RAJASTHAN HIGH COURT

Brij Sunder Sharma

Vs.

Election Tribunal Jaipur

Writ Pet. No. 92 of 1956
(Ranawat and Sharma, JJ.)

27.08.1956

ORDER

Ranawat and Sharma, JJ.

1. This is an application by Sri Brij Sunder Sharma under Article 226 of the Constitution of India for a writ of certiorari, against the Election Tribunal, Jaipur, and 8 others, for setting aside its order dated 30th April, 1956, and also for prohibition against the said Tribunal directing it not to forward its order dated the 30th April, 1956, to the Election Commission. In the alternative, writ of mandamus or any other appropriate writ, direction or order under Article 226 of the Constitution against the said Tribunal for setting aside the said order has been prayed for. It has further been prayed in the alternative that under Article 227 of the Constitution the said order be quashed.

2. The circumstances leading to this petition are as noted below :

In November, 1953, a bye-election was held to fill in a seat of the Rajasthan Legislative Assembly from the Sironj constituency in district Kotah. Sri Abhinna Hari, respondent No. 2 Sri Madan Lal Agarwal, respondent No. 3, Sri Kesri Mal Jain, respondent No. 4 and Sri Brij Sunder Sharma, the petitioner before us, filled in their nomination papers and at the time of scrutiny of the said papers the nomination paper of Sri Abhinna Hari was rejected and the election was consequently contested by the three remaining candidates. Sri Brij Sunder Sharma was declared successful at the election, by means of a gazette notification of the 23rd November, 1954. Sri Abhinna Hari (hereinafter to be referred as respondent No. 2) then filed an election petition on the 5th of February, 1954, before the Election Commission, Delhi, which was

forwarded to the Election Tribunal Jaipur for disposal. The Tribunal framed a number of issues out of which the following issues are relevant for the purposes of this petition :

> Issue No. (2) - Whether the petitioner's nomination was improperly rejected and the rejection has materially affected the result of the election.
> Issue No. 7(a) - Whether Sri Bakshi, Executive Engineer, Irrigation, at Bundi, toured the constituency at the instance of respondent No. 1 towards the end of September and beginning of October, 1953, in order to further the prospects of respondent No. 1 in the bye-election
> Issue No. 15(a) - Whether respondent No. 1 fed about 400 workers during the election and the expenses of their feeding have not been shown in the return of election expenses filed by him.
> Issue No. 15(b) - If so, what is the effect on the result of the election.
> Issue No. 16(a) - Whether 4 community kitchens at Sironj and one each at Deepua-Kharg, Anantpura, Ghatal, Lateri and Unarsi-tal, were started by respondent No. 1 to feed his workers numbering in all about 400 and these expenses should have been included in the return of election expenses filed by the respondent.
> Issue No. 16(b) - Whether travelling allowances were paid by the respondent to his workers of which the list has been filed by the petitioner and these expenses should have been shown in the return of election expenses.

3. Respondent No. 2 was not an elector in Sironj constituency but he was an elector in Ladpura constituency in the district of Kotah. He presented 4 nomination papers to the Returning Officer on or before the 5th October, 1953, the date for the filing of the nomination papers. In column No. 8 of the three nomination papers the Serial No. of respondent No. 2 of 1951 Electoral Roll of Ladpura constituency was mentioned and in the 4th nomination paper the same Serial No. was repeated but the description of the electoral roll was not given.

The Electrol Roll of Kotah district was first prepared in the year 1951 which remained in force till the 17th of September, 1953, when a new electoral roll of 1952 was prepared and published and which was the electoral roll in force at the time of the filing of the nomination papers during this election. The contest between the parties relating to Issue No. 2 centred round the entry in Col. 8 of the 4th nomination paper which is Ex. P-2A on the record of the Election Tribunal and will be hereinafter referred to as Ex. P-2A, and which may be translated into English as noted below :

"8. Serial number of the candidate in the electoral roll of the constituency in which his name is included.	No. 3834 ? Bhimganj Mandi Ward No. 1 Kotah (A certified copy of the electoral roll of 1951 annexed.")

This nomination paper Ex. P-2A was rejected on grounds which will appear from the copy of the order of the Returning officer given below:

> "This is a fact that Sri Abhinna Hari has filled in column No. 8 of the nomination paper wrongly and any correction would have been allowed as to the entries at the time of presenting his nomination by the Returning Officer under Section 33 (5) (A) of the Representation of the People Act, 1951. He wants to have corrected this entry at the time of scrutiny. He has quoted no provision of law nor I have come across any under which any correction of nomination paper can be allowed at this stage.
> Even if this candidate would have been allowed to correct his nomination paper at the time of presenting it before me he could not have corrected his nomination paper in time. This mistake came to his notice the very day and he tried to improve over his previous nomination papers by giving serial numbers of the proposer and seconder according to Electoral Roll of 1952. I therefore, hold that this mistake of filing serial number in column 8 from the electoral rolls not in operation is a substantial defect. Every man of ordinary prudence knew that the Electoral Rolls of 1952 have been finally published and have come in force. This nomination paper is, therefore, rejected."

4. Respondent No. 2's case before the Tribunal was that the defect in the entry of column 8 of his nomination paper was of a technical and non-substantial character and the Returning Officer acted illegally in rejecting his nomination paper, which affected the result of the election materially. He also alleged that the petitioner had been guilty of major and minor corrupt practices under Sections 123 and 124 respectively of the Representation of the People Act, 1951 (hereinafter to be referred as the Act) inasmuch as he had obtained assistance in furtherance of the prospects of his election from Sri Bakshi, Executive Engineer, Irrigation, Bundi and had filed false return of election expenses by omitting to enter therein the messing expenses of his workers at Sironj, Lateri and other places and the travelling allowance of his workers.

