constitution to contest the election. Accordingly he rejected both the nomination papers. Before the High Court a controversy was raised as to whether the two candidates were present at the time of scrutiny but on the evidence on record the High Court has held that neither of the two candidates nor anybody on their behalf was present at the time of scrutiny. Placing reliance on the oral and documentary evidence produced by the respondent the High Court has recorded findings that Hukmi Chand as well as Suraj Prakash Joshi both had attained the age of 25 years on the relevant date January 1, 1984 and their nomination papers had been rejected improperly by the returning officer, which materially affected the result of the election.

10. Dr. Chitale learned counsel for the appellant urged that on the admitted facts and circumstances the returning officer could not be held to have acted improperly in rejecting the nomination papers of Hukmi Chand and Suraj Prakash Joshi. He urged that since at the time of the scrutiny neither of the two candidates nor their proposer nor anybody else appeared before the returning officer, or placed any material before him showing that either of the two candidates was qualified to contest the election having attained the age of more than 25 years, the returning officer had no option but to rely on the entries contained in the electoral roll and therefore the rejection of the nomination papers of Hukmi Chand and Suraj Prakash Joshi could not be said to be improper. Learned counsel further urged that if the returning officer did not act improperly in rejecting the nomination paper of the aforesaid candidates, appellant's election could not be set aside on the basis of fresh or additional material placed before the High Court. Section 36 provides that on the date fixed for the scrutiny of nomination, the candidate, his election agent, proposer or any other person duly authorised in writing by the candidate may attend the proceedings at the time and place fixed for scrutiny. The returning officer is required to give them all reasonable facility for examining the nomination papers of all the candidates. Section 36(2) requires the returning officer to examine the nomination papers

and to decide all objections which may be made to any nomination. He may, either on such objection or on his own motion, after such summary inquiry, if any, as he may think necessary, reject any nomination on any of the grounds specified under clauses (a), (b) and (c). Clause (d) empowers the returning officer to reject nomination paper of candidate if on the date fixed for the scrutiny of the nomination the candidate is not qualified or is disqualified for being chosen to fill the seat under any of the provisions of Articles 84, 102, 173 and 191 of the Constitution. Article 173 lays down constitutional qualification for being a Member of the State legislature, according to which a person is not qualified to be chosen to fill a seat in the legislature of a State unless he is not less than 25 years of age. During the scrutiny the returning officer is under a statutory duty to satisfy himself that the candidate who may have filed nomination paper possesses the necessary constitutional qualification for contesting the election. In the instant case neither of the two candidates appeared nor anybody on their behalf appeared or placed any material before the returning officer to show that the candidates were not less than 25 years of age on the date of scrutiny January 1, 1984. No doubt in the nomination papers both the candidates had made a declaration that they were not less than 25 years of age but entries pertaining to them in the electoral roll clearly indicated that they were less than 25 years of age. The returning officer placing reliance on the entries contained in the public document i.e. the electoral roll, rejected the nomination paper of the two candidates on the ground that Hukmi Chand and Suraj Prakash Joshi were not qualified to contest the election. In the absence of any material before the returning officer, the returning officer was not wrong in taking the entries in the electoral roll into consideration and acting on them. But his decision is not final. In an election petition it is open to an election petitioner to place cogent evidence before the High Court to show that the candidate whose nomination paper was rejected had in fact attained the age of 25 years on the relevant date. It is open to the High Court to take a final decision in the matter notwithstanding the order of the returning officer rejecting the nomination paper. If on the basis of the material placed before the High Court it is proved that the candidate whose nomination paper had been rejected was qualified to contest the election it is open to the High Court to set aside the election. Enquiry during scrutiny is summary in nature as there is no scope for any elaborate enquiry at that stage. Therefore it is open to a party to place fresh or additional material before the High Court to show that the returning officer's order rejecting the nomination paper was improper. It should be borne in mind that the proceedings in an election petition are not in the nature of appeal against the order of the returning officer. It is an original proceeding. In the instant case it was open to the respondent election petitioner to place material before the High Court to show that the two candidates were qualified and their nomination paper was improperly rejected.

