

KERALA HIGH COURT

P. Kunhiraman

Vs.

V.R. Krishna Iyer

Election Appeal No. 3 of 1961

(M.S. Menon, Ag., C.J., T.K. Joseph and C.A. Vaidialingam, JJ.)

28.11.1961

JUDGMENT

M.S. Menon, Ag. C.J.

1. The question referred for decision by the Division Bench hearing the Election Appeal relates to the finality of the electoral roll before an Election Tribunal. The question in the words of the order of reference 7 is whether in the: case of a person whose name appears in the electoral roll and who has exercised his vote, the Election Tribunal can go into the question whether or not who had attained the age of twenty-one on the qualifying date, and, on the finding that he had not exclude his vote from the count, or whether under the scheme underlying the relevant provisions of the Constitution, of the Representation of the People Act, 1950, and of the Representation of the People Act 1951, the question of age is to be finally decided at the registration so that capacity or incapacity on that account is conclusively determined by inclusion in or exclusion from the roll.

2. The answer to the question depends essentially on the true scope and meaning of Article 326 of the Constitution.

"The elections to the House of the People or to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than, twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice shall be entitled to be registered as a voter at any such election."

The opening words - the elections to the House of the People and to the Legislative Assembly or every State shall be on the basis of adult suffrage - are the words of prime importance. The words that follow the words "that is to say" can only be words of explanation of the words that go before.

3. The direction that the elections shall be on the basis of adult suffrage can mean one thing, and one thing alone; that the representative of the people shall be chosen on that basis. Suffrage means the right or privilege of casting a vote at an election; and adult suffrage - in the context of Article 326 - must mean that right or privilege as extended or confined to all adults who are (1) citizens of India; (2) not less than twenty-one years of age on the qualifying date fixed in that behalf; and (3) not otherwise disqualified under the Constitution or under any law made by the appropriate legislature on the ground of non-residence, unsoundness of mind crime or corrupt or illegal practice.

4. According to counsel for the appellant the right or privilege conferred by Article 326 is only "to be registered as a voter" at an election and not to vote there. It will be a mockery of the Constitution to hold that such is the case, and that what was given to the citizens of this country by the Constitution was the mere processual right of registration unaccompanied by the substantive right of voting. Battles have been fought for adult suffrage; and the success enshrined in Article 326 is certainly not the privilege of having one's name engrossed in a register; but the right to exercise one's preference as to who shall be the representative by casting a vote for that purpose. If the proper interpretation of Article 326 is as given above - I think it is -, the presence of minors in an electoral roll and their voting in consequence thereof will both be violative of the provisions of that Article.

5. Section 100 of the Representation of the People Act, 1951, provides the grounds for declaring an election to be void. Sub-section(1)(d)(iv) of that section is to the effect that if the Tribunal is of opinion that the result of the election, in so far as it concerns a returned candidate, has been materially affected "by any non-compliance with the provisions of the Constitution' or of that Act or of any rules or orders made under that Act, the Tribunal shall declare the election of the returned candidate to be void.

6. The words "non-compliance with the provision of the Constitution" came up for discussion in *Durga Shankar Mehta v. Raghuraj Singh*¹ It was contended in that case that the expression "non-compliance" suggested the idea of not acting according to any rule or command and that it does not connote a mere lack of qualification. The Supreme Court said:-

"This, we think, would be a narrow way of looking at the thing."

that:

"There is no material difference between 'non-compliance and 'non-observance' or breach and that the expression is sufficiently wide to cover cases where "there is a fundamental disability in the candidate to stand for election at all." The case is also authority for the proposition that a provision like the one embodied in section 100 (1)(d)(iv) of the Representation of the People Act 1951, should be considered as a residuary provision covering every infraction of the Constitution, or of the Act and the rules and orders

¹ AIR 1954 SC 520

thereunder, which has not been specifically enumerated in the other portions of the section.

7. The Supreme Court pointed out in the case above mentioned, that the English law after the passing of the Ballot Act of 1872 has been substantially the same as the law now obtaining in India, and referred to *Stowe v. Jolliffe*², That case had to consider section 7 of the Ballot Act 1872, which provided that:

"At any election for a county or borough, a person shall not be entitled to vote unless his name is on the register of voters for the time being in force for such county or borough. and every person whose name is on such register shall be entitled to demand and receive a ballot paper and to vote: Provided that nothing in this section shall entitle any person to vote who is prohibited from voting by any statute, or by the common law of Parliament or relieve such person from any penalties to which he may be liable for voting."

Lord Coleridge, C.J., said that the register was not conclusive before an Election Tribunal in the case of persons ascertained by the proviso, and that such persons are those "who from some inherent, or for the time irremovable quality in themselves; have not, either by prohibition of statutes or at common law, the status of parliamentary electors."

8. All the submissions of counsel for the appellant are based on the assumption that the right or privilege conferred by Article 326 is only "to be registered as a voter" at an election and not to vote therein. If such is the case, he says, Article 327 of the Constitution –

"Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses."

will enable Parliament to give a finality to the electoral roll which cannot be disrupted on the ground of nonage by an Election Tribunal, and that this has been done by section 62 (1) of the Representation of the People Act, 1951.

9. Section 62(1) provides:-

"No person who is not, and except as expressly provided by this Act, every person who is for the time being entered in "the electoral roll of any constituency shall be entitled to vote in that constituency."

and section 62 (2):

"No person shall vote at an election in any constituency if he is subject to any
²(1874) 43 LJCP 265

or the disqualifications referred to in section 16 of the Representation of the People Act, 1950 (43 of 1950)." Section 16 of the Representation of the People Act, 1950 is to the

effect:

"(1) A person shall be disqualified to registration in an electoral roll if he -

(a) is not a citizen of India; or

(b) is of unsound mind and stands so declared by a competent court; or

(c) is for the time being disqualified from voting under the provisions of any law relating to corrupt and illegal practices and other offences in connection with elections.

"(2) The name of any person who becomes so disqualified after registration shall forthwith be struck off the electoral roll in which it is included:

Provided that the name of any person struck off the electoral roll of a constituency by reason of a disqualification under clause(c) of Sub-section (1) shall forthwith be reinstated in that roll if such disqualification is, during the period such roll is in force, removed under any law authorizing such removal."

The fact that citizenship occurs both in Section 16 and in Article 326 of the Constitution and that nonage occurs only in Article 326 was emphasized by counsel for the appellant.

10. I see no significance in the fact emphasized. Sub-section (2) of Section 16 indicates that the disqualifications dealt with by sub-section(1) of that section are only those types of disqualifications which cannot only exist on the date of registration but which can also arise for the first time thereafter. A disqualification based on the absence of citizenship belongs to that category. A disqualification based on nonage does not; if a person was twenty-one years of age on the qualifying date, he will not grow any the younger by efflux of time. In our sorry scheme of things there is only a one-way ticket from the cradle to the grave.

11. As pointed out by Channel J., in *Pembroke (Borough) case*, (1901) 5 O'M. and H.135 a person is not entitled to vote

"unless his name is on the register even although he ought to be on, and every person whose name is on the register shall be entitled to vote even if it ought not to be on."

This does not mean that the battle of qualification cannot rage subsequent to the poll. In the words of Lush, J. in *Worcester (Borough) case*, (1880) 3 O'M and H.184 that battle can be fought "either beforehand in the registration court or after the election upon a scrutiny."

12. Many decisions other than those mentioned above, English and Indian, were cited before us. None of them is of any great assistance in deciding the question before us.

13. One of them, *Jujhar Singh v. Bhairon Lall*³, had to deal with the question of minority. In that case the Election Tribunal, Kotah, said that though the electoral roll was final so far as the Returning Officer and Presiding Officer are concerned, the

³⁷ ELR 457

Election Tribunal can inquire into the question whether a voter was a minor and as such his vote was void even though according to the age given in the roll he was a major. This decision was followed by the Election Tribunal, Nagpur, in *Ramdayal Ayodhyaprasad Gupta v. K.R. Patil*⁴, That Tribunal said:

"If the challenge to the electoral roll is made on any one of the grounds covered by Section 100 of the Representation of the People Act 1951, my view is that the Election Tribunal has a right to consider the validity of the electoral roll notwithstanding the finality given to it under section 62 of that Act."

As a matter of fact the contention of counsel for the appellant is not that an attack cannot be delivered against the electoral roll on the grounds permitted by Section 100; but that the provisions of Section 100(1)(d)(iv) are not attracted because there has been no violation of the right conferred by Article 326 of the Constitution, that right according to him being only a right "to be registered as a voter" at an election and not to vote therein.

14. This is a contention which, as I have already stated I am not prepared to accept. It must follow that the answer to the question propounded should be as follows:

In the case of a person whose name appears in the electoral roll and who has exercised his vote, the Election Tribunal can go into the question whether or not he had attained the age of twenty-one on the qualifying date, and, on the finding that he had not, exclude his vote from the count.

15. I have already referred to (1874) 43 LJ CP 265. There is a passage in that judgment with which I would like to conclude this order:

"The case was argued before us with remarkable learning and clearness, and I may, I hope, be permitted to thank Counsel for the great help they have afforded the Court in arriving at a conclusion. A very natural result of an argument so complete and exhaustive was to narrow materially the disputable ground and to reduce the matters for decision to very few."

T. K. Joseph, J.

16. I agree.

Vaidialingam, J.

17. I respectfully agree with the judgment just now pronounced by my Lor'd the Chief Justice. The question of law that has been referred for decision by the Full Bench, by the learned Judges, Raman Nayar and Velu Pillai, JJ., who heard the Election Appeal, is as follows:

"Whether in the case of a person whose name appears in the electoral roll and who has exercised his vote, the Election Tribunal can go into the question whether or not he had attained the age of twenty-one on the qualifying date,

⁴¹⁸ ELR 378

and on the finding that he had not, exclude his vote from the count, or whether under the scheme underlying the relevant provisions of the Constitution, of the Representation of the People Act, 1950 and of the Representation of the People Act, 1951, the question of

age is to be finally decided at the registration so that capacity or incapacity on that account is conclusively determined by inclusion in or exclusion from the roll."

18. The appellant in the Election Appeal was the successful candidate in the mid-term elections held for the Kerala Legislative Assembly, on 1st February, 1960, from the Tellicherry Constituency. On 2-2-1960, the Returning Officer of the Constituency declared the appellant elected and also declared the respondent in the appeal to have lost the election by a margin of 23 votes

19. The respondent filed Election Petition No.9/1960, to declare (a) that the appellant's election is void; and (b) that the respondent has been duly elected.

