

SUPREME COURT OF INDIA

Krishna Mohini

Vs.

Mohinder Nath Sofat

(A . A.S., S R Babu and R Lahoti JJ.)

26.10.1999

JUDGMENT

R.C. LAHOTI, J.

1. This is an appeal under Section 116A of the Representation of the People Act, 1951 preferred by a candidate, who, though successful at the polls, has lost in the election petition before the High Court. For the sake of convenience, the parties shall be referred to as they were arrayed in the election petition filed before the High Court.

2. Mohinder Nath Sof at, the defeated candidate, filed an election petition putting in issue the election of Smt. Krishna Mohini, the returned candidate, alleging improper rejection of the nomination papers of Sarvshri Pritam Chand and Mohan Singh and also that the result of election in so far as it concerns the returned candidate having been materially affected by the improper acceptance of nomination paper of Jagdish Chander Bhardwaj. The two grounds were covered by Section 100(1)(c) and Section 100(1)(d)(i) of the Representation of the People Act, 1951(hereinafter referred to as the 'Act', for short). Both the pleas have prevailed with the learned Designated Election Judge of the High Court of Punjab and Haryana. The election petition has been allowed and the election of the returned candidate set aside.

3. Legislative Assembly elections including for 14-Solan Constituency of Himachal Pradesh Vidhan Sabha were held in the months of January and February, 1998 as per the programme notified by the Election Commission of India. Nomination papers were to be filed between 28.1.1998 and 4.2.1998(both days inclusive). Scrutiny of nomination papers was to take place on 5.2.1998. Last date for withdrawal of candidature was 7.2.1998 upto 3 p.m. Allotment of symbols was to take place after 3 p.m. on 7.2.1998. Date of polling was 28.2.1998. Counting of ballots was to take place on 2.3.1998.

4. The petitioner filed his nomination as a candidate of Bhartiya Janta Party, a registered and recognised political party. The respondent filed his nomination as a candidate of Indian National Congress (I), a registered and recognised political party. One Pritam Chand son of Bahadur Ram, filed his nomination (Ex. PW 1/P) as a candidate of Shiv Sena (a registered --unrecognised political party). On the date of scrutiny, his nomination was rejected by the Returning Officer by an order passed as under :

Since the nomination of main candidate has been accepted, he being substitute candidate, his nomination papers are rejected.

5. One Mohan Singh son of Shiv Ram had filed his nomination (Ex. PW 1/R) as a candidate of Himachal Vikas Congress (a registered--unrecognised political party). His nomination was also rejected by the Returning Officer by an order passed as under :

The main candidate since has been accepted hence his nominator is rejected.

6. Jagdish Chander Bhardwaj (PW 2) had filed his nomination (Ex. PW 1 N) as a candidate of Communist Party of India (CPI). The date and time of presentation of nomination as endorsed on his nomination paper are "4.2.1998" and "12.45. p.m." The Oath Form (Ex. PW I/O) bears the date and time of the Oath having administered by the Returning Officer as "4.2.1998" and "12.44 a.m.".

7. There were four other candidates whose nomination papers were found to be in order and were accepted by the Returning Officer. Thus, there were in all seven candidates in the fray. The contesting candidates secured the votes as under:

S.No. Name of Candidate Party affiliation No. of votes polled

1. Ms. Krishna Mohini Indian National Congress 12,210 (respondent)

2. Jagdish Chand Bhardwaj C.P.I. 598

3. Mohinder Nath Sofat Bhartiya Janta Party 12,184 (Petitioner)

4. Ravinder Nath Parihar Samajwadi Party 512

5. Vinod Kumar Himachal Vikas Congress 1,063

6. Smt. Satya Devi Shiv Sena 72

7. Harminder Singh Thakur Independent 9,739

8. In accordance with the above result of counting, the respondent-Krishna Mohini was declared elected. She had defeated her nearest rival, the petitioner, by a margin of 26 votes.

9. According to the petitioner, the nomination papers of Sarvshri Pritam Chand and Mohan Singh were wrongly rejected by the Returning Officer. Though these two candidates, as per their nomination papers, had claimed themselves to be alternate candidates of Shiv Sena and Himachal

Vikas Congress respectively, but each of the nomination papers was proposed by ten electors of the Constituency and as such both were entitled to be treated as independent candidates and none of the nomination papers filed by them could have been rejected inspite of the nomination papers of the main candidates having been accepted by the Returning Officer. Improper rejection of any nomination paper is by itself a ground for avoiding the election of the returned candidate under Section 100(1)(c) of the Act. Jagdish Chander Bhardwaj had not taken oath after the submission of the nomination paper before the Returning Officer, who was authorised by the Election Commission of India to administer the oath or affirmation as required by Article 173 of the Constitution and hence his nomination paper was illegally accepted which has resulted into the result of election being materially affected.