5. The case of the petitioner was that the order of Returning Officer was correct in law and that respondent No. 2 not being an elector in Sironj constituency and his nomination paper not having been filled in accordance with law, had no locus standi to file an election petition on grounds of corrupt and illegal practices. He denied the allegations about major and minor corrupt practices mentioned above.

6. Two separate judgments were delivered - one by the Chairman of the Tribunal, Sri A. N. Kaul (hereinafter to be referred as the minority judgment) and other by Sri S. N. Gurtu and Sri R. K. Rastogi members (hereinafter to be referred as the majority judgment). By the minority judgment Issues Nos. 15(a) and 16(a) only were partially decided in favor of the respondent No. 2, and by the majority judgment all the issues excepting Issues Nos. 2, 7 (a), .15 and 16 were decided against him. As a result the order of the tribunal was pronounced in accordance with the majority judgment and the election of the petitioner was set aside and it was declared that he would stand disqualified with effect from the date of the order for membership of Parliament and of the Legislature of every State for a period of six years and also for voting at any election for a similar period in view of the provisions of Sections 140 and 141 respectively of the Act for having committed major and minor corrupt practices Under Sections 123 and 124 of the Act.

7. The petitioner assails the findings in the majority judgment on all the above mentioned issues decided against him and in the minority judgment so far as it relates to Issues Nos. 15 and 16. Consequently, he prays that the order of the Tribunal dated the 30th of April, 1956, be set aside. His grounds are mainly as follows:

(1) (a). The majority judgment having itself held that the mention of Serial No. at item 8 of the nomination paper from the electoral roll of 1951 was a technical defect of a substantial character committed an error on the face of the record in holding that the defect lost its substantial character on the production of a certified copy of an electoral roll of Ladpura constituency of 1952.

(b) That the view taken in the majority judgment that because there was no dispute about the identity of the respondent No. 2 and so the defect in Ex. P-2A should have been overlooked under Section 36(4) of the Act, is altogether wrong in law and is manifestly erroneous.

(2) (a). That both the minority and majority judgments are manifestly wrong regarding running of the kitchens by the petitioner at Sironj and Lateri and for not having shown any expenses incurred thereon in the return of election

expenses.

(b) that the majority judgment is patently erroneous inasmuch as it has been held on no legally admissible evidence that travelling allowances were paid by the petitioner to his workers and he failed to show them in his return of election expenses.

(3) that the majority judgment is erroneous on its face inasmuch as the finding of minor corrupt practices in Issue No. 7(a) has been given on legally inadmissible evidence.

(4) that the election could not be set aside even if it were held that the petitioner committed any minor corrupt practice as alleged by respondent No. 2.

(5) that the tribunal had no jurisdiction to make an order that the petitioner would stand disqualified with effect from the date of the order for membership of Parliament and of the Legislature of every State for a period of six years and also for voting at any election for a similar period in view of the provisions of Sections 140 and 141 respectively of the Act.

8. The petitioner has also pleaded that respondent No. 2 not being an elector in the Sironj constituency was entitled to present an election petition only if he were able to prove that his nomination paper was improperly rejected. If it is found that the nomination paper was not improperly rejected, respondent No. 2 would have no locus standi to file an election petition against the petitioner and, therefore, respondent No. 2's election petition was liable to fail on this point alone and he was not entitled to be heard on the question of major and minor corrupt practices alleged by him.

9. On behalf of the respondent No. 2 who is the only contesting respondent in this case it has been pleaded that the defect regarding the entry of Serial Number in his nomination paper was only a technical defect of unsubstantial character and the nomination paper was, therefore, improperly rejected specially when a certified copy of the electoral roll in force had been filed at the time of scrutiny. It has been pleaded that even though the finding of the majority on this point be wrong it is at the best a mere mistake in law and this Court has, therefore, no jurisdiction to quash the order of the Tribunal on this point. It has also been pleaded that the majority judgment on Issue No. 7(a) and the minority and majority judgments on Issues Nos. 15 and 16 were based upon legal evidence on the record and on a full consideration of the relevant law on the subject. They cannot, therefore, be quashed on a writ of certiorari. As regards the order of disqualification it has been pleaded that the Tribunal had jurisdiction to

decide that question under Section 99 of the Act and to incorporate in its order that the petitioner be disqualified for standing as a candidate for a Parliament and State Assembly seat for a period of six years and also for voting at any election for a similar period. It has also been pleaded that respondent No. 2 is not debarred from bringing an election petition on the grounds other than the rejection of his nomination paper also.

10. We have heard Sri G. S. Pathak on behalf of the petitioner and Sri V. P. Tyagi on behalf of respondent No. 2. Before we give the main grounds for decision which arise from the arguments of the parties before us we may say that after the case had been argued out on behalf of the petitioner, the learned counsel for respondent No. 2 while opening his arguments submitted that the petitioner had made certain false statements in his petition and his affidavits, and therefore, his petition should be dismissed on this sole ground without going into the merits. It was pleaded that the petitioner had averred that after the arguments on Issue No. 2 had been concluded on behalf of the petitioner and his counsel proceeded to enter upon arguments on other issues, one of the members of the Tribunal made an observation that the only material issue in the case was Issue No. 2 and therefore, no arguments were necessary on other issues. It was submitted that this allegation was altogether false in view of the reports of the Chairman and the two members of the Tribunal which have been filed in this case.