20. In the Election Petition, among various other allegations that were made, with which this Full Bench is not concerned it was stated that persons below 21 years have been enrolled in the Tellicherry Constituency and have cast their votes in favour of the appellant in the appeal, and particulars of such persons were given in Schedule V of the Election petition. In Schedule V the names of as many as 116 persons were given.

21. In the counter-statement filed by the appellant, he stated that to the best of his knowledge and information such irregularities had not taken place. Here again, various other contentions had been taken by the appellant in his counter-statement.

22. The appellant again filed Recrimination Statement under Section 97(2) of the Representation of the People Act, 1951. In paragraph 13 of the Statement, the appellant had stated that at the time of the preparation of the voters' list the Communist Party had got entered in the elector roll large number of minors, who did not complete 21 years of age on 1-1-1959, and that objection for such entry was taken and some of the names were said to have been deleted, but nevertheless the names of those minors were again got entered. It is further alleged that many of such minors have voted for the Election Petitioner. The appellant further stated that in schedule II, filed with the Recrimination statement, a list of such minors is given. The appellant further alleged that those votes are void and have to be excluded.

23. The Election Petitioner filed a counterstatement to the Recrimination statement filed by the appellant. In this counter-statement he denied the allegation that at the time of the preparation of the voters' list, the Communist Party had got entered in the electoral roll any person who had not completed 21 years of age on 1-1-1959. It was further stated that various persons were seeking to get themselves enrolled and the political parties were raising objections, some of which were upheld and some rejected. The Election petitioner further denied that persons below 21 years of age voted for the petitioner, and that the statement in Schedule III filed with the Recrimination Statement, is not correct either regarding the age or regarding the persons by whom votes have been cast. In fact, the Election Petitioner stated that he does not admit that the persons mentioned in Schedule III have voted at all and further alleged that the appellant is put to strict proof of the same.

24. The above statement of facts will clearly show that both the appellant and the respondent in the appeal, was making allegations that minors, who are not entitled to vote, have actually got

themselves registered in the electoral list and they have voted for one or the other.

25. But it is seen that the appellant filed a statement later whereby he raised the contention that the Election Tribunal has no jurisdiction to go behind the electoral roll and investigate the question as to whether some of the voters were minors. The actual prayer made by the appellant was to permit him to amend his counter-statement filed already, by adding after paragraph 7 another paragraph 7A as follows:

"Para 7A. It is not open to the petitioner to dispute the fact that some of the voters were really minors at this stage. The Electoral roll is final so far as the Election Tribunal is concerned. The question of minority should have been raised before the revising authorities of the Electoral Roll. It is not open to the Election Tribunal to go behind the Electoral roll and investigate into the question as to whether some of the voters were minors. All this is true."

Though the exact date on which this application was filed or the terms of the order passed by the Election Tribunal on this application are not available before the Full Bench, during the course of arguments the learned counsel agreed that such an application was filed and it was also ordered by the Election Tribunal.

26. Issue No.8 framed by the Election Tribunal in this matter is as follows:

"Whether persons below 21 years of age as on 1-4-1959 have been enrolled in the Tellicherry Constituency and have cast their votes, as required by either party and whether these votes are void and have to be excluded?"

27. Therefore, it will be seen that in the Election Petition and in the counter-statements allegations were made both by the appellant and the respondent regarding the voting of minors in the election. The appellant in particular, raised the contention regarding the jurisdiction of the Election Tribunal to go behind the electoral rolls and make an investigation regarding the age of those persons who are alleged to be minors by one party or the other. But in the judgment of the Election Tribunal, dealing with the minor-voters, it is stated that both sides contend that persons who were in fact, minors have voted and that their votes should therefore be declared invalid and excluded. It is also stated in paragraph 200 by the Tribunal:

"It is not in dispute that the Election Tribunal can go behind the electoral rolls and decide whether a particular elector was a minor or not on the qualifying date."

All parties were also agreed that the 'qualifying date' in this case is 1st January, 1959.

28. As the Election Tribunal appears to have proceeded on the basis that the jurisdiction of the tribunal to go behind the electoral rolls was not in dispute, there is no discussion further about the legal position regarding that aspect. The tribunal, in fact, makes an investigation on facts on this matter also. Ultimately, so far as this aspect is concerned, the view of the tribunal is that 20 voters are found to be underaged on the qualifying date and so, their votes are to be struck off. After having recorded various findings on several aspects, the tribunal held that there should be a

scrutiny of the votes and ultimately held that the Election Petitioner, who is the respondent in the Election Appeal in this Court has in fact, secured a majority of the legal votes and as such, it declared that the election of the appellant in Election Appeal, namely, the returned candidate is void and it further declared that the Election Petitioner is duly elected.

29. The returned candidate whose election has been declared void, and who was the respondent in the Election Petition, challenged the judgment of the tribunal by filing Election Appeal No.3 of 1961 to this Court.

30. In view of the fact that the learned Judges have made the reference regarding the jurisdiction of the Election Tribunal to go behind the electoral roll the Full Bench has to proceed on the basis that, notwithstanding the statement contained in the judgment of the Election Tribunal that this point was not in dispute before it, the learned Judges were prepared to allow the parties to argue the legal aspect bearing on that question.

31. According to Mr. Kalathil Velayadhan Nair learned counsel for the applicant in the Election Appeal, the Scheme of Constitution, as well as of the two Acts namely, the Representation of the People Act 1950 - Act 43 of 1950; the Representation of the People Act 1951 - Act 43 of 1951 and the relevant Rules framed under these two statutes, will clearly show that the question regarding the age of an elector on the "qualifying date" as entered in the electoral roll prepared, in accordance with the relevant statute and the rules cannot be gone into by the Election Tribunal and that the age so entered in the electoral roll is conclusive not only before the Returning Officers, but also in proceedings before the Election Tribunal. In support of this contention Mr. Kalatnil Velayudhan Nair drew our attention to certain Articles in the Constitution and certain sections in the two Acts as well as certain rules.

32. According to Mr. K.V. Surianarayana Iyer learned counsel for the respondent in the appeal namely, the Election Petitioner, again, the provisions contained in the Constitution read along with the provisions made in the two Acts, as well as the relevant rules, will clearly show that the age as entered in the electoral roll, in respect of an elector, cannot be considered to be conclusive, so far as proceedings before an election tribunal are concerned. It may be that very serious attempts are made at the time of preparation of the electoral roll to ascertain as accurately as possible particulars regarding the age of an elector prior to entering his name in the electoral roll. According to Mr. K.V. Suriyanarayana Iyer the entry so made in the electoral register, can if at all, be conclusive before the authorities actually conducting the elections but in no sense can it be considered to be conclusive so as to bar the jurisdiction of the Election Tribunal to go into that matter and consider the legality of a vote cast by a person who has not completed 21 years of age on the "qualifying date", notwithstanding the fact that his name has been entered in the electoral roll by the registering officers.

33. The various aspects presented by both the learned counsel in support of their contentions will be referred to and dealt with later. But before I proceed to deal with those contentions, this is a convenient stage to advert to the relevant provisions in the Constitution as also the two enactments and the rules framed thereunder.

34. In Chapter II dealing with Parliament under Part V of the Constitution Article 84 deals with qualification for membership of Parliament as follows:

"A person shall not be qualified to be chosen to fill a seat in Parliament unless he-

- (a) is a citizen of India;
- (b) is, in the case of a seat in the Council of State, not less than thirty years of age and, in the case of a seat in the House of the People, not less than twenty-five years of age; and
- (c) possesses such other qualifications as may be prescribed in that behalf By or under any law made by Parliament".

Again Article 102 deals with disqualifications for membership of either House of Parliament and it is as follows:

"102.(1) A person shall be disqualified for being chosen as and for being a member of either House of Parliament -

- (a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;
- (b) if he is of unsound mind and stands so declared by a competent court;
- (c) if he is an undischarged insolvent;
- (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;
- (e) if he is so disqualified by or under any law made by Parliament.

(2) For the purposes of this article a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State."

35. Then, again, under Chapter III dealing with the State Legislature in Part VI of the Constitution, Article 173 deals with qualification for membership of the State Legislature as follows:

"173. 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;
- (b) is, in the case of a seat in the Legislative Assembly, not less than twenty-five years of age and, in the case of a seat in the Legislative Council, not less than thirty years of age; and
- (c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament".

Again, Article 191 in the same Chapter, deals with disqualifications for membership of the Legislative Assembly or Legislative Council of a State as follows:

"191(1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State-

- (a) if he holds any office of profit under the Government of India or the Government of

any State specified in the First Schedule other than an office declared by the Legislature" of the State by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

(2) For the purposes of this article, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State."

36. Part XV of the Constitution relates to "Elections" and it contains 6 Articles viz., Articles 324 to 329. Article 324 deals, among other matters, with the superintendence, direction and control of elections being vested in an Election Commission and Article 324 (1) is as follows:

"324 (1). The superintendence, direction and control of the preparation of the electoral rolls, for and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution including the appointment of election tribunal's for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of States shall be vested in a Commission (referred to in this Constitution as the Election, Commission)".

Clauses (2) to (6) of Article 324 are not adverted to by me, because they relate only to the constitution of the Election Commission the appointment of the Chief Election Commissioner and other Election Commissioners; their conditions of service; the appointment of Regional Commissioners and other incidental matters.

Article 325 provides:

"No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex.

There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them."

37. Articles 326, 327 and 328 on the basis of which considerable arguments have been advanced before us by both Mr. Kalathil Velayudhan Nair and Mr. K.V. Suriyanarayana Iyer, are as follows:

"326. Elections to the House of the people and to the Legislative Assemblies of States to be on the basis of adult suffrage.

The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say every person who is a citizen of India and who is not less than twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.

"327. Power of Parliament to make provision with respect to elections to Legislatures.

Subject to the provisions of this Constitution, parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses".

"328. Power of Legislature of a State to make provision with respect to elections to such legislature.

Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament, the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses". Article 329, which deals with the bar to interference by courts in electoral matters, provides under clause (b) as follows:

"329 (b) Notwithstanding anything in this Constitution no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

38. The Representation of the People Act, 1950 - Act 43/1950, as the preamble shows, is an Act to provide for the allocation of seats in and the delimitation of constituencies for the purpose of elections to, the House of the People and the Legislatures of States, the qualifications of voters at such elections, the preparation of electoral rolls, the manner of filling seats in the Council of States to be filled by representatives of Union territories, and matters connected therewith. Section 2(a) defines "article" as an article of the Constitution, 2(b) "Assembly Constituency" as a constituency provided by law for the purpose of elections to the Legislative Assembly of a State, and Section 2(d) "Election Commission" as the Election Commission appointed by the President under Article 324.

39. Part IIA of the Act deals with Officers and contains 3 sections namely Sections 13A, 13B and 13C. Section 13A(1) provides for the appointment of Chief Electoral Officer for each State and sub-section (2) thereof provides that subject to the superintendence, direction and control of the

Election Commission, the Chief Electoral Officer shall supervise the preparation, revision and correction of all electoral rolls in the State under this Act. Section 13B dealing with Electoral Registration Officers is to the effect that the electoral roll for the constituencies referred to therein which includes an assembly constituency also is to be prepared and revised by an Electoral Registration Officer who is to be so nominated or designated in the manner provided therein. Sub-section (2) of Section 13B empowers an Electoral Registration Officer to employ such persons as he thinks fit for the preparation and revision of the electoral roll for a constituency. Section 13C gives power to the Election Commission to appoint one or more persons as Assistant Electoral Registration Officers to assist the Electoral Registration Officer.

40. Part IIB deals with electoral rolls for Parliamentary Constituencies.

41. Part III deals with electoral rolls for Assembly Constituencies, and consists of Sections 14 to 25. It may also be stated that Section 24 of the original Act was repealed by Central Act 58/1958, viz., The Representation of the People (Amendment) Act, 1958, and new Sections 24 and 25 have been incorporated by the Representation of the People (Amendment) Act, 1961, Act 40/1961 and it will be referred to later at the appropriate stage. But the said Amendment Act, old sub-sections (4) and (5) of Section 23 have been in consequence, deleted and another Section 25 has also been incorporated providing for payment of the prescribed fee in respect of applications under Section 22 or Section 23 and an appeal under Section 24. Section 14(b) defines "qualifying date" in relation to the preparation or revision of every electoral roll under Part III, as meaning the 1st day of January of the year in which it is so prepared or revised. In the case before us, I may mention that all parties are agreed that the "qualifying date" is 1st January, 1959. Section 15 provides that for every constituency there shall be an electoral roll which shall be prepared in accordance with the provisions of the said Act under the superintendence, direction and control of the Election Commission. Section 16 deals with disqualifications for registration in an electoral roll and it provides:

"Section 16(1) A person shall be disqualified for registration in an electoral roll if he-

(a) is not a citizen of India; or

(b) is of unsound mind and stands so declared by a competent court; or

(c) is for the time being disqualified from voting under the provisions of any law relating to corrupt and illegal practices and other offences in connection with elections.

(2) The name of any person who becomes so disqualified after registration shall forthwith be struck off the electoral roll in which it is included:

Provided that the name of any person struck off the electoral roll of a constituency by reason of a disqualification under clause (c) of sub-section (1) shall forthwith be reinstated, in that roll if such disqualification is, during the period such roll is in force, removed under any law authorizing such removal".

Section 17 provides that no person shall be entitled to be registered in the electoral roll for more than one constituency and section 18 again states that no person shall be entitled to be registered in the electoral roll for any constituency more than once.

Section 19 which relates to conditions of registration is as follows:-

"19. Subject to the foregoing provisions of this part, every person who, -
(a) is not less than twenty-one years of age on the qualifying date and
(b) is ordinarily resident in a constituency, shall be entitled to be registered in the electoral roll for that constituency".

Section 20 only enumerates the various principles applicable for finding out as to whether a person is 'ordinarily resident' or not.

Section 21, dealing with preparation and revision of electoral rolls in particular, provides in sub-sections (1) and (2) as follows:-

"Section 21(1). The electoral roll for each constituency shall be prepared in the prescribed manner by reference to the qualifying date and shall come into force immediately upon its final publication in accordance with the rules made under this Act.

(2) The said electoral roll shall thereafter be revised in every subsequent year in the prescribed manner by reference to the qualifying date. Provided that if for any reason the electoral roll is not revised in any year the validity or continued operation of the electoral roll shall not thereby be affected."

Sub-section (3) of section 21, no doubt, states that notwithstanding anything contained in sub-section (2) the Election Commission may direct a special revision of the electoral rolls for any constituency or part; of a constituency. The proviso to sub-section (3) of section 21 also states that subject to the other provisions of the Act, the electoral roll for the constituency as in force at the time of the issue of any such direction shall continue to be in force until the completion of the special revision as directed.

Section 22 deals with correction of entries in electoral rolls and it provides as follows:-

"Section 22. If the electoral registration officer for a constituency, on application made to him or on his own motion, is satisfied after such inquiry as he thinks fit, that any entry in the electoral roll of the constituency-

(a) is erroneous or defective in any particular;

(b) should be transposed to another plate in the roll on the ground that the person concerned has changed his place of ordinary residence within the constituency, or

(c) should be deleted on the ground that the person concerned is dead or has ceased to be ordinarily resident in the constituency or is otherwise not entitled to be registered in that, roll,

the electoral registration officer shall, subject to such general or special direction, if any as may be given by the Election Commission in this behalf, amend transpose or delete the entry:

Provided that before taking any action on any ground under clause (a) or clause (b) or any action under clause (c) on the ground that the person concerned has ceased to be

ordinarily resident in the constituency or that he is otherwise not entitled to be registered in the electoral roll of that constituency, the electoral registration officer shall give the person concerned a reasonable opportunity of being heard in respect of the action proposed to be taken in relation to him".

Section 23 deals with inclusion of names in electoral rolls and sub-sections (1), (2) and (3) provide as follows:-

"Section 23 (1). Any person whose name is not; included in the electoral roll of a constituency may apply in the manner hereinafter provided for the inclusion of his name in that roll.

(2) Where an application under sub-section (1) is made at any time after the issue of a notification calling upon the constituency or the Parliamentary constituency within which that constituency is comprised, to elect a member or members and before the completion of that election, it shall be made to the chief electoral officer; and in any other case, it shall be made to the electoral registration officer of that constituency.

(3) The Chief Electoral Officer or, as the case may be, the electoral registration officer shall if satisfied that the applicant is entitled to be registered in the electoral roll, direct his name to be included therein:

Provided that if the applicant is registered in the electoral roll of any other constituency in the same State the Chief Electoral Officer or, as the case may be, the electoral registration officer shall inform the electoral registration officer of that constituency and that officer shall on receipt of the information, strike off the applicant's name from that electoral roll."

Sub-section (4) of section 23 as it originally stood, provides for an appeal against the order of rejection in the manner prescribed either to the Chief Electoral Officer or the Election Commission depending upon the officer who rejected the application. Sub-section (5) is only to the effect that every application and appeal under that section is to be accompanied by the prescribed fee which will not be refunded under any circumstances.

42. It will be seen that though a right of appeal is given under section 23 (4) against an order rejecting an application filed by a person for including his or her name in the electoral roll no such right of appeal was provided or given under the Act against orders passed under section 22 referred to earlier.

43. But it is to be noted that by a recent amendment of the Act in September, 1961 namely The Representation of the People (Amendment) Act, 1961 - Act 40/1961, section 24 has been newly incorporated by section 3 of the amendment Act giving a right of appeal against orders passed under both sections 22 and 23. Clause (a) of section 24 provides for an appeal being made to the chief electoral officer from any order of the electoral registration officer under section 22 or section 23 and clause (b) of section 24 provides for an appeal being filed to the Election Commission from any order of the Chief Electoral Officer under section 23.

44. Section 25 which is also newly incorporated provides for the applications filed under section

22 or section 23 and an appeal filed under section 24 being accompanied by the prescribed fee.

45. In view of the fact that special provisions for appeal and for the payment of necessary fee have been provided under the new sections 24 and 25, the original sub-sections (4) and (5) of section 23 became unnecessary and as such those two sub-sections were deleted by section 2 of the Amendment Act of 1961. Therefore after the amendments so effected, there will be a right of appeal to a party against orders passed either under section 22 or under section 23 of the Act. That may not really affect the question and I have only noted the progress of legislation in that respect

46. Part IV of the Act deals with electoral rolls for council constituencies and Part IV-A deals with the manner of filling seats in the Council of States etc.

47. There are certain general provisions in Part V of the Act in which are found sections 28 to 32. Section 28 (1) gives power to the Central Government after consulting the Election Commission to make rules for the purpose of the Act. Section 28 (2) indicates to what all other topics the rules may relate. A glance at clauses (a) to (i) mentioned therein will show that they relate to the particulars to be entered in the electoral rolls the preliminary publication of electoral rolls as to how claims and objections regarding entries in the electoral rolls are to be preferred and how exactly they are to be disposed of and the constitution and appointment of revising authorities to dispose of claims and objections and the final publication of electoral rolls etc.

Section 29 makes it obligatory on every local authority in a State to make available such staff as may be necessary for the purpose of duties in connection with the preparation and revision of electoral rolls.

Section 30 bars the jurisdiction of civil courts and is as follows:-

"No civil court shall have jurisdiction

(a) to entertain or adjudicate upon any question whether any person is or is not entitled to be registered in an electoral roll for a constituency; or

(b) to question the legality of any action taken by or under the authority of an electoral registration officer, or of any decision given by any authority appointed under this Act for the revision of any such roll."

Section 31 deals with punishment for making false declarations under circumstances mentioned therein.

Section 32 (1) deals with punishment to be meted out to the officers in charge of such matters for breach of official duty. Sub-section (2) of Section 32 bars legal proceedings against such officers or other persons for damages in respect of any act or omission. Sub-section(3) provides that for taking cognizance of any offence punishable under sub-section (1) by a court there should be a complaint made by or under the authority of the Election Commission or the Chief Electoral Officer of the State.