10. According to the respondent, the nomination papers of Pritam Chand and Mohan Singh were rightly rejected by the Returning Officer as they were mere alternate or substitute candidates of Shiv Sena and Himachal Vikas Congress respectively. Inasmuch as the nomination papers of Smt. Satya Devi and Shri Vinod Kumar, the candidates set up by the said two political parties respectively, were found to be in order and accepted, the question of accepting nomination papers of alternate/substitute candidates did not arise. Their nomination papers were rightly rejected by the Returning Officer. So far as Jagdish Chander Bhardwaj is concerned, the timings endorsed on the nomination paper and oath form suffer from a clerical error merely. Oath was administered to Jagdish Chander Bhardwaj by the Returning Officer after the presentation of nomination paper by him and, therefore, his nomination paper was rightly accepted by the Returning Officer.

11. On the basis of the pleadings of the parties, the following issues were framed by the learned Designated Election Judge:

1. Whether the petitioner does not disclose full, concise and material facts and does not disclose a cause of action? If so, its effect? OPR

2. Whether the petitioner has knowingly and intentionally concealed the material facts? If so, its effect? OPR

3. Whether the nomination papers of S/Shri Pritam Chand and Mohan Singh have been wrongly and improperly rejected and the election of respondent No. 1 is liable to be declared void under Section 100(1)(c) of the Representation of People Act? OPP

4. Whether the nomination papers of Jagdish Chand Bhardwaj were wrongly accepted and the result of election has been materially affected thereby? OPP

5. Relief-

12. Issues Nos. 1 and 2 were not pressed for decision by the learned senior counsel for the respondent before the High Court and they were accordingly decided against the respondent. Shri O.P. Sharma, learned senior counsel for the appellant, has disputed the correctness of the factual statement recorded by the High Court that the two issues were not pressed for decision. However, we are not persuaded to entertain such a plea. Firstly, no application disputing the correctness of the factual statement recorded by the learned Designated Election Judge in his judgment has been moved before the same Judge. Secondly, we also do not find any merit in the plea contained in the written statement filed in the High Court on which the two issues have been framed. Even if pressed

for decision, these two issues would have been liable to be decided in favour of the petitioner.

13. Issue Nos. 3 and 4 have been decided in favour of the election petitioner allowing the relief of setting aside the election of the respondent under Issue No. 5. The findings on these issues are under challenge in this appeal.

14. We would first take up the Issue No. 3.

15. Exhibit PW-1/G is the nomination paper of Mohan Singh, which was filed at 2.55 p.m. on 4.2.98. It has been subscribed by ten proposers, who are electors of the Constituency. In part-III of the nomination paper, Mohan Singh has declared himself to have been set up at the election by the Himachal Vikash Congress party. For the choice of symbols, he has given 'telephone' as the first preference and left blank the space meant for second and third preferences.

16. Pritam Chand filed his nomination paper at 1.55 p.m. on 4.2.98. In Part-III of the nomination paper, he has declared himself to have been set up as a candidate by Shiv Sena, a registered unrecognised political party. The space meant for giving the choice of three symbols in the order of preference has been left blank. The nomination paper is subscribed by ten proposers, all being electors of the Constituency.

17. Exhibit R-1 is the communication in form-A made on behalf of Himachal Vikash Congress to the Chief Electoral Officer, Himachal Pradesh and the Returning Officer for the 14-Solan Constituency, pursuant to para 13(b), (c) and (d) of the Election Symbols (Reservation and Allotment) Order, 1968 declaring Shri Chaman Lal, General Secretary of the party, as the person authorised for 14-Solan Constituency appending his specimen signatures.

18. Exhibit R-3 is form-B filed under the signature of the said Chaman Lal on 3.2.98 before the Chief Electoral Officer, 14-Solan Constituency, pursuant to paragraph 13(b), (c) and (d) of the Election Symbols (Reservation and Allotment) Order, 1968 whereby it was declared that the 'approved candidate' was Vinod Kumar and Mohan Singh was 'substituted candidate* who will step-in as a contesting candidate on the approved candidate's nomination being rejected on scrutiny or his withdrawing from the contest.

19. Similarly, form-A was filed before the Chief Electoral Officer, Himachal Pradesh, and the Returning Officer for the Solan Constituency on behalf of Shiv Sena forwarding the specimen signatures of Shri Satish Pradhan 'Rajya Sampark Neta' of Shiv Sena, as the person authorised for the purpose. Form-B was filed under the signature of Shri Satish Pradhan declaring Satya Devi to be the 'approved candidate' of Shiv Sena and Pritam Chand as 'substitute candidate' who will step-in as contesting candidate, on the approved candidate's nomination being rejected on scrutiny or his withdrawing from the contest.

20. It is to be noted that neither form-A nor form-B bears the signatures of any candidate. Indeed there is no provision in any Act, Rules or Order which requires any such form to be signed or subscribed to by a candidate.

21. At the scrutiny, the nomination papers of Pritam Chand and Mohan Singh were rejected by the Returning Officer as already stated.

22. The learned Designated Election Judge has held both the rejections to be illegal, which finding has been vehemently attacked by Shri O.P. Sharma, the learned senior counsel for the appellants.

23. The provisions of Sections 33 and 36 of the Act in so far as relevant for our purpose, are extracted and reproduced herein under :

33. Presentation of nomination paper and requirements for a valid nomination.-- (1) On or before the date appointed under Clause (a) of Section 30 each candidate shall, either in person or by his proposer, between the hours of eleven O'clock in the forenoon and three O'clock in the afternoon deliver to the returning officer at the place specified in this behalf in the notice issued under Section 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer.