11. We have considered the arguments of the learned counsel for respondent No. 2. We may say that he did not take any such ground in his reply although he simply denied the allegations made by the petitioner in his petition in this respect. Had a point been specifically taken that the petition should be dismissed on this ground alone we believe the petitioner would not have left this point undressed at the time of arguments. As there was a simple denial on behalf of respondent No. 2 so far as this allegation is concerned it is quite probable that the petitioner did not attach much importance to his allegation in this respect, and his counsel after having seen the reports of the Chairman and the members of the Tribunal did not think it proper to press this point any further. It is true that as the material stands at present there might have been certain exaggerations by one party or the other in this respect and it is also possible that there might have been some misunderstanding on the part of the petitioner as it appears from the affidavit of respondent No. 2 himself dated the 9th May, 1956, that one of the members of the Tribunal had asked Mr. Agarwal, counsel for the petitioner before the Tribunal, not to waste time in arguing over one of the issues and it is in the report of the Chairman that Issue No. 7(a) was not pressed by the

counsel for respondent No. 2 before the Tribunal although it was dealt with to a certain extent by the counsel for the petitioner. It may be that because no arguments were advanced on behalf of respondent No. 2, who was the petitioner before the Tribunal, on Issue No. 7(a), the counsel for the petitioner might not have addressed his full arguments on that point. Of course, so far as Issue Nos. 15 and 16 are concerned it appears from the reports of the Chairman and the members of the Tribunal that they were argued out fully on behalf of both the parties and in this respect the allegations of the petitioner may not be correct. But simply on this ground we do not think it proper to penalise him so much as to dismiss his petition altogether, specially when this objection has been taken at such a late stage. The preliminary objection of Mr. Tyagi is, therefore, overruled. We may now set out the points for decision which emerge from the arguments of the learned counsel of the parties :

1. Whether the majority judgment as regards the rejection of the nomination paper of respondent No. 2 by the Returning Officer is erroneous on its face and is liable to be quashed on a writ of certiorari?
2. If the nomination paper of respondent No. 2 is held to be properly rejected, could he have any locus standi to file an election petition and raise questions of major and minor corrupt practices alleged by him in his petition?
3. Is the judgment of the majority erroneous on its face on Issue No. 7(a) regarding the obtaining of assistance by the petitioner from Sri Bakshi, Executive Engineer, Irrigation, Bundi?
4. Are the minority and majority judgments erroneous on their face so far as Issues Nos. 15(a) and 16(a) are concerned?
5. Whether the majority judgment is erroneous on its face so far as Issue No. 16(b) relating to the payment of travelling allowances and not entering them in the return of election expenses is concerned?
6. Is the order of the Tribunal so far as disqualification of the petitioner is concerned illegal and ultra vires?
7. Is the order of the Tribunal dated the 30th April, 1956, liable to be quashed?
12. We now proceed to consider the above points one by one.
13. Point No. (1) - We may at the outset give some of the relevant provisions of the Act and the Representation of the People (Conduct of Elections and Election Petitions) Rules. 1951 (hereinafter to be referred to as the Rules).
Section 2(1)(g) - "prescribed" means prescribed by rules made under this Act.
Section 33(1) - On or before the date appointed under clause (a) of Section 30 each

candidate shall, either in person or by his proposer or seconder, between the hours of eleven o'clock in the forenoon and three o'clock in the afternoon, deliver to the Returning Officer at the place specified in this behalf in the notice issued under Section 31 a nomination paper completed in the prescribed form and subscribed by the candidate himself as assenting to the nomination and by two persons referred to in sub-section (2) as proposer and seconder.

Section 33(5)- On the presentation of a nomination paper, the Returning Officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer and seconder as entered in the nomination paper are the same as those entered in the electoral rolls :

> Provided that the Returning Officer may -
> (a) permit any clerical error in the nomination paper in regard to the said names or numbers to be corrected in order to bring them into conformity with the corresponding entries in the electoral rolls; and
> (b) where necessary direct that any clerical or printing error in the said entries shall be overlooked.

Section 33 (6)- If at the time of the presentation of the nomination paper the Returning Officer finds that the name of the candidate is not registered in the electoral roll of the constituency for which he is the Returning Officer, he shall for the purposes of sub-section (5) require the person presenting the nomination paper to produce either a copy of the electoral roll in which the name of the candidate is included or a certified copy of the relevant entries in such roll.

Section 35- The Returning Officer shall, on receiving the nomination paper under sub-section (1) of Section 33, inform the person or persons delivering the same of the date, time and Place fixed for the scrutiny of nominations and shall enter on the nomination paper its serial number, and shall sign thereon a certificate stating the date on which and the hour at which the nomination paper has been delivered to him; and shall, as soon as may be thereafter, cause to be affixed in some conspicuous place in his office a notice of the nomination containing descriptions similar to those contained in the nomination paper, both of the candidate and of the persons who have subscribed the nomination paper as proposer and seconder Section 36- (1) On the date fixed for the scrutiny of nominations under Section 30, the candidates, their election agents, one proposer and one seconder of each candidate and one other person duly authorized in writing by each candidate, but no other person, may attend at such time and place as

the Returning Officer may appoint; and the Returning Officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in Section 33.

(2) The Returning Officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination, and may, either on such objections or on his own motion, after such summary inquiry, if any, as he thinks necessary, refuse any nomination on any of the following grounds :
(a) that the candidate is not qualified to be chosen to fill the seat under the Constitution or this Act; or
(b) that the candidate is disqualified for being chosen to fill the seat under the Constitution or this Act; or
(c) that a proposer or seconder is disqualified from subscribing a nomination paper under sub-section (2) of Section 33; or
(d) that there has been any failure to comply with any of the provisions of Section 33 or Section 34; or
(e) that the signature of the candidate or any proposer or seconder is not genuine or has been obtained by fraud.
(3) Nothing contained in Clause (c), Clause (d) or Clause (e) of sub-section (2) shall be deemed to authorise the refusal of the nomination of any candidate on the ground of any irregularity in respect of a nomination paper, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed.
(4) The Returning Officer shall not reject any nomination paper on the ground of any technical defect which is not of a substantial character.
(5), (6) and (7) .....

