

**SUPREME COURT OF INDIA**

Sushil Kumar

Vs.

Rakesh Kumar

(V. N. Khare, C.J.I., and S. B. Sinha, J.)

16.10.2003

**JUDGEMENT**

**S. B. SINHA, J.:-**

1. This appeal under Section 116-A of the Representation of People Act, 1951 arises out of a judgment and order dated 7-8-2002 passed by the High Court of

Patna in Election Petition No. 3 of 2002 whereby and whereunder the election petition filed by the appellant herein was dismissed.

**THE FACTUAL BACKGROUND :**

2. The parties hereto together with other candidates filed their respective nomination papers for election to the Bihar Legislative Assembly from 181 Parbatta Constituency.

3. The last date for filing the nomination papers was 31-1-2000 whereas the scrutiny thereof was to be done on 1-2-2000. The candidate could be withdrawn by 3-2-2000. The date of polling was 17-2-

2000 and the counting of the ballot papers was to be done on 25-2-2000.

4. In the said election the respondent succeeded. The election petition was filed by the appellante herein solely on the ground that the respondent, at the time of filing his nomination paper being not above the age of 25 years as mandatorily required under Article 173(b) of the Constitution of India was not entitled to file his nomination.

#### **ELECTION PETITION :**

5. In his election petition, the appellant, inter alia, contended that the objection as regard the age of the respondent was made in writing before the returning officer but the same was rejected without giving an opportunity of hearing to him, purported to be on the ground that such objection had been filed in relation to one Rakesh Kumar alias Samrat Choudhary while the nomination paper had been filed by Rakesh Ku. According to the appellant, the respondent's date of birth was 1-5-1981 which would appear from a certificate issued by the Bihar Secondary School Examination Board wherein the respondent appeared as Rakesh Kumar alias Samrat Morya in the year 1996 as a private candidate from Kritanand Vidya Mandir High School and was allocated the Roll Code 3218, Roll No. 0019 and he failed therein.

6. Further contention of the appellant is that the respondent was appointed as a Minister of the Cabinet rank but having regard to the complaint made by one Shri P. K. Sinha before the Hon'ble Governor of Bihar, an inquiry was made and he was found to be below the age of 25 years, as a result whereof the respondent was removed from the Ministry. It has further been contended that the respondent was implicated in a criminal case being Tarapur P.S. Case No. 44 of 1995 wherein an application for bail was filed by him or on his behalf on 20-4-1995 before the Chief Judicial Magistrate, Munger and it had specifically been stated therein that he, thence, was a school going student being aged about 15 years.

7. The appellant further contended that the respondent's elder brother, Rohit Kumar, who was studying in the Birla Institute of Technology, was aged 22 years in the year 1999 and, thus, he could not be aged 25 years on the date of filing of the nomination paper.

#### **WRITTEN STATEMENT :**

8. On the other hand, the respondent in his written statement denied and disputed the aforementioned contentions of the appellant herein and in support of his plea that he was much

above 25 years of age on the date of filing of the nomination paper, he relied upon the election identity card as also the voter register wherein his age was shown to be 24 years in the year 1995. He contended that his date of birth is 16-11-1968 and in support thereof he relied upon his horoscope and the school admission register of New St. Xaviers School, Boring Road, Patna as also a transfer certificate issued by Swami Vivekananda Vidyalaya, Mithapur, Patna wherein it was alleged that he took admission in Class II in the former school on 12-11-1980 and left the same on 13-11-1983 whereas he was admitted in the latter school on 12-4-1984 and left the same while studying in Class VII on 31-12-86.

#### **ISSUE BEFORE THE HIGH COURT :**

9. The High Court having regard to the rival contentions raised in the respective pleadings of the parties framed the following issues :

"i) Whether the election petition is maintainable in the present form?

ii) Whether the nomination of the sole respondent was accepted illegally although he was under qualified as alleged in the election petition?

iii) Whether the election petition suffers from statutory defects as contemplated under the Representation of People Act?

iv) What relief, if any, the election petitioner is entitled to?"

#### **JUDGMENT OF THE HIGH COURT :**

10. Issue Nos. (i) and (ii) were decided in favour of the appellant. As regard Issue No. (ii), the parties adduced both oral and documentary evidence.

11. For the purpose of analyzing the materials on records, evidence brought on records were divided by the High Court in the following seven categories:

i) Order of His Excellency the then Governor of the State of Bihar and the report of the Chief Electoral Officer, Bihar, which have been marked as Exhibit-4 and Exhibit-8/A.

ii) The age records of Rohit Kumar son of Sri Shakuni Choudhary such as Ext. 5, Ext. 5/1 and Ext. 5/2.

iii) The age recorded of Samart Chandra Morya son of Shakuni Choudhary as 1-5-1981 in the application form for appearing in the examination of Secondary School Annual Examination, 1996 as per Ext. 6 and Ext. 6/1.

iv) Minority mentioned in the bail petition moved for and on behalf of the respondent Rakesh Kumar, Ext. 2, 2/A and 2/A/1.

v) Horoscope of the same respondent Rakesh Kumar, Ext. 6.

vi) Admission Register of the respondent in New St. Xaviers Junior School, Ext. D and the transfer certificate from Vivekananda Vidyalaya, Mithapur, Ext. I.

vii) Certified copy of electoral roll for the year 1995, Ext. E and the identify card of Rakesh Kumar issued by the Election Commission of India, Ext. F.