[Provided that a candidate not setup by a recognised political party, shall not be deemed to be duly nominated for election from a constituency unless the nomination paper is subscribed by ten proposers being electors of the constituency;

Provided further that no nomination paper shall be delivered to the returning officer on a day which is a public holiday;

Provided also that in the case of a local authorities' constituency, graduates' constituency or teachers' constituency, the reference to "an elector of the constituency as proposed shall be construed as a reference to ten per cent of the electors of the constituency or ten such electors, whichever is less, as proposers".]

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36. Scrutiny of nominations.-- (1) On the date fixed for the scrutiny of nominations under Section 30, the candidates, their election agents, one proposer of each candidate, and one other person duly authorised in writing by each candidate, but no other person, may attend at such time and place as the Returning Officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in Section 33.

(2) The Returning Officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination, and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds :

(a) that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely--

Articles 84, 102, 173 and 191. Part II of this Act [and Sections 4 and 14 of the Government of Union Territories Act, 1963.]; or

(b) that there has been a failure to comply with any of the provisions of Section 33 or Section 34; or

(c) that the signature of the candidate or the proposer on the nomination paper is not genuine.

(3)... (not reproduced)

(4) The Returning Officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character. xxx xxx xxx

[Underlining by us]

24. The first and third provisos to Sub-section (1) of Section 33 have been added by the Representation of the People (Amendment) Act, 1996 [Act 21 of 96] w.e.f. 1.8.1996. Prior to this, there was only one proviso which is now the second proviso in the present form.

25. In exercise of the powers conferred by Article 324 of the Constitution read with Section 29A of the Representation of the People Act, 1951 and Rules 5 and 10 of the Conduct of Elections Rules, 1961 and all other powers enabling it in this behalf, the Election Commission of India has issued the Election Symbols (Reservation and Allotment) Order, 1968(hereinafter referred to as the "Symbols Order", for short). This order provides for allotment of symbols to the contesting candidates, for classification of symbols into ^ reserved symbol--reserved for exclusive allotment to contesting candidates set up by a recognised political party, and free symbol --which is a symbol other than a reserved symbol. Para 6 classifies political parties into recognised and unrecognised political parties. To be a recognised political party in a State, a political party must satisfy the conditions specified in Clause (A) or Clause (B) of sub-para (2) of Para 6 of the Symbols Order. A recognised] political party may be a National party or a State party. A candidate set up " by a recognised party in an election contest can choose only a symbol reserved for that political party. Candidates set up by political parties other than recognised ones and independent candidates are entitled to free symbols. A candidate other than a candidate set up by a recognised National or State Party in that State or a candidate set up by a State party at elections in other State, has to choose and to be allotted a free symbol. A free symbol chosen by only one candidate must be allotted to him and to no one else. Where the same free symbol has been chosen by several candidates at such election the manner how the symbol shall be allotted as amongst those several candidates is laid down in sub-para 3 of para 12 of the Symbols Order.

26. Para 13 of the Symbols Order [as substituted by O.N. 203-E dt. 5.8.1996, and effective at the relevant time] provides as under :

13. When a candidate shall be deemed to be set up by a political party.--For the purposes of this Order, a candidate shall be deemed to be set up by a political party if, and only if,--

(a) the candidate has made a declaration to that effect in his nomination paper;

(b) a notice in writing to that effect has, not later than 3 p.m. on last, date for making nominations, been delivered to the Returning Officer of the constituency and the Chief Electoral Officer of the State;

(c) the said notice is signed by the President, the Secretary or any other of fice bearer of the party and the President, the Secretary or such other officer bearer is authorised by the party to sent such notice; and

(d) the name and specimen signature of such authorised person are communicated to the Returning Officer of the constituency and to the Chief Electoral Officer of the State not later than 3.00 p.m. on the last date for making nominations.

27. For the purpose of Symbols Order, as defined in Clause (h) of Para 2, "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. The scheme of the Symbols Order shows that it does not deal with unregistered political parties. It deals with registered political parties by sub-dividing them into recognised and unrecognised political parties and with independent candidates. To be entitled to the benefit of allotment of symbols reserved to a recognised political party, the candidate has to be one set up by a recognised political party and in a manner prescribed by Para 13 of the Symbols Order. The privilege enjoyed by a candidate set up by a recognised political party, as spelt out by a combined reading of Section 33 of the Act with the provisions of Symbols Order, is that his nomination paper is complete, inter alia, if proposed by an elector, (i.e., one only) of the Constituency, If the candidate be one not set up by a recognised political party, i.e., if he be a candidate set up by an unrecognised political party or be an independent candidate, his nomination paper must be subscribed by ten proposers being electors of the Constituency. Nomination paper filed by a candidate set up by an unrecognised political party or an independent candidate, cannot be proposed by a single elector of the Constituency or by electors less than ten.