Rule 4 of the Rules-Every nomination paper delivered under sub-section (1) of Section 33 or under that sub-section read with sub-section (4) of Section 39 shall be completed in the form specified in Schedule II.
Schedule II of the Rules -
Nomination paper
(Rule 4)
Election to the .....
Election to the .....
1. Name of the constituency.

2. Name of candidate.
3. Father's/Husband's name.
4. Age.
5. Address
6. If the candidate is a member of the Scheduled Castes or of the Scheduled Tribes or of a tribe in any autonomous district of Assam state the particular caste or tribe, and the area in relation to which such caste or tribe is one of the Scheduled Castes or Scheduled Tribes, as the case may be.
7. Constituency in the electoral roll of which the name of the candidate is included.
8. Serial number of the candidate in electoral roll of the constituency in which his name is included.
9. Name of the proposer.
10. Serial number of the proposer in the electoral roll of the constituency.
11. Number of the proposer in the list maintained under sub-section (1) or sub-section (2) of Section 152 of the Representation of the People Act, 1951.
12. Signature of the proposer.
13. Name of the seconder.
14. Serial number of the seconder in the electoral roll of the constituency.
15. Number of the seconder in the list maintained under sub-section (1) or sub-section (2) of Section 152 of the Representation of the People Act, 1951.
16. Signature of the seconder.

* * * * *
* * * * *

Foot notes -.....

(6) Where the electoral roll is sub-divided into parts and separate serial numbers are assigned to the electors entered in each part, a description of the part in which the name of the person concerned is entered must also be given in items Nos. 8, 10 and 14.

14. The entries in items Nos. 10 and 14 in the nomination paper, Ex. P-2A, were not defective as the serial numbers were given from the current electoral roll of 1952. In Item No. 8, however, the serial number of respondent No. 2 was given as 3834 of Bhimganj Mandi Ward No. 1 Kotah. Though it was not specifically stated that the number was from, the electoral roll of 1951 yet a certified copy of the entry in the electoral of 1951 was appended to it and it was mentioned in Item No. 8 that a

certified copy had been so appended. It thus becomes obvious that the serial number stated at Item No. 8 of Ex. P-2A related to the electoral roll of 1951. The argument of Mr. Tyagi is that since the year of the electoral roll was not mentioned in Ex. P-2A the entry of serial number at Item No. 8 may as well be taken to be from the electoral roll of the year 1952 and therefore, the insertion of the serial number 3834 amounts only to the giving of a wrong number from the current electoral roll of 1952. This argument cannot be accepted in the face of the certified copy of the electoral roll of 1951 filed along with Ex. P-2A and the clear mention at Item No. 8 in Ex. P-2A that a certified copy had been appended to it.

15. Before dealing with the arguments of the learned counsel for the petitioner we may say that it has not been contended by Mr. Tyagi that the order of the Returning Officer with respect to the three of the four nomination papers filed by respondent No. 2 was improper. His case is that the order of rejection was not proper only so far as nomination paper Ex P-2A of the Election Tribunal's record is concerned. He has also conceded that there was no clerical or printing error in relation to the entry of electoral roll number in Ex. P-2A. He has also conceded that even in the matter of clerical error with respect to names and numbers correction can be made only at the presentation stage and not thereafter. Although under these circumstances it is not necessary for us to refer to any authority as to whether putting down of serial number quite different from the relevant electoral roll is a clerical error or not yet we may refer to an English authority, referred to by Mr. Pathak on this point in *Gothard v. Clarke,* [1] In that case a candidate was nominated at a municipal election for the office of town councilor by 38 and 39 Vict. c. 40 (The Municipal Elections Act, 1875), Section 1, sub-section 2, Schedule 1, Form 2 and Note. It was required that the number on the burgess roll of a burgess nominating a candidate should be stated in the nomination paper. In the nomination paper, in question, instead of the right number 695 the number 704 appeared and an objection was taken thereto. It was allowed by the Returning Officer although no one had been or could be misled by the mistake. It was held that the decision of the Returning Officer was correct and the effect of the mistake was not remedied by and could not be amended under the provisions of 41 and 42 Vict., c. 26, Section 41, and 35 and 36 Vict. c. 33, Section 13. At page 261 of the judgment the following observations of Grove, J. appear :

> "There may be a clerical error, such as by making the figure 9 with too short a tail so as to look like the cyber O. It may be, although I do not give judgment on

> it, that the mayor is to treat that reasonably. There may be a clerical error which is obviously a mere clerical error ex facie. Or suppose the name Jones were written "Jone", the letter "s" being omitted. The mayor might perhaps be justified in treating that as the subject of correction. But here we have a real change of number. It is not "704" but "695"; not a figure is right, and there is no possibility of this being a mere clerical error."

In the present case also the number given in Ex. P-2A materially differs from the number of the current electoral roll. The number given in Ex P-2/A is 3834 whereas the number in the electoral roll of 1952 is 2012. Thus, it will be seen that here too not a single figure of the Serial Number of Ex. P-2A tallies with the figures of the S. No. of the electoral roll of 1952. Moreover, the serial number given in Ex. P-2A is from a roll which had become obsolete before the day of nomination. It is clear that that number is not of the electoral roll of 1952 but of 1951, We have, therefore, no hesitation in holding that the error in Ex. P-2A in this behalf was neither a clerical nor a printing error. The proviso (a) or (b) of sub-section (5) of Section 33 of the Act, therefore, could not be invoked under the circumstances of this case. It cannot be denied that Ex. P-2A was defective in the matter of Serial number. Mr. Tyagi's argument however, is that the defect was only technical and was not of a substantial character. Exhibit P-2A ought not, therefore, to have been rejected on this ground.