11. The question then arises whether the respondent has proved in accordance with law the Hukmi Chand and Suraj Prakash Joshi whose nomination papers were rejected by the returning officer had attained the age of 25 years on January 1, 1984. In the election petition the respondent pleaded that Hukmi Chand's nomination paper was improperly rejected on the basis of entry in the electoral roll which mentioned his age as 23 years while his correct date of birth was May 13, 1956 as evidenced by the certificate issued by the Head Master of the New Government School Jodhpur. The respondent had further pleaded that the nomination paper of Suraj Prakash Joshi was rejected on the sole ground that in the electoral roll his age was recorded as 23 years on January 1, 1984 but the entries contained in the electoral roll were not final and conclusive. The date of birth of Suraj Prakash Joshi was not mentioned in the election petition and there was no further pleading that on the date of filing his nomination Suraj Prakash Joshi had actually attained the age of 25 years. However it was pleaded that since Suraj Prakash Joshi had given a declaration that he had completed 25 years of age there was no reason to disbelieve him as no objection had been raised

against the declaration made by him and therefore the returning officer acted improperly in rejecting his nomination paper. In his written statement the appellant denied the allegations made by the election petitioner and asserted that the returning officer acted rightly in rejecting the nomination papers of Hukmi Chand and Suraj Prakash Joshi as they were not qualified to contest the election as they had not completed 25 years of age on the date of nomination. The respondent produced oral and documentary evidence to support his contention. Even before the High Court neither of the two candidates whose nomination papers were rejected appeared nor their parents were examined by the respondent nor any person having special knowledge about the dates of birth of the two candidates was examined by the respondent. As regards Hukmi Chand the respondent produced Ex. 8 (a copy of scholar's register) Ex. 9 (counterfoil of Certificate of Board of Secondary Education) Ex. 10 (mark-sheet of Hukmi Chand) Ex. 11 (a copy of counterfoil Certificate of Board of Secondary Education) relating to Suraj Prakash Joshi, and Ex. 12 (tabulation record of marks obtained by Suraj Prakash Joshi). These documents were sought to be proved by Anant Ram Sharma PW 3 and Kailash Chand Taparia PW 5. Ex. 8 is a copy of the scholar's register issued by the head of the Government Higher Secondary School and entries contained therein show that Hukmi Chand had joined Government Middle School Palasani on June 24, 1972 and he had left the same on June 10, 1976 after having passed Eighth class. In this document June 13, 1955 is mentioned as date of birth of Hukmi Chand son of Sardar Mal. Ex. 9 is a certificate issued by the Board of Secondary Education, Rajasthan certifying that Hukmi Chand Bhandari son of Sardar Mal Bhandari passed Secondary School Examination of 1974 from New Government Higher Secondary School Jodhpur, it also shows June 13, 1956 as date of birth of Hukmi Chand. Ex. 10 is a tabulation record containing the details of the marks obtained by Hukmi Chand at the Secondary School Examination 1974. In this document also his date of birth is mentioned as June 13, 1956. Placing reliance on these three documents the High Court held that Hukmi Chand's date of birth was June 13, 1956 and therefor his age on January 1, 1984 was more than 25 years. The High Court further held that in view of the entry in Ex. 11, certificate issued by the Board of Secondary Education, Rajasthan Suraj Prakash was born on March 11, 1959 and therefore he was qualified to contest the election as he was not less than 25 years of age. On these findings the High Court held that the respondent had successfully proved that the nomination papers of Hukmi Chand and Suraj Prakash Joshi had been wrongly rejected.

12. Before the High Court appellant raised a contention that there was no evidence to prove that Exs. 8, 9, 10, 11 and 12 related to Hukmi Chand and Suraj Prakash Joshi and therefore the documents could not be pressed into service. A further contention was raised that the election petitioner had failed to place any evidence before the court to show that entries of age in the documents Exs. 8, 9, 10, 11 and 12 had been made on the basis of information furnished either by the parents or by anyone else having special knowledge about the date of birth of Hukmi Chand and Suraj Prakash Joshi. In the absence of such evidence the entries in the documents had no evidentiary or probative value. The High Court rejected this submission on the ground that the appellant had raised no such plea in his written statement nor he produced any evidence to prove that the documents did not pertain to Hukmi Chand or Suraj Prakash Joshi or that any other persons having the same parentage by the name of Hukmi Chand and Suraj Prakash Joshi existed. The High Court committed error. The question of appreciation of evidence is not to be pleaded; instead it was the duty of the court to consider whether the documents produced by the respondent proved the facts in issue. As regards the evidentiary value of Exs. 8, 9, 10, 11 and 12 the High Court took note that there was no evidence as to who gave the information regarding the date of birth of Hukmi Chand at the time of his admission in Government Middle School, Palasani and even the initial application form for admission to the school was not produced and subsequent form for admission to the