28. Prior to the amendment in the body of the Act introduced by Act No. 21 of 1996, which inserted, inter alia, the first proviso to Sub-section (1) of Section 33 of the Act, the expression "recognised political party" was not to be found used in the Act. The Representation of the People (Amendment) Act, 1989 (Act No. 1 of 1989) introduced, w.e.f. 15.6.1989, Section 29A as also Clause (0 in Sub-section (1) of Section 2 of the Act. Section 2(1)(f) defines "political party" to mean an association or a body of individual citizens of India registered with the Election Commission as a political party under Section 29A. The latter provision lays down the manner of such registration. Symbols Order, 1968 divides 'registered political parties' into recognised and unrecognised ones. For the purpose of Symbols Order as defined by Para 2(1) (h) thereof, 'political party' is a political party registered with the Commission under Section 29A of the Act. The Act does not define recognised political party. The expression "recognised political party" as occurring in first proviso to Sub-section (1) of Section 33 of the Act must be assigned the same meaning as assigned to it by the Symbols Order.

29. The submission of Shri O.P. Sharma, the learned senior counsel for the appellant, is that setting up or otherwise of a candidate by a recognised political party is an integral part of the scheme of Sub-section (1) of Section 33 of the Act and hence an essential requirement of a valid nomination paper. A candidate, who claims to have been set up by a political party, but fails in substantiating such claim, would be deemed to have not complied with the (provisions of Sub-section (1) of Section 33 of the Act. He would attract the wrath of Clause (b) of Sub-section (2) of Section 36 of the Act resulting in the rejection of his nomination paper. The learned Counsel further submitted that Pritam Chand and Mohan Singh had both claimed to have been set up by Shiv Sena and Himachal Vikas Congress respectively. Both failed in substantiating their such claim. Both the political parties had set up Satya Devi and Vinod Kumar respectively as their approved candidates. The Returning Officer was, therefore, justified in rejecting their nomination papers. Neither Pritam Chand nor Mohan Singh was present at the time of scrutiny. Neither of the two had at any time declared or expressed before the Returning Officer his desire of contesting the election as an

independent candidate either in writing or orally. The Returning Officer was, therefore, fully justified in rejecting their nomination papers. The finding to the contrary recorded by the learned Designated Election Judge is wholly unsustainable in law and is liable to be set aside.

30. In our opinion, the submission of Shri Sharma, the learned senior counsel for the appellant, is based on a misappreciation of the correct scope and purport of the relevant provisions of law and hence has not appealed to us.

31. The historical background and the Objects and Reasons leading to the issuance of the Symbols Order have been traced and set out by this Court in *Sadiq AH and Anr. v. The Election Commission of India, New Delhi and Ors.* AIR (1972) SC 186 vide paras 17 and 18. This Court has observed :

17. Perusal of the different paragraphs of the Symbols Order makes it manifest that they provide, as is made clear by its preamble, for specification, reservation, choice and allotment of symbols at elections in Parliamentary and assembly constituencies as well as for the recognition of political parties in relation thereto and for matters connected therewith. One such matter is the decision of a dispute when two rival Sections or groups of a recognised political party claim to be that party for the purpose of the Symbols Order....

18....It may be pertinent to find out the reasons which led to the introduction of symbols. It is well known that overwhelming majority of the electorate are illiterate. It was realised that in view of the handicap of illiteracy, it might not be possible for the illiterate voters to cast their votes in favour of the candidate of their choice unless there was some pictorial representation on the ballot paper itself whereby such voters might identify the candidate of their choice. Symbols were accordingly brought into use. Symbols or emblems are not a peculiar feature of the election law of India. In some countries, details in the form of letters of alphabet or numbers are added against the name of each candidate while in Ors. resort is made to symbols or emblems. The object is to ensure that the process of election is as genuine and fair as possible and that no elector should suffer from any handicap in casting his vote in favour of a candidate of his choice. Although the purpose which accounts for the origin of symbols was of a limited character, the symbol of each political party with the passage of time acquired a great value because the bulk of the electorate associated the political party at the time of elections with its symbol....

32. Though Rule 4 of the Conduct of Elections Rules requires every nomination paper presented under Sub-section (1) of Section 33 to be complete in such one of the Form 2-A to 2-E as may be appropriate and, therefore, the blank space meant for showing three symbols in order of preference as symbols of the candidate's choice, has to be filled in, however, non-filling of the space as to choice of symbol is not a defect of substantial character. Such deficiency in the nomination paper is saved by the proviso to Rule 4 of the Conduct of Elections Rules, 1961 which provides that a failure to complete or defect in completing, the declaration as to symbols in a nomination paper shall not be deemed to be a defect of a substantial character within the meaning of Sub-section (4) of Section 36. Choosing a wrong symbol, leaving blank the space meant for filling the choice of symbols and an error in describing the symbol-are all defects not of substantial character. An independent candidate may mention as his preference the symbol reserved for a recognised political party, but that again will not be a defect of substantial character. Dealing with such cases, this Court has held in *K.S. Abdul Azeez v. Ramcmathan Chettiar and Ors.* , that the question of symbols should not play an important part because symbols can be assigned by political parties till the date for withdrawal and nomination paper should not be cancelled (on this ground) during the interval.