12. The findings of the learned Judge are :

(i) The orders of the Governor on the report of the Chief Electoral Officer are not binding of the Court, as the inquiry was an administrative in nature and not a statutory one. The Chief Electoral Officer who made the said inquiry having not been subjected to cross-examination, the contents of the report cannot be used in the judicial proceedings and thus, the same would not be conclusive on the pointed question of underage of the respondent.

(ii) Although the statements made in paragraph 18 of the election petition, had not been specifically denied or disputed in paragraph 15 of the written-statement but keeping in view the fact that denial had been made that Rohit Kumar was the elder brother of the respondent as also the evidence contrary thereto had been adduced the same did not come in aid to the election petitioner to prove

the underage of the respondent.

(iii) Although the respondent was named as Samart Choudhary, having regard to the denial that he was known as Samart Choudhary, Ext. 6 and Ext. 6/1 are not relevant.

(iv) The age of the respondent in the bail petition was mentioned without any instruction from the respondent or his family members, as alleged by the advocate who had deposed in the matter. Furthermore, judicial notice of the fact can be taken that for moving the bail application various grounds are raised for release of the accused from the custody, and, thus, such plea cannot be taken seriously for debarring a person as contemplated under Article 173(b) of the Constitution of India.

(v) Although the horoscope has not been proved by the maker thereof but as the same was marked without objection, the same can be taken as a supporting evidence.

(vi) Although no reliance was placed as regard Ext. I; as regard Ext. D, namely, the Admission Register maintained by New St. Xaviers Junior School, it was held :

". . . . . Regarding the Admission Register at New St. Xaviers Junior School, the same has been proved by Mrs. Reshmi Kumari, D.W.7, who happens to be the in charge Principal of that school. Although from the seriality and the other entries maintained in the register some question marks are there but on the face of the records it appears that against the entry No. 312 wherein the name of the respondent was being entered with all its particulars including the date of birth being verified by the father of the respondent who put his signature acknowledging the veracity of the particulars being recorded under that serial number . . . . ."

(viii) Although Ext. E and Ext. F are not of much help in construing the actual date of birth of the respondent but they are annexed to show that in the year 1995 he became eligible to vote.

#### **SUBMISSIONS:**

13. Mr. S. U. Abbas, learned counsel appearing on behalf of the appellant would, inter alia, submit that the respondent was having four names, namely, (i) Rakesh Kumar, (ii) Rakesh Ku, (iii) Samrat Choudhary; and (iv) Samrat Chandra Maurya. The first three names being admitted, the finding of the High Court that he was not known as Samrat Choudhary must be considered in the light of the

finding of the Governor of the State of Bihar wherein in no uncertain terms it was held that the respondent's father name as also the address, as mentioned in Ext. E being the same; the High Court committed a manifest error in holding that his disqualification had not been proved.

14. Taking us through the bail application Ext. 3, the learned counsel would contend that as therein the following statements had been made which are not denied :

"4. That the petitioner is school going student and he is aged about 14 years only,

5. That the petitioner is below 16 years."

the same was sufficient to prove the underage of the respondent.

15. As regard the question as to whether Rohit Kumar was the elder brother of the respondent or not, our attention was drawn to paragraph 18 of the election petition and paragraph 15 of the written statement and on the basis thereof the learned counsel would submit that as the respondent gave a vague reply in his written statement which was accepted by the High Court, it must be held that an admission in that behalf has been made by the respondent. In support of his contention, Mr. Abbas placed reliance on *Bapat and Co. v. East India Trading Co.* ((1964) 4 SCR 19). : AIR 1964 SC 538

16. The learned counsel drawing our attention to the Admission Register maintained by the New St. Xaviers Junior School would contend that the High Court, despite having observed that there were some question marks in relation thereto, must be held to have committed a manifest error in relying thereupon. The learned counsel would urge that as DW7, the Vice-Principal of New St. Xaviers Junior School, in her cross-examination categorically admitted that the maximum age of a student for taking admission in Class I was five years, it is supporting how the respondent who read in her school from Class II to Class IV could have been admitted at an age of more than 12 years. As regards the transfer certificate issued by Swami Vivekananda Vidyalaya, Mithapur (Ext.I), Mr. Abbas would submit that the same was issued on 28-7-1999 when the inquiry was pending and, thus, the same could not have been admitted in evidence.

17. As regards horoscope of the respondent (Ext.C), the learned counsel would urge that without examining the maker thereof, it could not have been admitted in evidence.

18. The learned counsel would contend that even there exists contradictions between the date of

birth of the respondent as evidenced in the school leaving certificate (Ext.I) and voter register and election identity card (Exts. E and F), insofar as if the former is taken into consideration, the respondent would have been of 26 years of age as on 1-1-1995 whereas he would be aged 24 years as per the voter register and election identity card. The learned counsel would lastly contend that the respondent having not questioned the findings contained in the Inquiry Report of the Chief Electoral Officer as also the order of the Governor of the State of Bihar, must be held to be estopped and precluded from contending that he was major on the date of filing of the nomination.

19. Mr. P. K. Mullick, learned counsel appearing on behalf of the respondent would, on the other hand, submit that the Governor of the state of Bihar while passing the order (Ext.4) committed an error of fact in holding that the father's name as also the residential address of the respondent were admitted despite the fact that no residential address was mentioned in the letter of the Secretary, Bihar Secondary Examination Board.