Government Multipurpose Higher Secondary School, Jodhpur from where he passed the secondary examination was also not produced, as it observed :

No attempt was made by the parties to get the application form for admission and transfer certificate produced from the New Government Higher Secondary School, Jodhpur and similarly no application form for admission was got produced from the Government Middle School, Palasani. But still it can be presumed that the date of birth recorded in the Scholar's Register is based on the date of birth given in the application form initially submitted at Palasani and continued in the transfer certificate and the same was mentioned at the time of admission in the Government Multipurpose Higher Secondary School, Jodhpur.

After making the aforesaid observation the High Court held that these documents were public documents within the meaning of Section 74 of the Evidence Act and therefore there was a presumption about the correctness of date of birth mentioned therein. The High Court was conscious of the fact that in the absence of the evidence of the person who may have given information regarding the date of birth, the entries contained in the scholar's register of certificate had no probative value as would be clear from the following observations :

It is true that it would have been better if the person who gave the information regarding the date of birth would have been examined but failure to examine such a person would not in any way affect the genuineness of the entries and also their probative value unless in comparison to these entries, any other weighty evidence having greater probative value is produced. The entry in the scholar register may be contradicted by the birth entry or entry in the vaccination register or reliable horoscope or any other reliable or weighty oral or documentary evidence but in the absence of such contradicting weighty evidence, the entries in the scholar register and other records of the educational institution would, in my opinion, certainly enjoy such probative value.

13. After making aforesaid observations the High Court held that in view of the Exs. 8, 9, 10, 11 and 12 the election petitioner had discharged the burden in proving that Hukmi Chand and Suraj Prakash Joshi both had attained the age of 25 years on the relevant date. The High Court drew adverse inference against the appellant on the ground that though Hukmi Chand and Suraj Prakash Joshi had been cited as witnesses by the appellant but they were not examined. The High Court proceeded on the assumption that if these witnesses had been examined they would not have supported the respondent. After drawing adverse inference against the appellant and placing reliance on the aforesaid documentary evidence the High Court held that Hukmi Chand and Suraj Prakash Joshi both were qualified to contest the election as they has completed 25 years of age on January 1, 1984 and the returning officer had improperly rejected their nomination papers which materially affected the result of the election. The High Court in our opinion committed serious error of law in appreciating the evidentiary value of the documentary evidence produced by the respondents as a result of which its findings are not sustainable.

14. We would now consider the evidence produced by the respondent on the question of age of Hukmi Chand and Suraj Prakash Joshi. The respondent examined Anantram Sharma PW 3 and Kailash Chandra Taparia PW 5. Anantram Sharma PW 3 has been the Principal of New Government High Secondary School, Jodhpur since 1984. On the basis of the scholar's register he stated before the High Court that Hukmi Chand joined school on June 24, 1972 in Ninth class and