33. In *N.T. Veluswami Thevar v. Raja Nainar and Ors.*, this Court has held that there can be no rejection of nomination paper outside Sub-section (2) of Section 36. Under Section 32 of the Act, any person may be nominated as a candidate for election if he is duly qualified under the provisions of the Constitution and the Act. Section 36(2) authorises the returning officer to reject any nomination paper on the ground that he either is not qualified or is disqualified for being chosen under the provisions referred to therein. If there are no grounds for rejecting a nomination paper under Section 6(2), then it has to be accepted, and the name of the candidate is to be included in a list of validly nominated candidates vide Section 36(8). "...the improper rejection or acceptance must have reference to Section 6(2), and the rejection of a nomination paper of a candidate who is qualified to be chosen/for election and who does not suffer from any of the disqualifications mentioned in Section 36(2) would be improper within Section 100(1)(c)."

34. The distinction between nomination filed by a candidate set up by a recognised political party and a candidate not set up by a recognised political party is precise. A perusal of first proviso to Sub-section (1) of Section 33 of the Act makes it clear that a candidate not set up by a recognised political party, meaning thereby a candidate set up by an unrecognised political party or an independent candidate, in order to be duly nominated for election must have his nomination paper subscribed by ten proposers being electors of the Constituency. If such nomination paper be subscribed by only one elector as proposer or by a number of electors less than ten, then it will amount to non-compliance with the provisions of Section 33. A candidate, who is merely a substitute or a cover candidate set up by a recognised political party, may file his nomination paper proposed by only one elector of the Constituency. If the nomination paper of the approved candidate of that political party is accepted, the nomination paper filed by the substitute or cover candidate, shall be liable to be rejected because there can be only one candidate set up by a recognised political party. In order to be a candidate set up by a registered and recognised political party so as to take advantage of being proposed by a single elector, all the four requirements set out in Clauses (a), (b), (c) and (d) of Para 13 of the Symbols Order must be satisfied. If any one or more of the requirements are not satisfied, the benefit of nomination being proposed by a single elector is not available to him. A situation can be visualised where more candidates than one may be aspiring to be the candidates each set up by the same recognised political party. The one in respect of whom notice and communication in forms A and B referable to sub-para (b), (c) and (d) of Para 13 of Symbols Order have been filed not later than 3.00 p.m. on the last date for making nominations shall be treated as a candidate set up by such political party. His nomination paper, even if subscribed to by single elector as proposer, shall be valid subject to satisfying other conditions as to validity. If any of the requirements contemplated by sub-para (b), (c) and (d) of Para 13 of the Symbols Order are not complied with by filing the requisite notice and communication, then the candidate shall not be deemed to be one set up by the recognised political party. His nomination, if subscribed by a single elector or electors less than ten, shall be liable to be rejected. If the nomination paper of such a candidate is subscribed to by ten proposers being electors of the Constituency within the meaning of first proviso to Sub-section (1) of Section 33 of the Act, then the nomination paper cannot be rejected because an error or omission as regards symbol or choice thereof being a defect not of a substantial character, would not come in the way of the nomination being accepted. The nomination paper shall be accepted as valid and an appropriate symbol to which the candidate may be entitled in accordance with the Symbols Order shall be allotted by the Election Commission.

35. In the nomination paper (Ex. PW-1/P) filed by Pritam Chand, he claimed to have been set up by

Shiv Sena, a registered but unrecognised political party. Vide Para 5 of the Election Petition, it is alleged that Shiv Sena was an unrecognised political party. Similarly, Mohan Singh in his nomination (Ex. PW-1/R) claimed to have been set up by Himachal Vikas Congress a registered unrecognised political party. Vide Para 6 of the Election Petition, it is averred that Mohan Singh was the candidate of an unrecognised political party, Himachal Vikas Congress. These facts are not disputed in the written statement vide paras 5 and 6. Thus, it is not in dispute that both these candidates were set up by unrecognised political parties. Both the nomination papers were subscribed each by ten electors of the Constituency as proposers. The Returning Officer had no other option but to accept their nomination forms as none of them was otherwise disqualified and the nomination forms also did not suffer from any other infirmity. In fact, the filing of Forms 'A' and 'B' as regards them was not of any significance. The only question to which the Returning Officer was called upon to apply his mind was as regards the allotment of symbol to each one of them and that stage would have arisen only after the scrutiny was over and the stage for allotment of symbol arrived after 3.00 p.m. on 7.2.98. Each one of them was to contest the election either as a candidate set up by an unrecognised political party or as an independent candidate. The nomination paper of Pritam Chand did not mention the choice of any symbol. The nomination paper of Mohan Singh mentioned 'Telephone', the symbol of Himachal Vikas Congress, as the symbol of first preference and left the second and third preference blank. The Election Commission could have allotted an appropriate symbol to each one of the candidates to which he was entitled subject to the symbols having been accepted by the Returning officer.