16. On behalf of the petitioner it was argued by Mr. Pathak that there are five grounds on which a nomination paper can be rejected under Section 36 (2) of the Act. All these 5 grounds are independent grounds and if the nomination paper is hit by any of those 5 grounds it should be rejected by the Returning Officer. The ground No. (d) which says that the nomination should be refused if there has been any failure to comply with any of the provisions of Section 33 or 34 is just as important as the remaining grounds (a), (b), (c) or (e). The provisions of Section 33(1) are mandatory and the conditions for a valid nomination paper are :

> (1) that it should be filed on or before the date appointed in Clause (a) of Section 30;
> (2) that it should be filed either by the candidate in person or by his proposer or seconder;
> (3) that it should be filed between the hours of 11 o'clock in the forenoon and 3 o'clock in the afternoon;

(4) that it should be delivered to the Returning Officer at the place specified in this behalf in the notice issued under Section 31;
(5) that it should be completed in the prescribed form; and
(6) that it should be subscribed by the candidate himself as assenting to the nomination and by two persons referred to in sub-section (2) as proposer and seconder.

All these conditions are equally important and if any of these conditions is not satisfied it cannot be said that there had been a valid nomination. It was argued that in this case the defect was not of an unsubstantial character but was of substantial nature and, therefore, under Section 36(4) the Returning Officer could not overlook this defect. It was argued that the objection of the petitioner was not with respect to the identity of the respondent No. 2 but it was with respect to the non-compliance with the mandatory provisions of Section 33(1). The majority of the Election Tribunal should not have been influenced by the fact that no question of identity was raised and respondent No. 2 was a well known person. It was argued that this constitutes an error apparent on the face of the record. Several authorities were cited to show that the defect like the present one could not be said to be not of substantial character within the meaning of Section 36(4) of the Act.

17. The learned counsel for the petitioner, inter alia, cited the following authorities: He also made a passing reference to some of the decisions of the Election Tribunals in India constituted under the Act but did not lay much stress upon them because they could not be treated as authority for this Court :

(1) *Gothard v. Clarke*
(2) *Baldwin v. Ellis,* [2]
(3) *The Queen v Tugwell;* [3]
(4) *Rattan Anmol Singh v. Ch. Atma Ram,* [4]

We have already dealt with the case of Gothard (A) above. In Baldwin's Case (B) 4 persons were nominated for election as rural district councillors and in column 5 under the heading "How qualified" it was merely stated that the persons nominated were "Local Government electors" and did not state the name of the parish for which they were qualified as local Government electors, as required by R. 4 of the Rural District Councilors Election Order, 1898.

The Deputy Returning Officer rejected the nomination paper as being invalid because the parish within the poor law union for which qualification was claimed was not stated. Upon an election petition it was held that the omission to state in the nomination paper the name of the parish for which the person nominated was qualified as a local Government elector was a non-compliance with the requirements of R. 4 of the Rural District Councilors Election Order, 1898, and that the omission was not an "inaccurate description" of the person nominated within R. 33 of the Order of 1898, but was a non-compliance with the requirements of R. 4 of that Order, and therefore was not cured by R. 33.

In the case of *Queen v. Tugwell* by Section 32 of the Municipal Corporation Act the voting paper was required to contain the Christian names and surnames of the persons for whom the burgess votes, with their places of abode and description. By Section 142 no inaccurate description of any person, body corporate, or place, named.....in any roll list notice, or voting paper required by the Act was to hinder the full operation of the Act in respect to such persons etc. provided that the description of such person, etc., be such as to be commonly understood. The voting paper, in question, in that case contained the Christian name and surname of the candidate and his place of abode and nothing more. It was held that it was not an inaccurate description, but a total omission of the description of the candidate and was not cured by Section 142, and the vote was therefore invalid. In Rattan Anmol Singh's case the proposer and seconder were illiterate and so placed their thumb marks instead of signatures, These thumb marks were not "attested" by the Returning Officer as required by Section 2 (1) (k) of the Act read with Rule 2(2) of the Rules. It was held that the defect was not a defect of unsubstantial nature.

18. Mr. Pathak's argument is that Section 36 (4) of the Act does not apply to a case like the present where there was a total omission to give the serial number of the respondent No. 2 from the electoral roll which was in force. It is not a case of inaccurate description which might be taken to be a defect of an unsubstantial character. It was argued that the view taken in the minority judgment that the defect in the present case was not of unsubstantial character was in accordance with law and that the view taken in the majority judgment was not only against law but that judgment was erroneous on its face on this point. It was further argued that the legislature places special emphasis upon the serial number and name of the candidate in the nomination paper and for this we were referred to sub-section (5) of Section 33.

19. On behalf of respondent No. 2 Mr. Tyagi strongly relied upon the ruling of their Lordships of the Supreme Court in *Karnail Singh v. Election Tribunal Hissar,* [5] and also referred to a recent ruling of their Lordships of the Supreme Court in the case of *Pratap Singh v. Sri Krishna Gupta,* [6] He also referred to certain decisions of the Election Tribunals under the Act.