his date of birth as mentioned in scholar's register was June 13, 1956. He made this statement on the basis of the entries contained in the scholar's register Ex. 8. He admitted that entries in the scholar's register are made on the basis of entries contained in the admission form. He could not produce the admission form in original or its copy. He stated that Hukmi Chand was admitted in Ninth class on the basis of transfer certificate issued by the Government Middle School, Palasani from where he had passed eight standard. He proved the signature of Satya Narain Mathur the then Principal who had issued the copy of the scholar's register Ex. 8. Satya Narain Mathur was admittedly alive but he was not examined to show as to on what basis he had mentioned the date of birth of Hukmi Chand in Ex. 8. The evidence of Anantram Sharma merely proved that Ex. 8 was a copy of entries in scholar's register. His testimony does not show as to on what basis the entry relating date of birth of Hukmi Chand was made in the scholar's register. Kailash Chandra Taparia PW 5 was Deputy Director (Examination) Board of Secondary Education, Rajasthan, he produced the counterfoil of Secondary Education Certificate of Hukmi Chand Bhandari, a copy of which has been filed as Ex. 9. He also proved the tabulation record of the Secondary School Examination 1974, a copy of which has been filed as Ex. 10. In both these documents Hukmi Chand's date of birth was recorded as June 13, 1956. Kailash Chandra Taparia further proved Ex. 11 which is the copy of the tabulation record of Secondary School Examination of 1977 relating to Suraj Prakash Joshi. In that document the date of birth of Suraj Prakash Joshi was recorded as March 11, 1959. Kailash Chandra Taparia stated that date of birth as mentioned in the counterfoil of the certificates and in the tabulation form Ex. 12 was recorded on the basis of the date of birth mentioned by the candidate in the examination form. But the examination form or its copy was not produced before the court. In substance the statement of the aforesaid two witnesses merely prove that in the scholar's register as well as in the secondary school examination records the date of birth of a certain Hukmi Chand was mentioned as June 13, 1956 and in the tabulation record of secondary school examination a certain Suraj Prakash Joshi's date of birth was mentioned as March 11, 1959. No evidence was produced by the respondent to prove that the aforesaid documents related to Hukmi Chand and Suraj Prakash Joshi who had filed nomination papers. Neither the admission form nor the examination form on the basis of which the aforesaid entries relating to the date of birth of Hukmi Chand and Suraj Prakash Joshi were recorded was produced before the High Court. No doubt, Exs. 8, 9, 10, 11 and 12 are relevant and admissible but these documents have no evidentiary value for purpose of proof of date of birth of Hukmi Chand and Suraj Prakash Joshi as the vital piece of evidence is missing, because no evidence was placed before the court to show on whose information the date of birth of Hukmi Chand and the date of birth of Suraj Prakash Joshi were recorded in the aforesaid document. As already stated neither of the parents of the two candidates nor any other person having special knowledge about their date of birth was examined by the respondent to prove the date of birth as mentioned in the aforesaid documents. Parents or near relations having special knowledge are the best persons to depose about the date of birth of a person. If entry regarding date of birth in the scholar's register is made on the information given by parents or someone having special knowledge of the fact, the same would have probative value. The testimony of Anantram Sharma and Kailash Chandra Taparia merely prove the documents but the contents of those documents were not proved. The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar's register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value. Merely because the documents Exs. 8, 9, 10, 11 and 12 were proved, it does not mean that the

contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted.

15. The High Court held that in view of the entries contained in the Exs. 8, 9, 10, 11 and 12 proved by Anantram Sharma Pw 3 and Kailash Chandra Taparia PW 5, the date of birth of Hukmi Chand and Suraj Prakash Joshi was proved and on that assumption it held that the two candidates had attained more than 25 years of age on the date of their nomination. In our opinion the High Court committed serious error. Section 35 of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. In *Raja Janaki Nath Roy v. Jyotish Chandra Acharya Chowdhury* (AIR 1941 Cal 41 : 45 CWN 141 : 193 IC 419) a Division Bench of the Calcutta High Court discarded the entry in school register about the age of a party to the suit on the ground that there was no evidence to show on what material the entry in the register about the age of the plaintiff was made. The principle so laid down has been accepted by almost all the High Courts in the country, see *Jagan Nath v. Moti Ram*, (AIR 1951 Punj 377) *Sakhi Ram v. Presiding Officer* (AIR 1966 Pat 459), *Ghanchi Vora Samsuddhisn Isabhai v. State of Gujarat* (AIR 1970 Guj 178) and *Radha Kishan Tickoo v. Bhushan Lal Tickoo* (AIR 1971 J & K 62). In addition to these decisions the High Courts of Allahabad, Bombay, Madras have considered the question of probative value of an entry regarding the date of birth made in the scholar's register or in school certificate in election cases. The courts have consistently held that the date of birth mentioned in the scholar's register or secondary school certificate has no probative value unless either the parents are examined or the person on whose information the entry may have been made, is examined, see *Jagdamba Prasad v. Jagannath Prasad* (42 ELR 465 (All HC)), *K. Paramalali v. I. M. Alangam* (31 ELR 401 (Mad HC)), *Krishna Rao Maharaju Patil v. Onkar Narayan Wagh* (14 ELR 386 (Bom HC)).