36. A candidate may be aspiring for being set up by a recognised political party. He can pin his hopes for being sponsored by such political party upto the hour by which the time for filing the nomination papers expires. If he fails to obtain such sponsorship by the recognised political party in accordance with the provisions contained in Para 13 of the Symbols Order, then he has the choice of continuing his candidature as an independent candidate subject to his satisfying the requirement of having been proposed by ten electors of the Constituency and other requirements as to the validity of a nomination paper. If he does not withdraw his candidature, then he would be a candidate validly nominated. Such a candidate who has not been able to secure sponsorship by a recognised political party at the time of filing his nomination papers but is still hopeful of securing such sponsorship, has the choice of filing nomination papers more than one. In one of the nomination papers subscribed by one elector of the Constituency he may declare himself to have been set up by a recognised political party. He may file yet another nomination paper declaring his candidature as an independent subscribed by ten electors of the Constituency as proposers. A single nomination paper though containing a declaration by the candidate of his having been set up by a recognised political party, may itself be subscribed by ten electors of the Constituency as proposers. In either case, his nomination would be valid in so far as the aspect of proposing is concerned.

37. Consequent upon amendments having been made in the Representation of the People Act, 1950 and 1951 by the Amendment Act, 1996 (Act No. 21 of 1996) w.e.f. 1.8.96, the Election Commission of India issued a Circular dated 9.8.96 for the guidance of the Chief Electoral Officers of all the States and the Union Territories. Paragraphs 7, 14 and 15 thereof are relevant for our purpose, which are extracted and reproduced hereunder :

7. Under the amended Section 33 of the Representation of the People Act, 1951, the nomination of a candidate at the election to the House of the People or a State Legislative Assembly shall be required to be subscribed by--

(i) One elector of the constituency as proposer, if the candidate has been set up either by a recognised National Party or by a recognised State party in the State or States in which it is recognised as a State party :

(ii) ten (10) electors of the constituency as proposers, if the candidate has been set up by a registered-unrecognised political party or if he is an independent candidate.

14. It may be further noted that having regard to the changed law, the Returning Officer will have to be satisfied at the time of the scrutiny of nominations whether a candidate who claims to have been set up by a recognised National or State party and whose nomination paper is subscribed only by one elector as proposer has in fact been duly set up by such recognised party or not, so as to decide the validity or otherwise of his nomination paper. Therefore, it is essential that the political parties intimate the names of the candidates set up by them to the Returning Officers concerned and Chief Electoral Officer of the State well before the date of scrutiny of nominations. Accordingly, the Commission has decided that all political parties must hereafter give the formal intimation in regard to the candidates set up by them to the aforesaid authorities NOT LATER THAN 3.00 P.M. ON THE LAST DATE FOR MAKING NOMINATIONS IN FORMS 'A1 AND 'B' prescribed for the purpose by the Commission under para 13 of the Election Symbols (Reservation and Allotment) Order, 1968. The said para 13 of the Symbols Order has also been amended by the Commission accordingly.

15. As a result of the aforesaid amendments made to the Forms of nomination paper and paragraph 13 of the Symbols Order, certain consequential amendments have also become necessary in the above referred Forms 'A' and 'B' in which the political parties give formal intimation with regard to the candidates set up by them. A copy each of the revised Forms 'A' is also enclosed herewith for your information and use at all future elections. It will be observed from the revised Form 'B' that the parties have still been given an option in that Form to intimate the name of the substitute candidate who will step-in, if the nomination of the main approved candidate of the party is rejected on scrutiny. But such substitute candidate shall be deemed to have been set up by the party, only if all the requirements under the said para 13, as amended, of the Election Symbols (Reservation and Allotment) Order, 1968 have been fulfilled in his case. If, however, the nomination of the main approved candidate of the party is found valid on scrutiny, the substitute candidate shall not be deemed to have been set up by that party for the purposes of the amended Section 33 of the Representation of the People Act, 1951 and his nomination paper will be scrutinised by the Returning Officer having regard to the other provisions of that Act.

38. So are the instructions for the guidance of the Returning Officers contained in the Handbook for Returning Officers, 1998 vide paragraphs 10.3(iii), 10.3(iv) and 10.3(vii) of Chapter-VI as under :

(iii) If a candidate has filed one nomination paper with both parts I and II thereof filled and he fails to bring notice in Forms 'A' and 'B' from the authorised officer-bearer of the concerned political party, the nomination paper may be accepted if Part II is properly filled subscribed by ten electors as proposers, as there will be substantial compliance with the provisions of Section 33 of the Representation of the People Act, 1951.

(iv) If a candidate, Who filled his nomination paper as candidate claiming to be set up by an unrecognised political party, fails to bring in his favour a notice from the concerned political party in Forms 'A' and 'B', his nomination paper will be accepted if it is subscribed by ten electors as

proposers, and he would be deemed to be an independent candidate.

xxx xxx xxx

(vii) The nomination paper of a substitute candidate of a recognised political party will be rejected if the nomination paper of the main approved candidate of that recognised political party is accepted. However, if such substitute candidate has also filed another nomination paper subscribed by ten electors as proposers, this latter nomination paper will be scrutinised independently by treating the candidate as an independent candidate. Further, if the nomination paper of the main approved candidate of the party is rejected, then also the nomination paper of the substitute candidate will be accepted, provided that the party has intimated his name as its substitute candidate in Form 'A' and 'B' filed before 3 p.m. on the last date for making nominations.

39. In our opinion, the above-said Circular and guidelines issued by the Election Commission of India are consistent with the statutory provisions and correctly bring out the position of law.