48. By virtue of section 28 of the Act the Representation of the People (Preparation of Electoral Rolls) Rules, 1956 have been framed by the Central Government. Part II of the Rules deals with

electoral rolls for Assembly constituencies. Rule 4 provides that the electoral roll in each constituency shall be prepared in such form or in such language or languages as the Election Commission may direct. Rule 8 makes it obligatory on persons who receive a letter of request in form 2 to furnish the information called for by the registration officer for the purpose of preparing the electoral roll. Rule 9 gives a right to the Electoral Registration Officer or any person employed by him or a revising authority to have access to any register of births and deaths maintained under any law for the time being in force for the purpose of preparing any electoral roll or deciding any claim or objection to an electoral roll.

Rule 10 deals with publication of draft roll in the places mentioned therein. Rule 11 deals with the manner in which further publicity to the draft roll is to be given by the electoral registration officer and under clause (c) it is provided that the officer shall supply free of cost two copies of each separate part of the electoral roll to every political party to which a symbol has been allotted by the Election Commission. Rule 12 provides for lodging of claims for inclusion of a name in the electoral roll and for filing objections to any entry in the electoral roll and it also prescribes the period within which it is to be done. The forms for making claims and objections are provided for in form 4 and form 5 respectively as is indicated by Rule 13. Rule 14 relates to the manner of making and lodging claims and objections. Rule 15 gives a power to the officer to reject a claim or an objection which is not lodged within the period or in the manner provided or is filed by a person not entitled to lodge the same.

Rule 17 provides for a register being maintained in respect of claims and objections.

Rule 18 provides for the service of notice regarding claims and objections which are not already rejected under Rule 15. Rule 20 deals with the manner of service of the notices. Rule 21 relates to inquiry into claims and objections and provides, for the revising authority holding a "summary inquiry into every claim or objections". Sub-rule (3) of Rule 21 provides that every decision of the revising authority under Rule 21 shall be communicated to the electoral registration officer and shall be final. Sub-rule (4) of Rule 21 gives power to the revising authority to correct any clerical or printing errors through the electoral registration officer. Rule 22 deals with the preparation of a list of amendments to carry out the decisions and directions of the revising authority under Rule 21 or of any other amendments which are found necessary for correcting any clerical or printing errors subsequently discovered in the electoral roll. Rule 23 provides for the final publication of the electoral roll together with the list of amendments and making it available for inspection and displaying it in the manner indicated therein and it is further provided that on such publication the roll together with the list of amendments shall be the electoral roll for the constituency.

Rule 25 deals with annual revision of electoral rolls. Rule 26 deals with the fees payable in respect of applications under sub-section (1) of section 23 of the Act and also provides for the application being notified for objections and the registration of the applicant, in the electoral roll, after considering objections if any. Rule 27 provides for appeals from orders rejecting applications under Rule 26 and the manner in which those appeals are to be filed.

49. Part V deals with preservation and disposal of electoral rolls. Rule 32 in that Part gives a right to every person to inspect the election papers referred to in Rule 31 and get certified copies thereof on payment of the fees prescribed.

50. The other Act that has to be considered is the Representation of the People Act, 1951 - Central Act 43/1951. The preamble to the Act states that it is an Act to provide for the conduct of elections to the Houses of Parliament and to the House or Houses of the Legislature of each

State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections. Section 2 (bb) defines chief electoral officer as the officer appointed under section 13-A of the Representation of the People: Act, 1950. Clause (d) defines "election" as an election to fill a seat or seats in either House of Parliament or in the House or either House of the Legislature of a State other than the State of Jammu and Kashmir. Clause (e) defines "elector" in relation to a constituency as a person whose name is entered in the electoral roll of that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act, 1950. Clause (k) defines "tribunal" as a tribunal appointed by the Election Commission under section 86.

51. Part II deals with qualifications and disqualifications for membership. Chapter II therein deals with qualifications for membership of State Legislatures. Apart from the other matters mentioned therein it will be seen that one of the qualifications is that the candidate should be an elector in that constituency also. Chapter III therein deals with disqualifications.

52. Part III deals with notification of general elections and Part IV deals with administrative machinery for conduct of elections. Section 20 is to the effect that the chief electoral officer of each State, subject to the superintendence, direction and control of the Election Commission is to supervise the conduct of all elections in the State under this Act.

Section 21 relates to the appointment of a Returning Officer by the Election Commission for every constituency. Section 22 relates to the appointment by the Election Commission of Assistant Returning Officers to assist the Returning Officer in the performance of his functions. Section 24 casts an obligation on the Returning Officer at any election to do all such acts and things for effectually conducting the election in the manner provided by the Act or the Rules. Section 25 deals with provision for providing sufficient number of polling stations for each constituency and section 26 relates to appointment of presiding officers for polling stations and section 27 states that it is the general duty of the presiding officer to keep order in the polling station and to see that a poll is fairly taken.

53. Part V deals with conduct of elections and provides for fixing dates for nominations and other incidental matters. Section 32 states that 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 the Act. Section 33 relates to the presentation of nomination paper and requirements of a valid nomination and it also states that a nomination paper is to be completed in the prescribed form and signed by the candidate and by an elector of the constituency as a proposer. Under sub-section (4) of section 33 there is a duty on the Returning Officer to satisfy himself when a nomination paper is presented, that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls. No doubt power is given to the Returning Officer to have any clerical or technical errors in the nomination paper corrected. Section 35 relates to giving notice of nominations and also fixing a time and place for their scrutiny. Section 36 deals with a scrutiny of nominations. Sub-section(1) provides for giving all reasonable facilities to the persons mentioned therein for examining the nomination papers of all candidates. Sub-section (2) gives power to the Returning Officer to examine the nomination papers and to decide all objections which may be made to any nomination and after such summary inquiry if any, as he thinks

necessary, reject any nomination on the ground

(a) that the candidate is not qualified or is disqualified under the relevant provisions of the Constitution, namely, Articles 84, 102, 173 and 191 and Part II of the Act; or

(b) that there has been a failure to comply with 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. Sub-sections (3) to (5) deal with certain other incidental matters. Sub-section (6) makes it obligatory on the Returning Officer to endorse on nomination paper his decision either accepting or rejecting the same and also to record his reasons in writing in a brief statement when a nomination paper is rejected. Sub-section (7) of section 36 as it now stands, is as follows:-

"For the purposes of this section a certified copy of an entry in the electoral roll for the time being in force of a constituency shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency, unless it is proved that he is subject to a disqualification mentioned in Section 16 of the Representation of People Act, 1950 (43 of 1950)."

54. It may be mentioned at this stage that sub-section (7) of section 36 as it originally stood, was as follows:-

"For the purposes of this section -

(a) the production of any certified copy of an entry made in the electoral roll of any constituency shall be conclusive evidence of the right of any elector named in that entry to stand for election or to subscribe a nomination paper, as the case may be unless it is proved that the candidate is disqualified under the Constitution or this Act, or that the proposer or seconder, as the case may be is disqualified under sub-section (2) of Section 33;

(b) where a person has subscribed, whether as proposer or seconder, a larger number of nomination papers, than there are vacancies to be filled, those of the papers so subscribed which have been first received, up to the number of vacancies to be filled shall be deemed to be valid."

55. It will be seen that the original sub-section (7) extracted above, was wider in, its phraseology and the present sub-section as it now stands, is more limited in its operation. I may also state that this distinction has been noted by the Supreme Court in its recent decision reported in *Brijendralal v. Jwalaprasad*⁵, This decision will have to be adverted to later when dealing with the scope of sub-section (7) of Section 36 in respect of which some arguments have been advanced by learned counsel.

56. Chapter IV of Part V deals with "The Poll". There are provisions enabling the Election Commission to fix the hours during which the poll is to be taken and also makes provision for adjournment of polls in emergencies etc. Section 59 therein states that at every election where

poll is taken vote shall be given by ballot in such manner as may be prescribed. Section 61 deals with special procedure for preventing personation of electors.

Section 62 which deals with right to vote, is as follows:

"Section 62(1). No person who is not, and except as expressly provided by this Act. every person who is, for time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.

(2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in Section 16 of the Representation of the People Act.1950 (43 of 1950).

(3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency his votes in all such constituencies shall be void.

(4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral" roll for that constituency more than once and if he does so vote, all his votes, in that constituency shall be void.

⁵ AIR 1980 SC 1049

(5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise or is in the lawful custody of the police;

Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force."

57. Chapter V in the said Part deals with counting of votes and Section 66 occurring therein states that when the counting of the votes has been completed, the Returning Officer shall forthwith declare the result of the election in the manner provided under the Act or the Rules and under Section 67A the date of elction of a candidate is the date on which a candidate is declared by the Returning Officer to be elected. Chapter VII in Pant V deals with publication of election results etc.

58. Part VI of the Act relates to 'disputes regarding elections'. Chapter II therein deals with 'presentation of election petitions to Election Commission'. Section 80 therein states that no election shall be called in question except by an election petition presented in accordance with the provisions of Part VI. Section 81 and certain other sections relate to details regarding presentation of petitions to the Election Commission and other incidental matters. Section 84 deals with the relief that may be claimed by the election, petitioner. Section 85 gives power to the Election Commission to dismiss the petition if the provisions of Section 81 or 82 or 117 have not been complied with.

59. Chapter III in Part VI relates to trial of election petitions and in particular Section 86 states that if the election petition is not dismissed under Section 85 the Election Commission is to cause a copy thereof to be published in the Official Gazette and a copy to be served by Post on each

respondent and then refer the petition to an election tribunal for trial. There are other provisions relating to the constitution, powers and procedure of election tribunal. Section 97 deals with Recrimination when a seat is claimed. Section 98 relates to the orders that may be passed by a tribunal namely, of dismissing an election petition or declaring the election of all or any of the returned candidates to be void or declaring the election of all or any of the returned candidates to be void and the election petitioner or any other candidate to have been duly elected.

Section 100 (1) relates to the various grounds under which the tribunal shall declare the election of the returned candidates to be void and is as follows:

"Section 100 (1). Subject to the provisions of sub-section (2), if She Tribunal is of opinion

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(a) that on the date of his election a returned candidate was not qualified or was disqualified, to be chosen to fill She seat under the Constitution or this Act; or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election in so far as it concerns a returned candidate, has been materially affected-

(i) by the improper acceptance of any nomination; or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any

rules or orders made under this Act, the Tribunal shall declare the election of the returned candidate to be void." It will be noted that under sub-section(1)(d)(iv) of Section 100, jurisdiction is given to the tribunal to declare the election void if it is of the view that the result of the election of the returned candidate has been materially affected by any non-compliance with the provisions of the Constitution or of the Act or of any Rules or Orders made under the Act.