16. In *Brij Mohan Singh v. Priya Brat Narain Sinha* ((1965) 3 SCR 861 : AIR 1965 SC 282 : 26 ELR 78), a question arose whether the returned candidate had attained the age of 25 years on the date of his nomination. The High Court had set aside the election of the returned candidate on the ground that he was below the age of 25 years on the date of filing the nomination. This Court set aside the order of the High Court and upheld the election of the returned candidate on the ground that the burden of proving that the returned candidate had not attained the age of 25 years on the date of his nomination was on the election petitioner and since he had failed to prove that, the

election of the returned candidate could not be set aside. This Court held that an entry recorded in the birth register maintained by an illiterate chowkidar by somebody else at his request, was not admissible and had no probative value within Section 35 of the Indian Evidence Act. In *Ram Murti v. State of Haryana* ((1970) 3 SCC 21 : AIR 1970 SC 1029 : 1970 SCC (Cri) 371) the date of birth of a girl mentioned in the school certificate was not accepted. However in *Mohd. Ikram Hussain v. State of U.P.* (AIR 1964 SC 1925 : (1964) 5 SCR 86 : 1964) 2 Cri LJ 590) this court accepted the date of birth of a girl as mentioned in the school certificate as the date of birth mentioned therein was supported by an affidavit filed by the father of the girl

17. The appellant was declared elected as he had polled majority of valid votes. His election could not be set aside unless the respondent-election petitioner was able to prove that Hukmi Chand and Suraj Prakash Joshi had attained the age of 25 years on the date of nomination by producing cogent and reliable evidence before the High Court. The burden to prove that fact was on the respondent throughout and he could not and did not discharge that burden merely by producing the documentary evidence Exs. 8, 9, 10, 11 and 12 or on the basis of oral testimony of Anantram Sharma PW 5. As discussed earlier these documents do not conclusively prove the dates of birth of Hukmi Chand and Suraj Prakash Joshi. The entries regarding dates of birth contained in the scholar's register and the secondary school examination have no probative value, as no person on whose information the dates of birth of the aforesaid candidates was mentioned in the school record was examined. In the absence of the connecting evidence the documents produced by the respondent, to prove the age of the aforesaid two candidates have no evidentiary value. The High Court committed serious error in accepting the dates of birth as mentioned in the aforesaid documents. In our view the High Court's entire approach in considering the question of dates of birth was wholly misconceived. The burden to prove the fact in issue, namely, the dates of birth of Hukmi Chand and Suraj Prakash Joshi was on the respondent who was the election petitioner. The respondent could not succeed if no evidence was produced by the appellant on the question of age of the aforesaid candidates and his election could not be set aside merely on the ground that the respondent had made out a prima facie case that the entry contained in the electoral roll regarding the age of two candidates was incorrect. It appears that in his list of witnesses the appellant had included the name of Suraj Prakash Joshi and his father Maghdutt Joshi as witnesses but they were not examined by him. Similarly, Hukmi Chand was also cited by the appellant but he was also not examined instead Navratan Mal Bhandari, brother of Hukmi Chand was examined as PW 4 and Ghanshyam Chhangani was examined as PW 6 by the appellant, who supported the appellant's case that Hukmi Chand and Suraj Prakash Joshi had not attained the age of 25 years on the date of nomination. Since the appellant had not examined Hukmi Chand, Suraj Prakash Joshi or their parents, the High Court drew adverse inference against him. The High Court committed serious error in doing so. There was no question of drawing adverse inference against the appellant, as the burden to prove the age of Hukmi Chand and Suraj Prakash Joshi was on the election petitioner and since he had failed to prove the same by cogent evidence no adverse inference could be drawn against the appellant. In fact, burden was on the respondent to prove his case by producing Hukmi Chand and Suraj Prakash Joshi, or their parents to prove and corroborate the dates of birth as mentioned in the school register and the certificate. If he failed to do that he could not succeed merely because appellant had not produced them. In the circumstances no adverse inference was at all possible to be drawn against the appellant for not examining Hukmi Chand and Suraj Prakash Joshi or their parents.

18. In view of the above discussion we are of the opinion that Umrao Ben's nomination paper was rightly rejected and further the respondent has failed to prove that Hukmi Chand and Suraj Prakash Joshi possessed the necessary age qualification as required by Article 173 of the Constitution.

Therefore the returning officer was justified in rejecting their nomination paper. In this view the High Court wrongly set aside the order of the High Court and dismiss the election petition. The appellant is entitled to costs which we quantify at Rs. 5000.

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