20. We have considered the arguments of both the learned counsel on this point. We have already held above that the defect with which we are concerned was neither a clerical nor a printing error to which proviso (a) or (b) to Section 33(5) could apply. We may now examine whether this defect could be rectified or overlooked after the presentation stage. We have given all the relevant provisions of the Act and Rules above and from that it would be found that no power of amendment of the nomination paper has been conferred upon the Returning Officer after the presentation stage, and the power at that stage can be exercised only in the matter of clerical error in regard to the names and numbers to be corrected in order to bring them into conformity with the corresponding entries in the electoral rolls. The defect, in question, amounting to failure to comply with the provisions of Section 33(1) regarding the nomination paper being completed in the prescribed form could be disregarded only if it were a technical defect not of a substantial character within the meaning of sub-section (4) of Section 36. In Rattan Anmol Singh's case the nomination paper was completed in all other respects except that the thumb marks of the illiterate proposer and seconder were not authenticated in the manner prescribed. Section 2(k) of the Act defines the word "Sign" as follows:

> "'Sign' in relation to a person who is unable to write his name means authenticate in such manner as may be prescribed." Rule 2(2) of the Rules prescribes the manner of authentication. It is as follows :
> "For the purposes of the Act or these Rules, a person who is unable to write his name shall, unless otherwise expressly provided in these rules, be deemed to have signed an instrument or other paper if he has placed a mark on such instrument or other paper in the presence of the Returning Officer or the presiding officer or such other officer as may be specified in this behalf by the Election Commission and such officer on being satisfied as to his identity has attested the mark as being the mark of such person." The nomination paper, in question, in Rattan Anmol Singh's case did not bear the attestation of the Returning Officer as required by Rule 2(2). Their Lordships held that the defect

could not be overlooked and upheld the order of rejection of the nomination paper of the Returning Officer. The observations of their Lordships which are relevant to this case are as follows :

"(14) That sub-section (36(4)) is as follows :

"The Returning Officer shall not reject any nomination paper on the ground of any technical defect which is not of a substantial character.'

The question, therefore, is whether attestation is mere technical or unsubstantial requirement. We are not able to regard it in that light. When the law enjoins the observance of a particular formality it cannot be disregarded and the substance of the thing must be there. The substance of the matter here is the satisfaction of the Returning Officer at a particular moment of time about the identity of the person making a mark in place of writing a signature. If the Returning Officer had omitted the attestation because of some slip on his part and it could be proved that he was satisfied at the proper time, the matter might be different because the element of his satisfaction at the proper time, which is of the substance, would be there, and the omission formally to record the satisfaction could probably in a case like that be regarded as an unsubstantial technicality.

But we find it impossible to say that when the law requires the satisfaction of a particular officer at a particular time his satisfaction can be dispensed with altogether. In our opinion this provision is as necessary and as substantial as attestation in the case of a will or a mortgage and is on the same footing as the "subscribing" required in the case of the candidate himself. If there is no signature and no mark the form would have to be rejected and their absence could not be dismissed as technical and unsubstantial. The "satisfaction" of the Returning Officer which the Rules require is not, in our opinion, any the less important and imperative.

(15) The next question is whether the attestation can be compelled by the person concerned at the scrutiny stage. It must be accepted that no attempt was made at the presentation stage to satisfy the Returning Officer about the identity of these persons but evidence was led to show that this was attempted at the scrutiny stage. The Returning Officer denies this, but even if the identities could have been proved to his satisfaction at that stage it would have been too late because the attestation and the satisfaction must exist at the presentation stage and a total omission of such an essential feature cannot be subsequently validated any more than the omission of a candidate to sign at all could have been. Section 36 is mandatory and enjoins the

Returning Officer to refuse any nomination when there has been " 'any' failure to comply with 'any' of the provisions of Section 33....." The only jurisdiction the Returning Officer has, at the scrutiny stage is to see whether the nominations are in order and to hear and decide objections. He cannot at that stage remedy essential defects or permit them to be remedied. It is true he is not to reject any nomination paper on the ground of any technical defect which is not of a substantial character but he cannot remedy the defect. He must leave it as it is. If it is technical and unsubstantial it will not matter. If it is not, it cannot be set right."
Now it appears from their Lordships' judgment that provisions of Section 33(1) are mandatory and non-compliant thereof will entail the rejection of the nomination paper. Their Lordships have expressly said that if there be no signature and no mark, the form would have to be rejected and their absence could not be dismissed as technical and unsubstantial. Now subscribing of the nomination paper by the candidate and by the proposer and seconder is also one of the conditions laid down by Section 33(1). The completion of the nomination paper also in the prescribed form is another condition laid down by Section 33. Therefore, unless the defect in the completion of the nomination paper in the prescribed form is only a technical defect of unsubstantial character within the meaning of Section 36(4) it cannot be overlooked and the nomination paper has to be rejected.

21. Let us now examine whether the defect, in question, in this case is a technical defect not of substantial character. Their Lordships of the Supreme Court in the case of Pratap Singh (F) observed as follows :

> "Tendency of the Courts towards technicality is to be deprecated; it is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter; they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as whole and provided no prejudice ensues; and when the legislature does not itself state which is which Judges must determine the matter and exercising a nice discrimination, sort out one class from the other along broad based commonsense lines."

That was a case under the C. P. and Berar Municipalities Act (2 of 1922). Several persons filed their nomination papers for the office of President of the Municipal Committee of Damoh. The nominations were made on forms supplied by the

Municipal Committee but it turned out that the forms were old ones that had not been brought up-to-date. Under the old rules candidates were required to give their caste but some time before the nomination papers were filed. This was changed. Instead of caste their occupation had to be entered. The only person who kept himself abreast of the law was the first respondent. He struck out the word "caste" in the printed form and wrote in "occupation" instead and then gave his occupation, as the new rules required, and not his caste. All the other candidates, including the appellant, filled in their forms as they stood and entered their caste and not their occupation. The first respondent raised an objection before the Supervising Officer and contended that all the other nominations were invalid and claimed that he should be elected as his was the only valid nomination paper. The objection was overruled and the election proceeded. The appellant secured the highest number of votes and was declared to be elected. The first respondent thereupon filed the election petition out of which the appeal before their Lordships arose. He failed in the trial Court which held that the defect was not substantial and so held that it was curable.