60. I may also state at this stage that there was a slight difference in the wording of the particular clause as it originally stood. Clause (c) of sub-section (2) of Section 100 omitting matters which are not necessary, as it originally stood, was as follows:

"Section 100(2)(c).....or by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act or of any other Act or rules relating to the election or by any mistake in the use of any prescribed form....."

While under the old sub-clause extracted above any non-compliance with the provisions of the Constitution or of the 1951 Act or the 1950 Act or the Rules, if such non-compliance has materially affected the result of the election was a ground for declaring the election to be void,

the sub-clause as it now stands, is more limited in that the non-compliance must be with the provisions of the Constitution or of the 1951 Act or of any Rules or orders made under the 1951 Act. Non-compliance with the provisions of "any other Act or Rules" which will include the 1950 Act and the Rules framed thereunder can no longer be urged as a ground for declaring an election void.

61. Section 101 deals with the grounds for which a candidate other than the returned candidate may be declared to have been elected.

62. Chapter IV in Part V deals with withdrawal and abatement of Election Petitions. Chapter IV-A deals with appeals. Section 116-A therein provides for an appeal to the High Court of the State from every order made by a tribunal under Section 98 or 99 and other incidental matters are also provided therein. Section 116-B provides that the decision of the High Court on appeal under Chapter IV-A and subject only to such decision the order of the tribunal under Section 98 or Section 99 shall be final and conclusive.

63. Part VII deals with corrupt practices and electoral offences.

64. Part VIII deals with disqualifications.

65. Section 169 gives power to the Central Government after consulting the Election Commission to make rules for the purposes of the Act and sub-section(2) therein states the various matters in respect of which rules may be framed also.

Section 170 bars the jurisdiction of the civil Court and it is to the following effect:

"Section 170. No civil court shall have jurisdiction to question the legality of any action taken or of any decision given by the returning officer or by any other person appointed under this Act in connection with an election."

66. By virtue of the rule-making power contained in Section 169 of the Act, the Representation of the People (Conduct of Elections and Election Petitions) Rules 1956 have been framed. Clause(b) of Rule 2 defines "electoral roll number".

67. Part II deals with conduct of elections. Rule 25 deals with identification of electors and sub-rule (3) therein gives a right to a candidate or his agent to challenge the identity of a person claiming to be a particular elector. Rule 33 deals with "tendered votes" and Rule 34 deals with "challenged votes". Rule 41G deals with voting.

68. Chapter III deals with counting of votes. Rule 56 deals with scrutiny and opening of ballot boxes and Rule 57 deals with scrutiny and rejection of ballot papers. Sub-rule(2) of Rule 57 deals with the circumstances under which a Returning Officer shall reject a ballot paper. Sub-rule (2A) deals also with certain other circumstances when a ballot paper shall be rejected. Rule 58 provides for counting of ballot papers which are not rejected under Rule 57. Rule 64 deals with re-count of votes and Rule 66 deals with declaration of the result of election. It is not necessary to deal with the other provisions in the said rules.

69. I have given rather elaborately the various provisions contained in the Constitution, as well as the two statutes and the rules so that it will be easier to appreciate the contentions of the learned counsel.

70. Mr. Kalathil Velayudhan Nair, learned counsel for the appellant urged that under Article 326 the only right that is declared is the right of persons stated therein for being entitled to be registered as a voter at any such election. The learned counsel urged that there is absolutely no right to vote given to any person under Article 326. The right to be registered as a voter, is according to the learned counsel, one thing and the right to vote in an election is a totally different matter and the latter right has not been provided in the Constitution.

71. According to the learned counsel the very constitution which gives a right to persons, mentioned in Article 326 to be registered as a voter at any such election, gives also powers to Parliament under Article 327 to make provision by law, with respect to all matters relating to or in connection with elections to either House or Parliament or to the House or either House of the Legislature of a State including the preparation of an electoral roll, the delimitation of the constituencies and all other matters necessary for securing the due constitution of such House or Houses.

Similarly, the learned counsel urged that powers have been given under Article 328 to the State Legislature to enact the provisions referred to in Article 327 regarding the House or either House of the Legislature of the State in so far as provision in that behalf has not been made by Parliament, Therefore, Mr. Kalathil Velayudhan Nair urged that the scheme of the Constitution is that after declaring a particular right in Article 326, the method and procedure by which that object is to be achieved has been completely given by the Constitution to the Parliament and under certain circumstances, to the State Legislatures also. In accordance with the powers conferred on Parliament under Article 327 the two statutes namely, the Representation of the People Act, 1950 and the Act of 1951 have been passed by Parliament. The various provisions contained in particular, in the 1950 statute as also the rules framed under the said Act will clearly show that the object of the Legislature was that entries made in the electoral rolls prepared under the provisions of the statute and the rules are to be considered final and conclusive for all purposes. In particular, the Act of 1950 almost exclusively deals with the qualifications of voters at the election, the preparation of electoral rolls, and matters connected therewith. The 1950 enactment is a complete code by itself making very careful and elaborate provisions regarding those matters.

72. The learned counsel further alleged that a perusal of the said Act and the relevant rules will clearly show that considerable care is to be taken by the authorities, charged with the duty, to collect as accurate particulars as possible regarding the age of a voter before registering his name in the electoral roll. Provisions have been made for filing claims for inclusion of names in the electoral roll and also for objections being filed either to inclusion or in respect of entries which are already on record. Powers have been given to the officers concerned to make an investigation into the claims or objections and it is only after satisfying themselves on these matters that an order is finally passed either by way of including a particular person in the electoral roll or rejecting his claim or striking off an entry from the electoral roll. In fact, Mr. Kalathil Velayudhan Nair learned counsel urged that under Rule 9 framed under the 1950 statute the officers have got powers to inspect the birth and death registers and also to obtain all information from those

officers in connection with the preparation of any electoral roll or in deciding any claim or objection to an electoral roll. Similarly the learned counsel urged that there are elaborate provisions made for publication of the draft electoral roll and there is also provision making it obligatory on the part of the electoral registration officer to supply free of cost two of such drafts to every political party. All these are aimed for giving very wide publicity regarding the preparation of the electoral roll. It is only after all these formalities are gone through, and all claims and objections are investigated and considered that the final roll is prepared by the department.

73. In fact, the learned counsel also urged that there are provisions made for appeals being filed against the orders passed by the electoral registration officers. All these will, according to the learned counsel, clearly show that the scheme of the Constitution, entrusting Parliament with the power of passing the necessary law and the fact that the Parliament has actually made such a law was that the entries in the electoral roll, as finally framed, is conclusive for all purposes and the election tribunal has absolutely no jurisdiction to start an inquiry afresh as to whether the persons who are on the electoral rolls and who also voted at the elections are persons who have not completed 21 years of age on the 'qualifying date',

74. Mr. Kalathil Velayudhan Nair placed considerable reliance upon Sections 16 and 19 of the 1950 statute and Sec.62 of the 1951 statute. As I have shown earlier Section 16 of the 1950 Act deals with disqualifications for registration in an electoral roll. One of the persons who is disqualified for registration in the electoral roll is indicated in Section 16(1)(a) as a person who "is not a citizen of India". Section 19 deals with conditions of registration and it says that every person who (a) is not less than 21 years of age on the qualifying date and (b) is ordinarily resident in a constituency, shall be entitled to be registered in the electoral roll for that constituency.

75. Mr. Kalathil Velayudhan Nair urged that under Article 326 it is already provided that a person to be entitled to be registered as a voter should be-

- (a) a citizen of India; and
- (b) not less than 21 years of age on the qualifying date; and
- (c) who is not otherwise disqualified under the Constitution or any law made by the appropriate Legislature on the several grounds mentioned in the Article.

When one of the essential qualifications under the Article is that the person should be a citizen of India, it will be seen that the Parliament has dealt with that aspect in Section 16(1)(a) of the 1950 Act. Section 16 deals with the state of registration in an electoral roll and one of the aspects referred to in the Constitution namely, a person being a citizen of India has alone been dealt with in Section 16 whereas notwithstanding the fact that Article 326 requires another essential qualification namely, that of a person being not less than 21 years of age that has not been treated as disqualification for registration in an electoral roll under Section 16 of the 1950 Act. According to Mr. Kalathil Velayudhan Nair, this omission will clearly show that Parliament was not for treating the existence of minors in an electoral roll as a serious infirmity which will affect the elections held on that basis. The omission to declare as a disqualification, of a person who is less than 21 years of age in Section 16 of the Act will also, according to the learned counsel,

indicate that the scheme of the Act is that the entry of a person in the electoral roll, after due investigation by the officers is not a matter which is open for further challenge.

76. The learned counsel also placed considerable reliance upon Section 62 of the 1951 Act, which deals with a right to vote. In particular, the learned counsel placed very strong reliance upon sub-sections (1) and (2) of Section 62 to the effect, that every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency and that no person shall vote at an election in any constituency if he is subject to any disqualifications referred to in Section 16 of the 1950 Act.

77. Based upon these two sub-sections of Section 62 the learned counsel urged that the absolute right of every person who has been entered in the electoral roll rightly or wrongly, to vote in that election has been recognized. Sub-sections (3) to (5) of Section 62 do not come into the picture in this case. The only other prohibition that is contained in Section 62 is in sub-section (2) wherein it is stated that persons who are subject to the disqualifications referred to in Section 16 of the 1950 Act shall not vote at an election. Persons who are less than 21 years of age on the qualifying date and whose names may have been entered even by error or mistake in the roll are not disqualified from voting because such a disqualification is not to be found in Section 16 of the Act. Therefore, according to the learned counsel once a person's name has been entered in the electoral register, he gets an absolute right to vote under sub-section(1) of Section 62 unless he is disqualified under the provisions of sub-section (2).

78. The learned counsel for the appellant has also attempted to draw some support in particular, from the provisions contained in sub-section (7) of Section 38 of the 1951 Act that the production of a certified copy of an entry in the electoral roll for the time being in force of a constituency shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency unless it is proved that he is subject to a disqualification mentioned in Section 16 of the 1950 Act. This sub-section is again relied upon by the learned counsel to show that the scheme of the two enactments is to make the entries contained in an electoral roll conclusive evidence regarding the right of those persons to be on the electoral roll notwithstanding that there may have been an error or mistake committed in the matter by registering those persons in the electoral roll.