40. In the case of Pritam Chand and Mohair Singh, the controversy before the Returning Officer was confined to the allotment of symbol only. The question of testing validity of nomination papers by reference to first proviso to Sub-section (1) of Section 33 of the Act, did not arise at all for that proviso is confined in its application to the candidates set up or claiming to have been set up by a recognised political party. It had no application to the nominations filed by Pritam Chand and Mohan Singh.

41. The learned Designated Election Judge was, therefore, right in holding that none of the two nomination papers suffered from any defect of substantial character and the Returning Officer was, therefore, not right in rejecting the said nomination papers. We agree with the finding so recorded.

42. It was submitted by the learned senior counsel for the appellant before us that in spite of the above-said findings, the election of the returned candidate (the appellant) was not liable to be set aside inasmuch as Pritam Chand and Mohan Singh were dummy and non-serious candidates. Such an inference, according to him, flows from the circumstance that none of them was present at the scrutiny of nomination papers. On the nomination papers being rejected, none of them tried to obtain copies of orders rejecting their nominations. On the contrary, they withdrew their security deposits. None of them has filed any Election Petition on his own. We are not impressed with submission. That apart illegal rejection of a nomination is by itself a ground for setting aside an election without further proof of the result of the election of the returned candidate having been materially affected, this Court's decision in *Hira Singh Pal v. Madan Lot* is a complete answer to the contention forcefully advanced by the learned Counsel.

43. In *Hira Singh Pal's* case (*supra*), one Had Das was the approved candidate of Indian National Congress. Madan Lal was set up as a substitute candidate of the same party. The respondent had asked for the Congress symbol, namely, a pair of bullocks, which was also asked, for by the approved candidate. At the time of scrutiny, the respondent was absent. His nomination was rejected being defective. The respondent did not ask for a copy of the order of the Returning Officer rejecting his nomination. He had also acted as a counting agent of Hari Das, the approved candidate of the political party, who had contested the election. The respondent had also actively canvassed for the approved candidate. This Court arrived at a finding from the facts and circumstances established in the case that the respondent was at no time a genuine candidate and in fact the

rejection of his nomination paper was being availed for undoing the result of the election in view of the approved candidate having lost at the election. This Court further held :

All that we have to consider in this appeal is whether the Returning Officer was right in rejecting the nomination of the respondent....Obviously, he rejected the nomination papers for the reason that the respondent was only a dummy candidate but that was not a matter for him to decide. If he was a dummy candidate there was occasion for him to withdraw his candidature after the scrutiny of the nomination papers. Therefore, it is quite clear that the respondent's nomination papers were improperly rejected. Such a rejection was impermissible under Section 6 and the same is a ground for setting aside the election under Section 100 of the Representation of the People Act.

44. Vide Issue No. 4, the High Court has arrived at a finding that the nomination paper of Jagdish Chander Bhardwaj was filed on 4.2.98 at 12.45 p.m. However, the Form of Oath accompanying the nomination papers shows the oath as required by Article 173 of the Constitution having been subscribed by Jagdish Chander Bhardwaj at 12.44 a.m. on 4.2.98, which means that the oath was taken by him much before the filing of the nomination paper. Inasmuch as the oath was not taken by the said Shri Bhardwaj after his having been nominated as a candidates, his nomination paper was liable to be rejected. It was illegally accepted. He secured 598 votes. The difference between the votes secured by the returned candidate (appellant) over the votes secured by the defeated candidate, was only 26 votes. On the question whether the result of the election has been materially affected by illegal acceptance of nomination paper of said Shri Bhardwaj, the learned Designated Election Judge made a review of the law available on the point and referred to the observations made by this Court in *J. Chandrasekhra Rao v. Jagapathi Rao and Ors.* [1993] Supp. 2 SCC 229 and *Chhedi Ram v. Jhilmit Ram and Ors.* and held that the margin of votes by which the returned candidate has succeeded being small while the number of votes secured by the candidate whose nomination was accepted was many a number of times in proportion to the margin, the result of the election can be assumed to have been materially affected. In arriving at this finding, the learned Judge also drew strength from the factum of non-examination of the returned candidate in the Court.

45. Article 173 of the Constitution (the relevant part thereof) provides as under :

A person shall not be qualified to be chosen to fill a seat in the legislature of a State unless he ♦

(a) is a citizen of India, and makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation accordingly to the form set out for the purpose in the-Third Schedule;

(b)...; and

(c)...

The form of oath reads as under:

Form of oath or affirmation to be made by a candidate for election to the Legislature of a State :

I ...having been nominated as a candidate to fill a seat in the Legislative Assembly (or Legislative Council), do swear in the name of God/Solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of

India.

[Emphasis supplied]

Section 32 of the Act provides as under :

32. Nomination of candidates for election.--Any person may be nominated as a candidate for election to fill a seat if he is qualified to be chosen to fill that seat under the provisions of the Constitution and this Act or under the provisions of the Government of Union Territories Act, 1963(20 of 1963), as the case may be.

46. According to Sub-section (2) of Section 36 of the Act, one of the grounds on which a nomination can be rejected is that on the date fixed for scrutiny of the nominations, the candidate was not qualified for being chosen to fill the seat under Article 173 of the Constitution.