This was reversed by the High Court on revision who relied upon the decision in Rattan Anmol Singh's case and held that any failure to comply with any of the provisions set out in the various rules is fatal and that in such cases the nomination paper must be rejected. Their Lordships reversed the judgment of the High Court and made the observations noted above. Their Lordships relied upon the provisions of Section 23 of the C. P. and Berar Municipalities Act which ran as follows :

> "Anything done or any proceeding taken under this Act shall not be questioned.....on account of any defect or irregularity not affecting the merits of the case."

It was in the light of this provision that their Lordships construed the Rules relating to the filing of the nomination papers under the said Act. Rule 9 (1) (i) and (iii) of the Rules framed under the said Act ran as follows :

> "Rule 9 (1) (i)- .....each candidate shall .....deliver to the Supervising Officer a nomination paper completed 'in the form appended' and subscribed by the candidate himself as assenting to the nomination and by two duly qualified electors as proposer and seconder."

Rule 9(1) (iii) - "The Supervising Officer shall examine the nomination papers and

shall decide all objections which may be made to any nomination and 'may' either on such objection or on his own motion, after such summary enquiry, if any, as he thinks necessary, refuse any nomination on any of the following grounds." The argument of the first respondent was that the nomination paper of the appellant was not completed in the form appended as required by R. 9 (1)(i) and, therefore, the Returning Officer had no option but to refuse the nomination. Their Lordships observed as follows:

> "Reading Rule 9(1) (iii) (c) "in the light of Section 23, all that we have to see is whether an omission to set out a candidate's occupation can be said to affect "the merits of the case". We are clear it does not. Take the case of a man who has no occupation. What difference would it make whether he entered the word "nil" there, or struck out the word "occupation" or placed a line against it, or just left it blank? How is the case any different, so far as the merits are concerned, when a man who has an occupation does not disclose it or misnames it, specially as a man's occupation is not one of the qualifications for the office of President. We are clear that this part of the form is only directory and is part of the description of the candidate; it does not go to the root of the matter so long as there is enough material in the paper to enable him to be identified beyond doubt."

It would be clear that by virtue of Section 23 of the Municipalities Act, in question, any defect or irregularity not affecting the merits of the case was curable. Their Lordships construed the rule 9 in that light as is quite apparent from their Lordships' observations in para 7 on page 141 of their judgment. The language of Section 36(4) is not the same as that of Section 23 of the C. P. and Berar Municipalities Act. The ruling in Pratap Singh's case therefore does not exactly apply to the facts of this case. But the general observations of their Lordships too are entitled to great weight.

22. Under Section 36(4) only a technical defect which is not of substantial character can be overlooked. As observed by their Lordships some rules are vital and go to the root of the matter. They cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as whole and provided no prejudice ensues, and when the Legislature does not itself state which is which Judges must determine the matter and exercising a nice discrimination, sort out one class from the other along broad based commonsense lines. Their Lordships considered the decision in Rattan Anmol Singh's case cited above and

observed:

> ".....That was a case in which the law required the satisfaction of a particular official at a particular time about the identity of an illiterate candidate. That, we held, was the substance and said in effect that if the law states that A must be satisfied about a particular matter, A's satisfaction cannot be replaced by that of B; still less can it be dispensed with altogether. The law we were dealing with there also required that, the satisfaction should be endorsed on the nomination paper. That we indicated was mere form and said at p. 513 :
> "If the Returning Officer had omitted the attestation because of spine slip on his part and it could be proved that he was satisfied at the proper time, the matter might be different because the element of his satisfaction at the proper time, which is of the substance, would be there, and the omission formally to record the satisfaction could probably, in a case like that be regarded as an unsubstantial technicality."

It would be seen that their Lordships did not dissent from the view taken by them in Rattan Anmol Singh's case but considered that the defect with which their Lordships were concerned did not go to the root of the matter and was therefore, curable under the special phraseology of Section 23 of the C. P. and Berar Municipalities Act. Examining the provisions of Section 33(1) we find that a nomination paper should be complete in the prescribed form. The prescribed form is given in Schedule II of the Rules. At S. No. 2 is to be given the name of the candidate and at No. 8 is to be given the serial number of the candidate in the electoral roll of the constituency in which his name is included.

When we read sub-section (5) of Section 31 we find that the Returning Officer has to satisfy himself that the names and the electoral roll numbers only of the candidate and his proposer and seconder as entered in the nomination paper are the same as those entered in the electoral rolls and if any clerical error in the nomination paper in regard to the said names and numbers is found he is required to permit them to be corrected in order to bring them into conformity with the corresponding entries in the electoral rolls. This provision to our mind shows that the names and the electoral roll numbers of the candidate and his proposer and seconder are considered to be more important than any other entries of the nomination form and as there is no provision in the Act for their correction at a subsequent stage even though there is a clerical or printing error in them the Returning Officer has been invested with the power of permitting

them to be corrected at the presentation stage because if no corrections were made at that stage the nomination paper would be invalidated. The legislature, to our mind, thought that clerical or printing errors in other entries might be ignored under Section 36(4) of the Act, and, therefore, it did not cast a duty upon the Returning Officer of satisfying himself at the presentation stage that they are the same as those entered in the electoral rolls Section 33 envisages that the name and serial number of the candidate must find place in the form of nomination paper and has not left it to the discretion of the rule-making authority. Whereas in other matters it had been left to the rule-making authority to include such items in the form of the nomination paper as it considers proper and necessary. From this too we are of opinion that the name and the serial number are matters of substance and not only of form. The reason appears to be that without the name and the serial number of the relevant electoral roll the Returning Officer might find a lot of difficulty in satisfying himself that the nomination paper was being filed by an eligible person. The legislature has intended that this question of eligibility must be found out on a comparison of the name and serial number given in the nomination paper with those given in the relevant electoral roll at the presentation stage. It is not to be left for comparison at any subsequent stage.