79. The learned counsel drew our attention to certain decisions of the election tribunal wherein, no doubt a view has been taken that it is not open to the election tribunals to go behind the entries regarding age as found in the electoral rolls. This view has been arrived at by some tribunals very largely on the basis that the scheme of the two enactments tends to show that those entries are to be treated as final; and some other tribunals have also placed reliance, in support of that view on the provisions contained in sub-section (7) of Section 36 of the 1951 Act.

80. I do not think it necessary to deal with all those decisions of the election tribunals, because, in my view, a decision has to be arrived at on the basis, of what according to me, is the clear directions contained in the Constitution and also the two enactments in question.

81. Mr. Kalathil Velayudhan Nair also drew our attention to some of the provisions of the corresponding English Statute namely, the Representation of the People Act 1949 (12 and 13 Geo.6 Ch.68). The learned counsel relied upon sub-section(1) of Section 1 which is as follows:

"Section 1(1). Parliamentary electors.

Subject to the provisions of sub-section(2) or this section the persons entitled to vote as electors at a parliamentary election in any constituency shall be those resident there on the qualifying date who, on that date and on the date of the poll are of full age and not subject to any legal incapacity to vote and either British subjects or citizens of the Republic of Ireland:

Provide that a person shall not be entitled to vote as an elector in any constituency unless registered there in the register of Parliamentary electors to be used at the election nor, at a general election, to vote as an elector in more than one constituency."

The above section according to the learned counsel, gives two different rights namely, (a) registration in the register of Parliamentary electors as an elector and (b) right to vote in the said election. Again the learned counsel relied upon Section 39 (4) of the English Act which is as follows:

"Section 39 (4). A person registered as a parliamentary or local government elector, or entered in the list of proxies, shall not be deluded from voting on the ground that he is not a British subject or citizen of Eire or is not of full age or is otherwise subject to any legal incapacity to vote, or that on the qualifying date or the date of his appointment, as the case may be, he was not a British subject or citizen of Eire or was not of full age or was otherwise subject to any legal incapacity to vote; but this provision shall not prevent the rejection of the vote on a scrutiny or effect his liability to any penalty for voting."

From the above provision it will be seen, among other matters, it is provided that a person shall not be excluded from voting on the ground that he was not of full age; but nevertheless there is a provision for rejecting the vote on any of the disqualifications mentioned in the sub-section on a scrutiny. The learned counsel urges that there is no provision in our statutes giving any such jurisdiction to the tribunal to reject a vote given by a person who is not of a full age, but who has been registered in the electoral roll. The absence of such a provision, will also show according to Mr. Kalathil Velayudhan Nair that no investigation is contemplated by the tribunal, in such matters, under our law.

82. Mr. K.V. Suriyanarayana Iyer learned counsel for the respondent urged that Article 326 of the Constitution is explicit and mandatory. It clearly says that the elections shall be on the basis of adult suffrage. That clearly means that the elections are to be held by adults voting. The Constitution has also taken care to specify who those adults are in the said Article itself. The description of an adult, as contained in Article 326 will clearly show that a minor has no right to vote in an election. No doubt, Article 326 does not say that the persons stated therein, who shall be entitled to be registered as a voter at any such election, are also entitled to vote in the election. Mr. K.V. Suriyanarayana Iyer urges that it is not necessary at all to say so, in view of the fact that the registration as a voter is really "for any such election" as referred to in Article 326 itself. The preparation and finalisation of the electoral roll is us such part of the election itself. Else mere preparation of an electoral roll serves absolutely no purpose whatsoever unless it has any relation to an election that is contemplated.

83. In fact, the scheme of Part XV of the Constitution will clearly show that the preparation of the electoral rolls is as much part of the elections either to the Parliament or to the Legislature of every State. When Article 326 has categorically stated that elections are to be on the basis of adult voting, it clearly implies that no person other than an adult as mentioned in Article 326 is contemplated by the Article as one who is entitled to vote in the elections. Articles 327 and 328 will also clearly show that the power to make laws given either to Parliament under Article 327 or to the State Legislature under Article 328 is "subject to the provisions of this Constitution" and it is under the provisions of Article 327 that the Parliament has enacted two statutes namely, 1950 and 1951 Acts. Parliament cannot certainly be understood as enacting any law which goes counter to the directions or mandatory provisions contained in Article 326. This will be the position when Parliament enacts a law and more so when it has enacted the statutes in question on the basis of this special restriction provided in Article 327 which gives such power to Parliament to make laws only subject to the provisions of the Constitution.

84. Having regard to the scheme of Article 326 and the limitation placed upon the powers of Parliament under Article 327 if these two statutes are read, Mr. K.V. Suriyanarayana Iyer urges, there is really no conflict between the statutes and the matters provided in the Constitution. The learned counsel for the respondent further urged that even if it is held that any of the provisions in the two statutes come into conflict with the provisions of the Constitution, it goes without saying that the provisions of the Constitution will have to prevail.

85. Mr. K.V. Suriyanarayana Iyer further urged that the scheme of the two enactments also will clearly show that no finality was intended by Parliament to be given regarding entries as contained in the electoral registers. The policy underlying the two enactments is that elections will have to proceed at all stages as quickly as possible; and having that in view, powers have been given no doubt, to the electoral registration officers to adjudicate upon certain disputes regarding the claims made for inclusion in an electoral roll or in dealing with objections that may be made with regard to such inclusion or to remove the entries that are already found in the electoral rolls. All these adjudications are only for a limited purpose, namely, to have a final list prepared, after investigating all those aspects, so that the elections may be proceeded with on the basis of that electoral roll. It is really again on the same basis that Section 62 of the 1951 Act clearly says that all persons who are on the electoral roll, are entitled to vote. That is only a matter of convenience. The scheme of the statute will show that the Legislature intended to give some sort of finality that should obtain to such matters when the voters begin to exercise their rights of polling on the basis of their names having been registered in the electoral roll. No person, at that stage of polling, should again be allowed to raise a dispute regarding the right of a person to vote except as otherwise provided by the statute; and if all these inquiries are again racked up at the time of the actual polling, it will lead to endless chaos and confusion.

86. Even otherwise, it will be seen that only very limited powers are given to the electoral officers to reject the nomination of a candidate or to reject a vote. Only a very limited power of investigation is given to the officers at the time when the actual elections take place.

87. So far as Section 16 of the 1950 Act is concerned, Mr. K.V. Suriyanarayana Iyer urged that the fact that a person, being less than 21 years of age on the qualifying date, has not been dealt with as a person under a disqualification, does not at all affect the question. Citizenship is a

fluctuating thing and therefore, a person who may have been a citizen on the qualifying date, may have ceased to be a citizen of India on the date of voting. That is why Section 62 specifically prohibits such disqualified persons from voting at the elections. The essential condition regarding the age of a person on the qualifying date has been dealt with in Article 326, and that has been provided in Section 19 of the 1950 Act. Such a provision regarding age, in Section 19, according to the learned counsel, is absolutely unnecessary in view of the specific provisions contained in Article 326 of the Constitution.

88. According to Mr. K.V. Suriyanarayana Iyer, the scheme of the English statute is entirely different and it deals with all the matters relating to election in one and the same statute; whereas the matters relating to elections have been dealt with in two statutes in our country namely, 1950 and 1951 Acts. But the essential qualifications, are already dealt with in the Constitution itself.

89. The learned counsel for the respondent further urged that Article 324 deals, among other matters, with the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the legislatures of States by the Election Commission. Article 329(b) is also to the effect that no election shall be called in question except by an Election Petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate legislature. Section 80 of the 1951 statute is more or less analogous to Article 329(b) of the Constitution and the Act has made provision for the appointment of election tribunal and other matters. The provision in Section 30 of the 1950 statute and Section 170 of the 1951 statute barring jurisdiction of civil courts, read along with Article 329(b) and Section 80 of the 1951 Act, will clearly show that it is the election tribunal, which is given absolute jurisdiction to investigate all matters relating to an election. In particular, Mr. K.V. Suriyanarayana Iyer also referred to Section 100(1)(d)(iv) of the 1951 Act, wherein jurisdiction and power have been given to the election tribunal to declare an election void, if the result of the election has been materially affected by "any non-compliance with the provisions of the Constitution"; and it will be a non-compliance with the provisions of the Constitution, according to the learned counsel, if persons who have not completed 21 years of age on the qualifying date, have voted in the elections.

90. The learned counsel further urged that the question as to whether a person was less than 21 years of age on the qualifying date cannot be allowed to rest on any presumptions, because it is a matter to be ascertained on actual facts. In fact, Section 36(7) of the 1951 Act, also limits the presumption regarding the entries in an electoral roll only for the purpose of Section 36 and it goes no further than that.

91. The learned counsel further pointed out that the Supreme Court has even held that the High Court should not exercise its powers under Article 226 in respect of matters concerning elections because the entire matter is available to be canvassed before an election tribunal as provided under Article 329(b).

92. After a consideration of the various aspects presented by both the learned counsel, in my view, the contention of Mr. K.V. Suriyanarayana Iyer will have to be accepted, and in consequence, it will have to be held that the election tribunal has got jurisdiction to investigate the question as to whether persons, who were less than 21 years of age on the qualifying date have actually voted in the elections and in consequence, to come to the conclusion whether there

has been a non-compliance with the provisions of the Constitution.

93. I will be indicating in the course of the discussion later, that Article 326 itself has declared that election to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage or adult voting. What exactly are the qualifications such an adult should possess, and what disqualifications he should not suffer from have also been indicated in the Article itself. Having categorically stated what the qualifications of that adult should be, the Constitution has also indicated that which can be done by any law made by the appropriate legislature, (viz.) only to fix the qualifying date; as to what other disqualifications should be affected can be fixed by the appropriate legislature. The age of a person cannot be an uncertain factor and there can be no presumption regarding age or even fixation of a notional age for a particular individual. For instance, when the Constitution says that a person should not be less than 21 years of age on the qualifying date fixed by the appropriate legislature, and if actually a person of only 18 years of age has been registered in the electoral roll, rightly or wrongly, can it be stated that his age is not 18, but must be above 21, because his name is in the electoral roll? If such a person, though no doubt, registered on the roll, votes, in my view, it will certainly be a violation of Article 326 of the Constitution, because that Article declares in unequivocal terms that the election shall be on the basis of voting by adults who are not less than 21 years of age on the qualifying date. The scheme of the two statutes which has been considered earlier, also indicates that in order to facilitate quick completion of elections, a right is recognized in persons, whose names are in the electoral roll, to vote. No doubt, considerable care and trouble is also taken, as will be seen by the provisions in the two statutes, for gathering as accurate and complete information as possible. But that, certainly by itself will not mean that a person whose name is nevertheless in the electoral roll, satisfies as a fact, one of the essential qualifications insisted upon by the Constitution that he is not less than 21 years of age on the 'qualifying date'.