47. Under Sub-section (1) of Section 33 of the Act, a candidate is deemed to have been nominated only after his nomination paper complete in all respects in the prescribed form and signed by the candidate and proposer has been delivered to the Returning Officer between 11.00 a.m. and 3.00 p.m. The law has been settled in Pashupati Nath Singh v. Harihar Prasad Singh by a three-Judge Bench that the oath or affirmation has to be taken by the candidate after he has been nominated, i.e., after he has submitted the nomination papers, but before the date of scrutiny. It follows that an oath or affirmation taken before the submission of nomination form and on or after the day of scrutiny would be invalid depriving the nomination paper of its validity. Following the law laid down by this Court in the case of Pashupatti Nath Singh, (supra) and Khaje Khanavar Khadarkhan Hussain Khan and Anr. v. S. Nijalingappa and Anr. , the Election Commission has issued instructions contained in paragraphs 22.1 and 22.2 of Chapter-V of the Handbook for Returning Officers, which read as under :

22.1. The oath or affirmation should be made and subscribed before the date fixed by the Election Commission for scrutiny or nomination papers at that election. The decisions of the Supreme Court in Pashupati Nath Singh v. Harihar Prasad Singh and Khader Khan Hussain Khan and Ors. v. Nijalingappa [1970] 1 SCR 548 have clarified the position and removed all doubts in regard to the actual making and subscribing the oath or solemn affirmation.

22.2. According to these decisions, the oath or solemn affirmation can be made and subscribed by a candidate only after his nomination paper has been delivered and it cannot be so made and subscribed on the date of scrutiny. You should, therefore, advise the candidate to make the oath or affirmation immediately after presenting their nomination papers and in any case not later than the day previous to the date of the scrutiny.

48. The above-said instructions correctly bring out the legal position.

49. However, the finding arrived at by the learned Designated Election Judge betrays too pedantic an approach and overlooks the effect of oral testimony adduced by the respondent. Tek Chand (RW3), the Returning Officer, has very clearly stated that the nomination paper (Ex. PW-1/N) was presented by Shri Jagdish Chander Bhardwaj before him on 4.2.98 at 12.45 p.m. After the nomination paper was presented to him, he had carried out the preliminary examination thereof which took 2-3 minutes, whereafter he had administered the oath to the candidate. The Oath Form

(Ex. PW I/O) was signed by the candidate in his presence. The date and time recorded on Ex. PW 1/N and Ex. PW 1/O were in the handwriting of Khiali Ram, Election Kanungo, who was assisting him. The time recorded as '12.44' a.m. on Ex. PW I/O was clearly a clerical error. The witnesses very emphatically stated that Oath was administered only after the submission of nomination paper (Ex. PW 1/N), the time where of in so far as the witness could recollect was 12.46 p.m. No objection to the validity of nomination was taken by anyone at the time of scrutiny. Khiali Ram, Election Kanungo, has also appeared in the witness box as RW-4. He too has stated that the time recorded on Ex. PW I/O was wrong and appears to be an outcome of rush of work in the office at the time of filing of the nomination papers. Jagdish Chander Bhardwaj (RW-2) has in his statement narrated the facts, which find support from the testimony of the Returning Officer and the Election Kanungo assessing him. He has stated that on submission of the nomination papers the same were examined in about one or two minutes by the Returning Officer and then the Returning Officer asked him to take Oath in the prescribed form which he did. Sitting in a corner of the office of the Returning Officer he signed the oath form.

50. The learned Trial Judge is certainly not right in recording the finding that the oath was administered before the filing of the nomination papers by literally accepting the time of oath at 12.44 a.m., as recorded on the oath form. The oath could not and must not have been administered on the midnight intervening 3rd and 4th day of February, 1998. If the oath was administered by the Returning Officer, it was certainly between 11.00 a.m. and 3.00 p.m. of 4.2.98. That shows that the time 12.44 a.m. as recorded on the oath form was an obvious effort. Once this fact is accepted, the weight of overwhelming testimony coming from the mouth of the Returning Officer and the Officer assisting him, both being public officers having no obvious reason to tell a lie, should have been assigned due weight. Taken into consideration as corroborating the testimony of Jagdish Chander Bhardwaj, the learned Trial Judge should have held that the oath was administered after the presentation of the nomination forms before the Returning Officer. We hold it to be so and accordingly set aside the finding to the contrary recorded by the learned Designated Election Judge. In our opinion, the nomination form of Jagdish Chander Bhardwaj was not illegally accepted. The acceptance was legal. We need not, therefore, examine the legal-issue whether the result of the election can be said to have been materially affected by the acceptance of the nomination paper of Jagdish Chander Bhardwaj as it is not necessary.

51. Inasmuch as the finding as to illegal rejection of the nomination papers of Pritam Chand and Mohan Singh, as recorded by the learned Designated Election Judge, has been upheld, the election was void and has been rightly held to be so by the High Court. Under Clause (d) of Sub-section (1) of Section 100 of the Act, improper rejection of any nomination is by itself enough to avoid the election without requiring further proof of the result of the election having been materially affected.

52. For the foregoing reasons, the appeal is liable to be dismissed and is dismissed accordingly though without any order as to costs.