20. The learned counsel would urge that only because the father's name of the respondent was Shakuni Choudhary, the same by itself could not have led to the conclusion that he is also known Samrat Choudhary. Pointing out to the report of the Chief Electoral Officer, it was argued that the findings recorded therein in this behalf are in favour of the respondent. According to the learned counsel, the date of birth as disclosed by the respondent was not accepted by the Chief Electoral Officer only on the ground that the transfer certificate as also the horoscope had not been proved by any witness in that behalf but the said lacuna having filled up by the High Court, the said evidence had rightly been considered to be admissible. Mr. Mullick would contend that in terms of Section 146 of the Representation of the People Act, the Chief Electoral Officer can make an inquiry for the purpose of ascertaining as to whether a member suffers from disqualification or not but no inquiry is contemplated for the purpose of unseating the elected member on the ground that he was unqualified therefor. In that view of the matter, the learned counsel would contend that the report of their Chief Electoral Officer and consequently the order of the Governor of the State of Bihar were inadmissible in evidence. In any event, the maker of the report having not been examined, no evidentiary value can be attached thereto. As regards the statements made in the application for grant of bail, Mr. Mullick would submit that the same being not supported by an affidavit and further the advocate who had filed the same having deposed as regards the circumstances under which such application was made, had rightly been not accepted by the High Court as a proof of age of the respondent.

21. As regard the age of Rohit Kumar, Mr. Mullick would urge that DW.9 had asserted that he was younger to the respondent, no credence to the contention of the appellant had rightly been placed by the High Court.

22. Drawing our attention to the evidence of DW3, Md. Ekramul Haque, it was argued that the said witness had been examined to show that the respondent was 33 years old as on 17-1-2002. He would further submit that the horoscope had been proved by a person in whose presence the same was prepared, and, thus, the same was admissible in evidence.

## **RELEVANCE OF PRESCRIBED AGE:**

23. The Constitution of India, the Representation of the People Act and the rules made thereunder had been enacted to protect the purity of the election. Article 173 of the Constitution of India underlines a salutary object. It postulates that a person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he is not less than twenty-five years of age in the case of a seat in the Legislative Assembly. A person although may become entitled to vote on attaining majority, the makers of the Constitution deliberately inserted Clause (b) in Article 173 so as to enable the voters to elect a person who has attained maturity and experience in life. Only a matured and experienced person can represent the people and take steps which would be beneficial to the electorates.

24. Section 36(2) of the Representation of the People Act, 1951 casts a mandatory duty on the returning officer to examine the nomination papers and take a decision on all objections which may be made upon making an inquiry in that behalf, which would include the question as to whether the requirement of Article 173 has been fulfilled or not by the candidate. The effect of the aforementioned provision is that a candidate is not qualified unless he has attained the age specified in the clause on the date fixed for scrutiny of nomination. (See *Amritlal Ambalal Patel v. Himatbhai Gomanbhai Patel and another*, 1969 (1) SCR 2777). AIR 1968 SC 1455

25. It is beyond any cavil that in the event a person is elected who does not fulfill the constitutional requirements, the election would be void despite the fact that the returning officer has accepted his nomination paper. (See *Durga Shankar Mehta v. Thakur Raghuraj Singh and others*, 1955 (1) SCR 267). AIR 1954 SC 520

26. Such a question indisputably would fall for consideration in an election petition where the parties would be entitled to adduce evidence in support of their respective cases. (See *Birad Mal Singhvi v. Anand Purohit*, 1988 Supp SCC 604). AIR 1988 SC 1798

## **PRESENT CONTROVERSY:**

27. The evidence on record as also the judgment of the High Court are to be scrutinized keeping the aforementioned legal principles in mind. The date of birth of the respondent, according to the appellant, is 1-5-1981 whereas according to the respondent it is 16-11-1968.

## **BURDEN OF PROOF:**

28. It is no doubt true that the burden of proof to show that a candidate who was disqualified as on the date of the nomination would be on the election petitioner.

29. It is also true that the initial burden of proof that nomination paper of an elected candidate has wrongly been accepted is on the election petitioner.

30. In terms of Section 103 of the Indian Evidence Act, however, the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

31. Furthermore, in relation to certain matters, the fact being within the special knowledge of the respondent, the burden to prove the same would be on him in terms of Section 106 of the Indian Evidence Act. However, the question as to whether the burden to prove a particular matter is on the plaintiff or the defendant would depend upon the nature of the dispute. (See *Orissa Mining Corporation and another v. Ananda Chandra Prusty*, AIR 1997 SC 2274). 1997 AIR SCW 2145

32. The age of a person, in an election petition has to be determined not only on the basis of the materials placed on records but also upon taking into consideration the circumstances attending thereto. The initial burden to prove the allegations made in the election petition although was upon the election petitioner but for proving the facts which were within the special knowledge of the respondent, the burden was upon him in terms of Section 106 of the Evidence Act. It is also trite that when both parties have adduced evidence, the question of onus of proof becomes academic. (See *Union of India and others v. Sugauli Sugar Works (P) Ltd.*, (1976) 3 SCC 32, (Para 14) and *M/s. Cox and Kings (Agents) Ltd. v. Their Workmen and others*, AIR 1977 SC 1666, (Para 36)). Furthermore, an admission on the part of a party to the lis shall be binding on him and in any event a presumption must be made that the same is taken to be established. AIR 1976 SC 1414

1977 Lab IC 897

#### **INSTITUTIONAL RECORDS/CERTIFICATES:**

33. Under Section 35 of the Indian Evidence Act, a register maintained in terms of a statute or by a statutory authority in regular course of business would be a relevant fact. Had such a vital evidence been produced, it would have clinched the issue. The respondent did not choose to do so.