94. As observed by Halsbury, 3rd Edition Vol.14 at page 303.

"A person not of full age on the qualifying date is not entitled to vote; it would appear that if such a person votes, his vote may be struck off on a scrutiny".

No doubt, these observations are made by the learned author with reference to the provisions in the English statute. In fact, in the English statute, though a person was not of full age on the qualifying date, nevertheless he could vote if he had attained full age at the time of the poll. No such contingency is contemplated either in our Constitution or the two statutes. But these observations will show that notwithstanding the fact that a person, who is not qualified may nevertheless be on the electoral roll. If he votes at the election, by virtue of his being on the electoral roll nevertheless such votes can be excluded on scrutiny by the tribunal.

95. The most important thing to bear in mind is the mandatory provision contained in Article 326 of the Constitution, Article 326 categorically states that 'the elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage', and this is later explained in the same Article to the effect that every person who is a citizen of India and who is not less than 21 years of age on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate legislature on the various grounds mentioned therein shall be

entitled to be registered as a voter at any such election. Therefore, it will be seen that the Constitution categorically declares that elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult voting who those adults are is mentioned later in the Constitution and one of the essential qualifications for such an adult is that he is one 'who is not less than 21 years of age on such date as may be fixed in that behalf.'

96. 'Qualifying date' is defined in Section 14(b) of the 1950 Act, Therefore, one of the qualifications necessary to entitle a person to be on the electoral roll is that he should not be less than 21 years on the 'qualifying date' which in this case is 1-1-1959.

97. The expression "suffrage" is defined in Black's Law Dictionary 4th Edition as

"A vote; the act of voting; the right or privilege of casting a vote at public elections. The last is the meaning of the term in such phrases as "the extension of the suffrage", 'universal suffrage', etc. *Spitzer v. Fulton*⁶, *Cofield v. Farrell*⁷, ". and "Suffragium" is defined as:

"Lot. In Roman Law, a vote, the right of voting in the assemblies of the people."

98. In Murray's Oxford New English Dictionary the expression "suffrage" is stated to be:

"The casting of a vote, voting; the exercise of a right to vote, election by voting, to elect by vote."

When the expression "suffrage" occurring in Article 326 of the Constitution itself means vote or the act of voting, it is not possible to accept Mr, Kalathil Velayudhan Nair's contention that the right to vote is not at all contemplated under Article 326 and that is dealt with only under Section 62 of the 1951 statute. In my view, the Article clearly envisages an election by adults voting and the registry in the electoral roll is for the purpose of that person, so registered, to figure as a voter at any such election. Therefore, it was not really necessary to provide also a further right of voting in Article 326.

99. Even the rules framed under the 1950 statute are only to the effect that the roll finally published shall be electoral roll for the constituency (see rule 23 of the relevant rules).

100. In my view, the scheme of the Constitution clearly shows that election should be

⁶33 Misc.237: 58 NYS 660

⁷38 Ckl. 608: 134 p.407, (409)

only by adult voting. Article 327, no doubt, gives powers to Parliament to make laws regarding matters relating to or in connection with elections but that power is "subject to the provisions of this Constitution". Similarly, the powers given to the State Legislature under Article 328 are again subject to the provisions of the Constitution. Mr. K.V. Suriyanarayana Iyer urges that the jurisdiction of the civil courts have been completely barred by specific provisions contained in the 1950 and 1951 statutes. That by itself according to the learned counsel, will indicate that the legislature did not intend the matters covered by the two statutes to be final and not available for scrutiny at the hands of the election tribunal.

101. Mr. Kalathil Velayudhan Nair met this contention by urging that the question as to whether a court has been given any power at an intermediary stage has no bearing because it is open to make provisions in the Constitution giving powers to Parliament to enact legislations in respect of those matters and such a power is contained in Article 327. In enacting such a law, it is open to Parliament to provide for investigation and claims in a particular manner by appropriate officers or authorities mentioned in the Act itself and make those decisions final for all stages.

102. On my view the fact that the courts' jurisdiction has been excluded may be a very relevant circumstance to be taken into account to consider as to whether the statute really intended a finality being given to the decisions of the authorities constituted under a particular statute. That by itself, may not be conclusive one way or the other. It may be that the statute by clear and unequivocal language may indicate that decisions arrived at by authorities functioning under the statute will be final for all purposes, but there is no such indication, either in the 1950 or 1951 Act.

103. In this connection, it may be mentioned that notwithstanding the fact that jurisdiction has been given to the county court to revise the orders of the registering authority under the English statute, and notwithstanding the further fact that an appeal is also provided to the Court of Appeal against the decision of the county court in such matters, nevertheless it is specifically provided in Section 39(4) of the English Act, that the votes, given by persons who are not of full age, can be rejected at the time of the scrutiny. In the statutes before me, either of 1950 or 1951 I do not see any indication that the legislature intended to make the entries in the registration roll final for all purposes. On the other hand, in my view, the intentions are that they are all considered to be final only to enable the progress of the elections at a quick space and giving a right to the concerned parties to challenge all these aspects at the final stages after the elections are over namely, before the election tribunal. In fact, Article 329(b) of the Constitution, read with Section 80 of the 1951 Act clearly indicates that it is the election tribunal that will have jurisdiction in such matters.

104. I have already stated that I am not adverting to the decisions of the various election tribunals that have been placed before us by Mr. Kalathil Velayudhan Nair, because their view proceeds on the basis that the scheme of the statutes in question indicates that the registry in the electoral roll is final for all purposes. In my view, such an approach is clearly erroneous because the scheme of the Constitution as well as the scheme of the statutes, clearly indicate to the contrary. In any event, the scheme of the Constitution, as well as the conferment of a power on the Election Tribunal, under Section 100(1)(d)(iv) of the 1951 Act, to consider the question of "any non-compliance with the provisions of the Constitution," clearly indicates that there cannot be a finality of the age entered in the electoral roll, if by such wrong entry, there is a non-compliance with the provisions of the Constitution.

105. Another approach made by some of the election tribunals, whose decisions have been placed before us is that section 36(7) of the 1951 Act makes the entry in the electoral roll conclusive, and on this basis they have come to the conclusion that the correctness of the entries in the electoral roll cannot be canvassed before art election tribunal. This approach again, in my view, is fallacious. Section 36(7) of the 1951 statute itself, in my view, gives an indication than even the legislature did not contemplate to give finality for those entries in the electoral rolls for all purposes, because section 36(7) limits that presumption contained in the said sub-section, not even for the purposes of the Act as a whole, but only for the purpose of "this section". Therefore,

it is clearly seen that the presumption is applicable only when the matters mentioned in section 36 have to be considered.

106. The presumption arising under Section 36(7) has been considered in a recent decision given by the Supreme Court, reported in AIR 1960 SC 1049. No doubt, the question that arose before their Lordships was as to whether the Returning, Officer was justified in rejecting a nomination paper filed by a candidate, for the latter's omission to specify his age therein. In dealing with Section 36(7) of the 1951 statute, Mr. Justice Gajendragadkar speaking on behalf of the Court observes at page 1055:

"In this connection it is relevant to consider the effect of the presumption which is raised under Section 36(7) of the Act and its effect. As we have already noticed, under Section 38(7) a certified copy of the entry in the electoral roll shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency, but it must be remembered that this presumption is raised for the purposes of this section and it is made expressly subject to the last clause of this sub-section, that is to say, the presumption can, arise unless it is proved that the person in question is subject to any of the disqualifications mentioned in Section 16 of the Act of 1950. The use of the adjective 'conclusive' which qualifies 'evidence' is technically inappropriate because the presumption arising from the production of the certified copy is by no means conclusive".

The learned Judge again deals with the provisions of Section 36(7) as it originally stood, and as it now stands after amendment by Act 27/1956, and it is the view of the learned Judge as given in the same page as follows:

"The Legislature apparently thought that the presumption authorized by these words was unduly wide, and so, by the amendment, the prima facie and rebuttable presumption is now limited to the capacity of the person concerned to be treated as an elector and nothing more, and that too unless it is proved that he suffers from any disqualification mentioned in Section 16".

Then the learned Judge again considers, the provisions of section 19 of the Act of 1950, regarding registration in the electoral roll, and it is the view of the learned Judge that the rebuttable presumption, which arises under Section 36(7) merely refers to the status of the person concerned as an elector and observes at page 1055:

"Thus when a presumption is raised under Section 36(7) it may mean prima facie that the person concerned is not less than 21 years of age and is ordinarily resident in that constituency."

The observations extracted above will clearly show that there is absolutely no finality or conclusiveness about the entries regarding the age as contained in the electoral roll and the presumption even on the basis of Section 36(7), is merely a rebuttable presumption. This decision, in my view, establishes the position that it will be open to the election tribunal to go

behind the age as entered in the electoral rolls in a proper case. Therefore, it follows that the views of some of the election tribunals in reported cases based upon section 36(7) of the 1951. Act cannot also be accepted.

107. I may here state that the learned Chief Justice and Mr. Justice M.S. Menon as he then was in the decision reported in *Gopalan v. Kannan*⁸, have also taken the view that the electoral rolls are prepared, in accordance with the Representation of the People (Preparation of Electoral Rolls) Rules, 1956 and that those Rules contained detailed provisions to ensure the correctness of the entries and the only evidence adduced in that case to displace the presumption in their favour under section 114 of the Evidence Act regarding those matters consisted only of the entries in the admission registers. No doubt, the question as regards the jurisdiction of the tribunal to go behind the age mentioned in the electoral roll, as such, was not debated and in fact, the tribunal seems to have gone into the facts and come to the conclusion that certain persons who were less than 21 years of age on the qualifying date, had actually voted. It is in dealing with that aspect, that the learned Judges expressed the view above. Those observations, if I may say so with respect, will indicate that the entries in the electoral rolls will be prima facie presumed to be correct, till a party is able to prove them to be wrong by cogent and clear evidence to the contrary.

108. There was an attempt made by Mr. Kalathil Velayudhan Nair, learned counsel for the appellant to show that the preparation of the electoral roll is not a matter connected with the election. I have no hesitation in rejecting this contention. The provisions regarding the preparation of the electoral roll are contained in Articles 324, 327 and 328. All these Articles are in Part XV of the Constitution which deals with elections. As observed by Mr. Justice Fazl Ali in *M.P. Ponnuswamy v. Returning Officer, Namakkal Constituency*⁹,

"It seems to me that the word 'election' has been used in Part XV of the Constitution in the wide sense that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature. The use of the expression 'conduct of elections' in Article 324 specifically points to the wide meaning, and that meaning can also be read consistently into the other

⁸1958 Ker LT 388; AIR 1959 Ker 12

⁹ AIR 1952 SC 64 at page 85

provisions which occur in Part XV including Article 329(b)".

109. After referring to certain passages from Halsbury's Laws of England, the learned Judge ultimately winds up the discussion on this aspect by observing that the word "election" can be and has been appropriately used with reference to the entire process which consists of several stages and includes many steps, some of which might have an important bearing on the result of the process. The learned Judge has also held, that considering the scheme of the provisions contained in Article 329(b) of the Constitution and Section 80 of the Representation of the People Act, 1951, the High Court has no jurisdiction to interfere in election matters under Article 226 of the Constitution.

110. The principles laid down in this decision have been adopted and reiterated in the later decision of the Supreme Court in *Dr. N.B. Khare v Election Commission of India*¹⁰,

111. In fact, the two statutes of 1950 and 1951, deal with the entire matter relating to election, beginning from the stage of preparation of the electoral roll, till the adjudication of the disputes by the election tribunal in the first instance and by the High Court on appeal. Broadly the scheme of both the Acts deals with preparation and publication of electoral rolls, nomination and scrutiny; polling; counting and declaration of the result; and finally the decision of disputes. These aspects, in my view, cover the complete field of election, as understood in law.

112. Once I come to the conclusion that the scheme of the Constitution shows that elections must be by adult voting and that there is no finality regarding the age as entered in the electoral roll, the question arises as to under what circumstances the election tribunal can interfere?

113. In this connection, Mr. Kalathil Velayudhan Nair, learned counsel for the appellant urged that the provisions regarding the preparation of electoral roll were contained in the Representation of the People Act, 1950 - Act 43/1950 and the relevant Rules framed under the said Act. Section 100 of the 1951 statute, as it originally stood, gave jurisdiction to an Election Tribunal to declare an election void, if it is of the opinion that the result of the election has been materially affected by any non-compliance with the provisions of the Constitution or of the Act of 1951, or any rules or orders made under the said Act or of any other Act or rules relating to election. This provision was contained in Section 100(2)(c) of the 1951 Act, as it stood originally. Under this clause it may have been open to the tribunal to declare an election void if there has been a non-compliance with the provisions of the 1950 Act, or the Rules relating to the election; no doubt, subject to the condition that the result of the election has been materially affected. But such a provision is not to be seen in Section 100(1)(d)(iv) of the 1951 Act, as it now stands. The said clause now relates only to non-compliance with the provisions of the Constitution or of the 1951 Act or on any rules or orders made under the 1951 Act. The provision giving a right to a tribunal to interfere in cases of violation of the provisions of any other Act or the Rules including the 1950 Act and the Rules have been taken away by the Amending

¹⁰ AIR 1957 SC 694

Act. Therefore, Mr. Kalathil Velayudhan Nair urged that any error or mistake or illegality that may have been committed on the basis of the provisions of the 1950 Act, or the relevant rules, in the matter, of preparation of the electoral roll, cannot form the basis for declaring an election void under section 100(1)(d)(iv) of the 1951 Act as it now stands.

114. If certain matters had been exclusively provided only under the 1950 Act, and the relevant rules framed thereunder and there has been a violation of the provisions of that statute alone in respect of those matters, Mr. Kalathil Velayudhan Nair is perfectly justified in his contention that the election tribunal will have no jurisdiction to interfere, in view of the clear exclusion of the said Act and the Rules in Section 100(1)(d)(iv) as it now stands. In fact, Mr. Kalathil Velayudhan Nair referred to a decision of the Bombay High Court reported in *Ramdayal Ayodhyaprasad Gupta v. K.R. Patil*¹¹, Mr. Kalathil Velayudhan Nair frankly accepted the position that the learned Judges of the Bombay High Court were dealing with a matter which was exclusively provided for by the 1950 Act and the Rules. There was no question of the violation of any provisions of the Constitution, apart from the provisions of the 1950 Act, that arose for decision before the learned Judges. Under those circumstances, the learned Judges held that the election tribunal cannot declare an election void simply because there has been a non-observance of the provisions of the 1950 Act and the Rules. Therefore, this decision, by itself, will not assist Mr.

Kalathil Velayudhan Nair, because in the case before us, the question of the non-compliance with the provisions of the Constitution also arises for decision and that question is to be decided having due regard to the mandatory provisions contained in Article 326 of the Constitution.

115. Mr. Kalathil Velayudhan Nair further urged that the expression 'non-compliance with the provisions of the Constitution' occurring in section 100(1)(d)(iv) of the 1951 statute will only attract those cases where there has been an omission to do what is directed to be done. That is, according to Mr. Velayudhan Nair, there must have been a positive direction in the Constitution to do a particular thing and it is only when that is omitted to be done that the provisions of this clause will stand attracted. This contention of Mr. Kalathil Velayudhan Nair has to be rejected in view of the decision of the Supreme Court in AIR 1954 SC 520. No doubt, that decision related to the disqualification of a candidate; but the learned Judges had to consider the expression 'non-compliance with the provisions of the Constitution' as it occurred in Section 100(2)(c) of the 1951 Act as it originally stood. Mr. Justice Mukherjea observes at p.524 as follows:

"The expression 'non-compliance with the provisions of the Constitution' is in our opinion, sufficiently wide to cover such cases where the question is not one of improper acceptance or rejection of the nomination paper by the Returning Officer, but there is a fundamental disability in the candidate to stand for election at all. The English law after the passing of the Ballot Act of 1872 is substantially the same.....The register which corresponds to our electoral roll is regarded as conclusive except in cases where persons are prohibited from voting by any statute or by any common law of Parliament. It is argued on behalf of the respondent that the expression 'non-compliance' as

¹¹²⁰ ELR 13

used in sub-section (2)(c) would suggest the idea of not acting according to any rule or command and the expression is not quite appropriate in describing the mere lack of qualification.

This, we think, would be a narrow way of looking at the thing. When a person is incapable of being chosen as a member of a State Assembly under the provisions of the Constitution itself, but has nevertheless been returned as such at an election, it can be said without impropriety that there has been non-compliance with the provisions of the Constitution materially affecting the result of the election. There is no material difference between 'non-compliance', and 'non-observance', or 'breach' and this item in clause (c) of sub-section (2) may be taken as a residuary provision contemplating cases where there has been infraction of the Constitution or of the Act but which have not been specifically enumerated in the other portions of the clause." In my view, these observations clearly show that there will be a fundamental disability in persons, who are less than 21 years of age on the qualifying date, from voting in the elections and this fundamental disability is indicated in Article 326 of the Constitution. Further Section 100(1)(d)(iv) of the 1951 Act, is really a residuary provision to deal with the cases where there has been infraction of the provision of the Constitution or of the Act and which have not been specifically enumerated in the other portions of the clause.

116. To the same effect is the decision of the Bombay High Court reported in 20 ELR 13. Therefore to conclude on this aspect, in my view, the expression 'non-compliance' etc., occurring

in Section 100(1)(d)(iv) is wide enough to include any infraction of the Constitution or of the 1951 Act or the relevant Rules or orders issued under the 1951, Act. In consequence, it further follows that the tribunal has got jurisdiction to consider under section 100(1)(d)(iv) regarding the non-compliance with the provisions of the Constitution or of the other matters mentioned in the clause. The voting, if it has taken place as a fact, by persons who are less than 21 years of age on the qualifying date in this case, 1-1-1959, will amount to a 'non-compliance with the provisions of the Constitution', because Article 326 specifically says that elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage, which I have already said will mean adult voting and the tribunal will have jurisdiction to investigate that question when it is deciding an election dispute in an Election Petition.

117. Before I close, there is one more decision of the Supreme Court which has to be referred to, namely, AIR 1957 SC 694. That decision will clearly show that the election tribunal has got jurisdiction to decide all disputes or doubts relating to an election at whatever stage the disputes or doubts may have arisen. That related to a consideration by the Supreme Court in particular of Article 71 of the Constitution. In that connection, the learned Judges had also to consider Article 329(b) of the Constitution, regarding the jurisdiction of election tribunals and observe as follows at p.697:

"The only way such an order could be called in question was as laid down in Article 329(b) of the Constitution and Section 80, Representation of the people Act, 1951 and this could be done only by an Election Petition presented before the Election Tribunal after the entire process of election culminating in a candidate being declared elected has been gone through. On such Election Petition being filed the election tribunal would be properly bound to enquire into and decide 'all doubts and disputes arising out of or in connection with the election' irrespective of the stage in the entire election process to which the 'doubts and disputes' relate".

118. I will wind up the discussion by quoting a passage from the judgment of Lush, J., in Worcester (Borough) case, (1880) 3 O'M and H184 to the following effect:

"The battle of qualification shall be fought either beforehand in the registration court or after the election upon a scrutiny.

119. To conclude, my answers to the question, which consists of several parts, and referred for the opinion of the Full Bench are as follows:

- (i) In the case of a person whose name appears in the electoral roll and who has exercised his vote, the Election Tribunal can go into the question whether or not he has attained the age of 21 on the 'qualifying date';
- (ii) If the finding of the Tribunal is that such person has not attained the age of 21 on the 'qualifying date', it has got jurisdiction to exclude his vote from the count;
- (iii) The age entered in the electoral roll cannot be considered to be final, either under the scheme of the Constitution or of the Representation of the People Act, 1950 or 1951, so

as to preclude the Election Tribunal from going into that matter when deciding an Election Petition.

Reference answered.