34. In the aforementioned backdrop the evidences brought on record are required to be considered. The Admission Register or a Transfer Certificate issued by a Primary School do not satisfy the requirements of Section 35 of the Indian Evidence Act. There is no reliable evidence on record to show that the date of birth was recorded in the school register on the basis of the statement of any reasonable person .

35. In *Brij Mohan Singh v. Priya Brat Narain Sinha and others* (AIR 1965 SC 282), this Court, inter alia, observed that in actual life it often happens that persons give false age of the boy at the time of his admission to a school so that later in life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed.

36. The entry of date of birth made in school admission register in terms of Section 35 of the Evidence Act should be considered from that perspective.

37. However, in *Birad Mal Singhvi* (supra), it was held : AIR 1988 SC 1796 Para 15

". . . . . 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 to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of material on which the age was recorded. . . ."

38. In *Chittaranjan Das v. Durapore Project Limited and others* (99 CWN 897), it was held :

"Thus, in absence of the primary material on the basis whereof the age was recorded, and particularly in view of the conflicting evidence available, it is not possible to accept the contention of Mr. Roy that the date of birth of the petitioner as recorded in the said certificate would prevail over the letter of the Board."

39. The said principles were reiterated in *Coal India Limited v. Arun Kumar Sinha and others* (1999 (1) SLR 151).

## **THE CERTIFICATE ISSUED BY THE BIHAR SCHOOL EXAMINATION BOARD:**

40. The appellant contended that the respondent was also known as Samrat Choudhary. He appeared in the matriculation examination from Kritanand Vidya Mandir High School but failed in the year 1996. The said allegations were denied and disputed by the respondent. The Secretary of the Bihar School Examination Board, however, in response to a letter issued by the Assistant Registrar of the High Court stated :

"In reference to the aforesaid matter I have to state that the item No. 12 i.e. Examination application form of the year 1996 is no more available in the office of the Board, such forms are not kept for over long period. The only record which is properly be kept in the Board in Tabulation Register and as per the details mentioned in the Sl. No. 12 and 13 of the Election Petition, on Roll Code 3218, Roll No. 19 of Secondary School Examination Annual Examination 1996, the following details are printed in the Tabulation Register of the Board.

Name of the School : K.N.V.M.H.S. KUMARSAR  
Name of candidate : SAMRAT CHANDRA MOURA  
Father's name : SHAKUNI CHOUDHARY  
Date of Birth : 01-05-81 (First May eighty one)  
Result : Fail  
Total Marks: 268  
Category: private"

41. It, thus, appears that the Bihar School Examination Boards was possessed of the election petition or the nature of particulars in relation to the respondent. The name and address of the respondent, the school from which he appeared, his Roll Code, Roll No. etc. must have been duly mentioned therein.

42. It is pertinent to note that in paragraph 15 of the election petition, it was categorically stated :

"That it is relevant to state here that the sole respondent Rakesh Ku is in fact Rakesh Kumar alias

Samrat Choudhary son of Sri Shakuni Choudhary is the same person who has filed his nomination paper for the election as member of Bihar Legislative Assembly from 181 Parbatta Assembly Constituency and has been declared elected by the Returning Officer, Gogari, he was earlier one of the Ministers in the Government of Bihar in the reign of Rastriya Janta Dal Government and was dismissed from the Ministry of the Bihar Government in October, 1999 on the sole ground that he was less than 25 years of his age."

43. The aforementioned statements had been traversed in paragraph 12 of the written statement which is in the following terms :

"That with regard to statement made in para 15 of the election petition under reply that the respondent Rakesh Kumar filed his nomination in the name of Rakesh Kumar and the proposal seconded it according to law. And after scrutiny the nomination paper was found valid. It is absolutely wrong to say that he was dismissed from the ministry in October 1999 on the ground of age. The respondent was appointed minister by the Governor on the advice of the Chief Minister keeping in view Article 164(3) and (4) of the Constitution of India. And just 2 or 3 days before completing six months he submitted his resignation to Chief Minister."

44. It would, thus, appear that the respondent did not controvert the allegation that his alias name was Samrat Choudhary but despite the same he as also his father Shakuni Choudhary in their depositions denied and disputed that the respondent had an alias name of Samrat Choudhary. The legal principles contained in Order VIII, Rules 3 and 5, which would be discerned herein a little later shall apply herein.

45. Even if it be assumed to be correct that the appellant has not able to conclusively show that the respondent was also known as Samrat Chandra Mourya but the name of the respondent's father is the same. The said reply had been sent with reference to a letter of the Assistant Registrar of the High Court pursuant to the order dated 28-2-2001 wherein the address of the respondent must have been mentioned. Even in the election petition the same address has been disclosed.

46. DW2 in his examination-in-chief itself admitted that Samrat Choudhary was the second son of Shakuni Choudhary. The High Court should not have brushed aside the said statement. It is pertinent to note that admittedly even his brother had an alias name. The finding of the High Court in this behalf is contradictory and inconsistent. It may, therefore, safely be concluded that the respondent was also known as Samrat Choudhary.

**REPORT OF THE CHIEF ELECTORAL OFFICER AND THE ORDER OF THE GOVERNOR OF THE STATE OF BIHAR:**

47. The report of the Chief Electoral Officer had been marked exhibit without any objection. A contention could validly be raised that the said report is not admissible in evidence, but the counsel for both the parties relied thereupon and placed before us the findings recorded therein in extenso. The parties cannot be permitted to rely upon a part of a document and at the same time raise a contention that the same is inadmissible. The said report is, thus, admissible in evidence, although it may not have any statutory backing. In any event, having regard to the pleadings of the parties as also the stand taken before us the said report can be looked into, inter alia, for the purpose (i) that an inquiry had been made as regard the underage of the respondent; (ii) in said inquiry the respondent was given an opportunity to prove that he was not below the age of 25 years when he was sworn in as Minister; (iii) He had been given an opportunity to place all the materials in support of his case; and (iv) it was found that he did not complete 25 years of age on the date of his having been appointed as a Minister.

48. The report of the Chief Electoral Officer clearly suggests that the respondent herein did not cooperate with him in any manner whatsoever. He had all attempts to delay the proceedings as far as possible. He despite giving opportunities did not place on record any affidavit in support of his plea that he had studied in New St. Zavier's School and Swami Vivekananda Vidyalaya, Mithapur. He even did not deny that he had an alias name of Samrat Choudhary. Such a conduct on the part of a Minister of a Government speaks a volume.

49. The said report was placed before Hon'ble the Governor of Bihar, who upon considering the materials on records came to the conclusion that the allegations made by Shri P. K. Sinha, a member of Samta Party, were correct. He, therefore, advised the Chief Minister to drop the respondent from his council of ministers.

50. It may be a matter of co-incidence that at that time, the period of six months envisaged under Article 164 of the Constitution of India was coming to an end but the fact remains that he resigned at a point of time when the Chief Minister was advised to drop him from his council of ministers. The said report as also the order of the Governor never came to be questioned by the respondent. It is accepted that at the relevant time, the matter received the attention of the media wherein inter alia the alias name of the respondent as Samrat Choudhary was highlighted, but the respondent did not make any attempt to deny the same. Such a conduct must be viewed in its proper perspective. A person against whom an allegation of violation of constitutional provisions has been made and who has taken Minister's berth without being properly qualified therefor, expectedly would question the said decision before an appropriate forum, if not for the sake of the office but for maintaining his own reputation in the public field. It will, thus, be safe to infer that he had accepted the said report and the order of the Governor sub-silently.

**ELECTORAL ROLL AND ELECTION COMMISSION OF IDENTITY CARD :**

51. In both the aforementioned documents the age of the respondent was stated to 24 years on 1-1-1995. According to the respondent he was born in 1968 and, thus, on the said date he would have been more than 24 years of age. Why such an inconsistency crept in has not been explained. The High Court, however, did not give much importance to the said fact and proceeded on the basis that these documents go to show that the respondent was major on that day. It is conceded by Mr. Mullick, learned counsel appearing on behalf of the respondent that the date of birth of a voter contained in the voter list and the election identity card issued by the Election Commission of India is not conclusive. They are recorded as per the statements made by the person concerned. Be that it may, it was for the High Court and consequently for this Court in appeal to consider the said materials on records in their proper perspective. We may, however, observe that the said documents do not conclusively show that the respondent was major on that day.

#### **ANALYSIS OF THE EVIDENCE :**

52. We have examined the admission register of the school. Pagination of the register had been done by hands. The name of the respondent is at Sl. No. 320. The guardians including that of the respondent purported to have signed in English. A bare perusal of the said register would show that entries have been made by one person with two different pens in one sitting. It is curious to note that the entries at Sl. Nos. 310 and 311 relate to the same person and in relation to the names of the two students two pens had been used. Entries 312 and 313 are dated 23-9-1980 whereas entries 315 and 316 are dated 23-9-1990. For all those students, the same person has signed as guardian, although admissions were effected on different dates. So far as Entry No. 314 is concerned, the same has been altered from 334. There is an alteration in the date of admission being 12-11-1980 as against Sl. No. 319. The address of the father of the respondent is shown as Lakhanpur Tarapur, District Munger. There is no evidence on record that the respondent used to stay with some relative at Patna as the school is not a residential one. At page 66 of the register alternations have been made as regards date of admission from 1981 to 1980, although at the top of the page, the figure '1981' has been written.

53. The school authorities, thus, must have used some blank space of the register for the year 1980 at the instance of the respondent. No credence thereto, thus, can be given. Forgery in this register has been done in a crude form. As notice hereinbefore, even the High Court placed its needle of suspicion in relation to the said document but still proceeded to rely thereupon which amounts to misdirection in law.

54. So far as Ext. I is concerned, no witness has taken oath to prove the entries made therein. The said school is a minority institution situate in the heart of capital of the State. The residential address of the respondent had been shown as Lakhanpur Tarapore, District Munger. For the students who had taken admission in the primary school, it is expected that the name of the local guardian and his local address, if any, would be disclosed.

55. The father of the appellant was a member of the Legislative Assembly as also Member of Parliament. He had deposed that he had disclosed the respondent's age while getting him admitted in the New St. Xaviers Junior School. This, however, has not been corroborated by any other witness. The school register (Ext.D) and (Ext.I) were, thus, required to be taken into consideration in their proper perspective by the High Court, which was not done. The respondent purported to have read in Class II to Class IV from 12-11-1980 to 13-11-1983 whereas he allegedly read in Swami Vivekananda School, Mithapur from 12-4-1984 to 31-12-1986 from Class V to Class VII. He attended classes from the middle of the session. But still he is said to have completed his studies from Class II to Class IV within three years and V to VII only in two years 8 months. The respondent as on the date of admission in Class II would have been aged about 12 years. If the evidence of the Vice-Principal is to be believed, the same was impermissible inasmuch as the maximum age for admission in Class I was 5 years. It is difficult to believe that a boy aged about 15 years would be reading in Class IV in a Christian School situate in the heart of the State capital.

56. As the respondent only had special knowledge as to in which school did he study; he should have disclosed the same. It is relevant to note that the respondent in his deposition alleged that he started his education in some school at his native village, but for reasons best known to him no details thereof or document to prove the same were brought on record.

57. In *Punit Rai v. Dinesh Chaudhary* 2003 (Supp 1) JT (SC) 557, it is stated 2003 AIR SCW 5149 : AIR 2003 SC 4355, Para 16

". . . . . These are the material facts relating to the plea raised by the appellant that the respondent is not a Scheduled caste. We don't think if the respondent means to say that the petitioner should have stated in the petition that the respondent is not born of Deo Kumari Devi said to be married to Bhagwan Singh in village Adai. If at all these facts would be in the special knowledge of respondent, Bhagwan Singh and Deo Kumari Devi hence not required to be pleaded in the election petition. It is not possible as well. In this connection, a reference may be made to a decision of this Court in *Balwan Singh v. Lakshmi Narain and others* (AIR 1960 SC 770). This case also, relates to election matter and it was held that facts which are in the special knowledge of the other party could not be pleaded by the election petitioner. It was found that particulars of the arrangement of hiring or procuring a vehicle would never be in the knowledge of the petitioner, such facts need not and cannot be pleaded in the petition."

58. The respondent instead of disclosing the said facts took recourse to *suppressio veri* and *suggestio falsi*. He produced documents which are apparently forged and fabricated. He, according to DW7 could not have been admitted in New St. Xaviers Junior School being overaged. The High Court has relied upon the evidence of the father of the respondent but he is not trustworthy keeping in view the fact that he not only denied that any inquiry made by the Chief Electoral Officer on the application filed by Shri P. K. Sinha but even went to the extent denying that the respondent had in a

criminal case filed any application for bail.

59. He denied with impunity the factum of the complaint made by Shri P. K. Sinha to the Governor of the State of Bihar as also the inquiry proceedings conducted in that behalf. When through the media a large section of people of Bihar came to know about such inquiry and the result thereof, it is unbelievable that the father of the respondent who not only was in politics but also was a member of Parliament would be totally ignorant thereabout. He is, thus, a totally untrustworthy witness. It is well known that a man may lie but the circumstances do not.

### **HOROSCOPE:**

60. The horoscope purported to have been filed by the respondent does not inspire confidence. It was said to have been prepared at the instance of one Damodar Pathak. It was purported to have, however, been written by his brother. DW2 was a by-stander. He had nothing to do either with the preparation of horoscope or with the writing thereof. His evidence is, thus, not trustworthy. The horoscope, therefore, could not have been looked into by the High Court for any purpose whatsoever. The paper on which the said horoscope has been drawn up does not appear to be an old one. It is self-serving document. Furthermore, the maker of the horoscope being dead could not be examined to prove as to what was the primary evidence of date and time of the birth of the respondent on the basis whereof the same was prepared.

### **BAIL APPLICATION:**

61. It is not in dispute that an application for bail was filed in a case in which the respondent as well as his father were accused. It is difficult to eschew the contention raised on behalf of the respondent that the statements made in the bail application were made without any instruction. How without instruction a lawyer would come to know that the respondent at the relevant time was reading in a school? The occurrence took place in April, 1995. If the date of birth as disclosed by the appellant is correct, the respondent would be about 14 years as on that date, and, thus, would be below 16 years in the year 1996. He at that age could have also appeared in the matriculation examination in the year 1996. The contents of the bail application are suggestive of the said fact. The High Court, in our opinion, is not correct in observing that it is a common experience that all such pleas are taken for the purpose of obtaining bail. No presumption in this behalf can be raised as such allegations would be subject to judicial scrutiny. Thus, a person is not expected to take false grounds regarding his age or to make a statement that he had been reading in a school.

62. Furthermore, the advocate who had filed the said bail application stated that the Chief Judicial Magistrate did not accept the contention that the respondent was less than 16 years of age on the

ground that in the records his date of birth was mentioned as 17 years. Even if the age of the respondent being 17 years as on the date of commission of the offence is considered to be correct, he would not still be of the age of 25 years as on the date of filing of the nomination.

63. In *Thiru John etc. v. The Returning Officer and others* ((1977) 3 SCC 540), the law is stated in the following term: AIR 1977 SC 1724, Para 15

"It is well settled that a party's admission as defined in Sections 17 to 20, fulfilling the requirements of Section 21, Evidence Act, is substantive evidence *proprio vigore*. An admission, if clearly and unequivocally made, is the best evidence against the party making it and though not conclusive, shifts the onus on to the maker on the principle that "what a party himself admits to be true may reasonably be presumed to be so and until the presumption was rebutted the fact admitted must be taken to be established"."

64. Even otherwise making a false statement before the Court whether on affidavit or not is not to be treated lightly. The Court acts on the basis of the statement made by a party to the *lis*. Whether such defence has been accepted or not is not of much importance but whether a false statement to the knowledge of the party has been made or not is. In any view of the matter, the Court must draw an adverse inference in this behalf against the respondent.

65. Furthermore, a person should not be permitted to take advantage of his own wrong. He should either stand by his statement made before a Court of law or should explain the same sufficiently. In absence of any satisfactory explanation, the Court will presume that the statement before a Court is correct and binding on the party on whose behalf the same has been made.

**ROHIT KUMAR ALIAS RAJESH KUMAR:**

66. The contention of the appellant in this behalf assumes significance in the peculiar facts and circumstances of the case.

67. The appellant in paragraph 18 of the election petition alleged :

"That it is most significant and relevant to state here that the elder brother namely Sri Rajesh Kumar of Sri Rakesh Kumar was and is a student of B. I. T. Meshra School where he got his age recorded

as 22 years on 28-7-1999. So an easy and clear conclusion can be drawn that his younger brother namely Rakesh Kumar was at least less than 22 years in the year 1999."

68. The said statements, as would appear from paragraph 15 of the written statement, had not been traversed in accordance with law. Paragraph 15 of the written statement is as under :

"That the statement made in para 18 of the election petition under reply is not correct. Merely on imagination Sri Rajesh Kumar has been mentioned as elder brother. The petitioner has no knowledge about that and wrong statement has been made."

69. In terms of Order VIII, Rule 3, a defendant is required to deny or dispute the statements made in the plaint categorically, as an evasive denial would amount to an admission of the allegation made in the plaint in terms of Order VIII, Rule 5 of the Code of Civil Procedure.

70. Under Section 58 of the Indian Evidence Act a fact admitted need not be proved.

71. In paragraph 15 of the written statement, the respondent has not specifically contended that the statements made in paragraph 18 of the election petition are incorrect or how they are so. Merely the said allegations have been denied as being imagination of the election petitioner without making a statement of fact that Rohit Kumar is not the elder brother of the respondent or in fact younger to him. Such an evasive denial attracts Order VIII, Rule 5 of the Code of Civil Procedure. The statements made in paragraph 18 of the election petition must, therefore, be deemed to have been admitted. The Birla Institute of Technology, Mesra, has produced the Application for undergraduate Admission for Rohit Kumar, wherein his date of birth has been shown as 1-3-1979. Even in the inquiry made by the Chief Electoral Officer, the respondent had not specifically denied the said fact. The Governor of the State of Bihar in his order (Ext. 4) observed :

"Sri Rakesh Kumar has not denied that his elder brother is a student of Birla Institute of Technology. Documents furnished by Birla Institute of Technology about the age of his elder brother are extremely significant and relevant to determine Shri Rakesh Kumar's likely age. The documents furnished by the Institute reveal that the date of birth of the elder brother of Sri Rakesh Kumar is 1-3-1979. Hence, on 19-5-99 Sri Rakesh Kumar and elder brother was 20 years, 2 months and 18 days old. So, it can be safely and conclusively assumed that on 19-5-99 Sri Rakesh Kumar, when he was sworn in as a minister, was less than 20 years, and definitely much less than 25 years, the qualifying age to become a member of the State Legislative Assembly."

72. The High Court, on the other hand, observed :

". . . . . It is true that it has not been specifically stated in the reply to paragraph 18 of the election petition that Rajesh Kumar happens to be younger brother of Rakesh Kumar but making him an elder brother has been totally denied. In that way, it cannot be said that only evasive reply is there and when this fact could not be proved by any cogent evidence from the side of the election petitioner that Rajesh Kumar happens to be the elder brother of the respondent Rakesh Kumar rather when contrary evidence is there from the side of the respondent then the age group of Rohit Kumar alias Rajesh Kumar does not come in aid to the election petitioner to prove the underage of Rakesh Kumar the respondent."

73. In our opinion, the approach of the High Court was not correct. It failed to apply the legal principles as contained in Order VIII, Rules 3 and 5 of the Code of Civil Procedure. The High Court had also not analysed the evidences adduced on behalf of the appellant in this behalf in details but merely rejected the same summarily stating that the vague statements had been made by some witnesses. Once it is held that the statements made in paragraph 18 of the election petition have not been specifically denied or disputed in the written statement, the allegations made therein would be deemed to have been admitted, and, thus, no evidence contrary thereto or inconsistent therewith could have been permitted to be laid.

74. In *Badat and Co. (supra)* this Court upon referring to Order VIII, Rules 3, 4 and 5 of the Code of Civil Procedure, observed: AIR 1964 SC 538 at p, 545

"These three rules form an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written-statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary. The first paragraph of R. 5 is a re-production of O. XIX, R. 13 of the English rules made under the Judicature Acts. But in mofussil Courts in India, where pleadings were not precisely drawn, it was found in practice that if they were strictly construed in terms of the said provisions, grave injustice would be done to parties with genuine claims. To do justice between those parties, for which Courts are intended, the rigor of R. 5 has been modified by the introduction of the proviso thereto. Under that proviso the Court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission. In the matter of mofussil pleadings, Courts, presumably relying upon the said proviso, tolerated more laxity, in the pleadings in the interest of justice. But on the Original side of the Bombay High Court, we are told, the pleadings are drafted by trained lawyers bestowing serious thought and with precision. In construing such pleadings the proviso can be invoked only in exceptional circumstances to prevent obvious injustice to a party or to relieve him from the results of an accidental slip or omission, but not to help a party who designedly made vague denials and

thereafter sought to rely upon them for non-suiting the plaintiff. The discretion under the proviso must be exercised by a Court having regard to the justice of a cause with particular reference to the nature of the parties, the standard of drafting obtaining in a locality, and the traditions and conventions of a Court wherein such pleadings are filed. In this context the decision in *Tildesley v. Harper* will be useful. There, in an action against a lessee to set aside the lease granted under a power the statement of claim stated that the donee of the power had received from the lessee a certain sum as a bribe, and stated the circumstances; the statement of defence denied that that sum had been given, and denied each circumstance, but contained no general denial of a bribe having been given. The Court held, under rules corresponding to the aforesaid rules of the Code of Civil Procedure, that the giving of the bribe was not sufficiently denied and therefore it must be deemed to have been admitted. Fry J. posed the question thus : 1878 (7) Ch D 403

What is the point of substance in the allegations in the statement of claim? and answered it as follows :

"The point of substance is undoubtedly that a bribe was given by Anderson to Tildesley, and that point of substance is nowhere met . . . . . no fair and substantial answer is, in my opinion, given to the allegation of substance, namely that there was a bribe. In my opinion it is of the highest importance that this rule of pleading should be adhere to strictly, and that the Court should require the Defendant, when putting in his statement of defence, and the Plaintiff, when replying to the allegations of the Defendant, to state the point of substance, and not to give formal denials of the allegations contained in the previous pleadings without stating the circumstances. As far as I am concerned, I mean to give the fullest effect to that rule. I am convinced that it is one of the highest benefit to suitors in the Court."

It is true that in England the concerned rule is inflexible and that there is no proviso to it as is found in the Code of Civil Procedure. But there is no reason why in Bombay on the original side of the High Court the same precision in pleadings shall not be insisted upon except in exceptional circumstances. . . . ."

75. The pleadings in an election petition must likewise be construed strictly. The provisions of the Code of Civil Procedure apply to an election petition. The election petition is not an action at law or a suit in equity. It is a special proceeding and even withdrawal of an election petition may not be permitted .

76. In *R. M. Seshadri v. G. Vasantha Pai and others* (AIR 1969 SC 692), it has been held :

". . . . . The policy of election law seems to be that for the establishment of purity of elections, investigation into all allegations of malpractices including corrupt practices at elections should be thoroughly investigated . . . . ."

## **OTHER EVIDENCE:**

77. Reliance placed on the witness of Md. Ekramul Haque by Mr. Mullick appears to be misplaced. He stated that the date of birth of the respondent was entered in the register maintained in the Police Station on the very next day of his birth. If that be so, the same should have been produced. Non-production of the said document would again give rise to drawal of an adverse inference to the effect that had such documents been produced, the same would have gone against the interest of the respondent. Such a fact, having regard to the statement of DW 3 in his examination-in-chief must be held to have been made with the knowledge of the respondent, but he did not make any attempt to produce or cause production of the said evidence.

78. In National Insurance Co. Ltd., New Delhi v. Jugal Kishore and others ((1988) 1 SCC 626), this Court stated the law thus : AIR 1988 SC 719

"This Court has consistently emphasized that it is the duty of the party which is in possession of a document which would be helpful in doing justice in the cause to produce the said document and such party should not be permitted to take shelter behind the abstract doctrine of burden of proof."

## **CONCLUSION:**

79. The Election Tribunal while determining an issue of this nature has to bear in mind that Art. 173(b) of the Constitution of India provides for a disqualification. A person cannot be permitted to occupy an office for which he is disqualified under the Constitution. The endeavour of the Court shall therefor should be to see that a disqualified person should not hold the office but should not at the same time, unseat a person qualified therefor. The Court is required to proceed cautiously in the matter and, thus, while seeing that an election of the representative of the people is not set aside on flimsy grounds but would also have a duty to see that the constitutional mandate is fulfilled.

80. The upshot of the discussions aforesaid is that the materials on records taken in their entirety together with the circumstantial evidence goes to show that the respondent was not above the age of 25 years on the date of filing of the nomination. The findings of the High Court to the contrary cannot be sustained.

81. For the reasons aforementioned the impugned judgment is set aside. The appeal is allowed and

the election of the respondent from 181 Parbatta Assembly Constituency is declared as void. Consequently, the same is set aside. Let the substance of this decision be intimated to the Election Commission and the Speaker of the Bihar Legislative Assembly and further a certified copy of the decision be sent to the Election Commission forthwith. There shall be no order as to costs.

Appeal allowed.