23. In the judgment of the majority of the Tribunal the decision of the Election Tribunal *Baroda Pranlal Thakorlal Munshi v. Indubhai Bhailalbhai Amin,* [7] has been referred to. In that case it was held that the omission to fill in the age of a candidate in column 4 of the nomination paper was a substantial defect and could not be cured under Section 36 (4). The majority judgment does not differ from this view but has differentiated that case on the ground that age is more important in the nomination paper than a serial number and their reasoning is that the age decides the question of qualification of a candidate. It is true that persons below a certain age are not allowed to stand as candidates but the reasoning of the majority is not correct because the question of age can be found out from the entries in the electoral roll and if the defect of omission of serial number in the nomination paper can be cured by filing of a certified copy from the relevant electoral roll the defect about the omission of age can also be likewise cured. To our mind the distinction made by the majority between age and serial number is without a difference.

24. The majority of the tribunal also differentiated the case of age from the case of the names and numbers on the ground that no power of correction of a clerical or printing error in the matter of age has been given to the returning officer even at the

presentation stage; whereas such power has been given in the matter of names and serial numbers. The majority of the Tribunal overlooked the fact that the power was given of the correction of clerical error in the names and numbers of the candidate and his proposer and seconder because these are the two factors only to which the Returning Officer has to pay special heed at the time of the presentation of the nomination paper. If the name or number differs from that recorded in the electoral roll the nomination paper would become invalid and, therefore, to save the candidate from such a catastrophe provision has been made that if there is a clerical error in the names and numbers it might be corrected then and there in order to make it correspond to the entries in the electoral roll. It cannot be contended that the error in regard to name is less important than the error in regard to age and it would be found that the names and numbers have been given the same importance under sub-section (5) of Section 33. Therefore, it cannot be said that the number is less important than age. In fact, if the serial numbers and names are given correctly in the nomination paper and are in accordance with the entries in the electoral roll there might be no difficulty for the Returning Officer to find out that the candidate or his proposer and seconder were entitled respectively to stand as a candidate and propose and second the candidature. If they are wrong then even if all other entries might be correct it might be very difficult if not impossible for the Returning Officer to satisfy himself that the names of the candidate and his proposer and seconder are entered in the relevant electoral rolls. The majority judgment seems to be of the view that if it is shown even at the time of scrutiny that a candidate is eligible for nomination no matter what are the defects in the completion of the nomination paper in the prescribed form, the nomination paper should not be rejected. We do not think that in the face of the provisions of Section 33 read with Section 36(4) of the Act this is a correct view. If such a view were to prevail then the mandatory provisions regarding the completion of the nomination paper in the prescribed form can be disregarded with impunity and the candidate can insist upon his nomination by producing evidence about his eligibility at the scrutiny stage. We find that the Act does not allow even the corrections of clerical errors beyond the presentation stage. This will be of no importance if errors howsoever material are overlooked at the scrutiny stage. To our mind, the law requires that there should be enough material in the nomination paper itself to enable the Returning Officer without any difficulty to satisfy himself on a reference to the relevant electoral roll only that the candidate is eligible by virtue of his name being entered in the electoral roll. This is possible only if at least the serial number and the name are correctly given. If there are only clerical mistakes it may not be difficult to find out the name of the candidate

in the relevant electoral roll and it will be possible for the Returning Officer to have the entries regarding serial number and name corrected so as to tally with the entries in the electoral roll. But if the name or the serial number is not given at all or is totally incorrect it would be very difficult for the Returning Officer, if not altogether impossible, to find out the name of the candidate on the relevant electoral roll. In our support we have the observations of their Lordships of the Supreme Court in the case of Pratap Singh, which are as follows:

> "We are clear that this part of the form is only directory and is part of the description of the candidate; it does not go to the root of the matter so long as there is enough material in the paper to enable him to be identified beyond doubt."

Note : By this part of the form their Lordships meant the insertion of the word "occupation" in the nomination paper. From these observations it can be gathered that if there is not enough material in the nomination paper itself to enable the candidate to be identified beyond doubt, the defect would be taken as going to the root of the matter. With regard to the omission to give the serial number from the relevant electoral roll we are of opinion that the respondent No. 2 failed to place enough material in the nomination paper Ex. P-2A from which the Returning Officer might have been able to satisfy himself that the name of respondent No. 2 was on the relevant electoral roll. The furnishing of a copy from the relevant electoral roll at the time of scrutiny cannot be said to amount to the putting of enough material in the nomination paper in order to enable the Returning Officer to be satisfied that the candidate was an eligible candidate. The Chairman of the Tribunal who has given the minority judgment on this point has correctly realised the importance of the serial number and the name.

25. Learned counsel for the petitioner cited the ruling of the Common Pleas Division in the case of *Gothard v. Clarke*. In that case the number on the burgess roll of a burgess nominating a candidate at a municipal election for the office of the town councilor was not given in the nomination paper and instead of the right number which was 695 the number was wrongly given as 704. The returning officer rejected the nomination paper on the ground of this defect. It was argued in that case that the provision of the Act so far as it related to the insertion of the number in the burgess roll of the burgess subscribing is directory only and imposes no obligation. This argument was based upon sub-section (2) of Section 1, which ran as follows :

"The nomination paper shall be in the form No. 2, or to the like effect." It was held that it could not be understood how it could be seriously contended that the giving that which was absolutely wrong could be giving that which was "to the like effect". Further it was observed:

"If, again, the insertion of a wrong number is not to invalidate the nomination paper, the failure to insert any number cannot render it insufficient." In that case the candidate was so well known that no person could be misled and in fact no person was misled. But this was not considered enough to validate the defect and it was observed:

"If this test was the one intended to be applied, the mayor in every case, when an objection like the present was taken, would have to hear evidence, and decide how far the inaccuracy was likely to mislead, or had misled; such loose proceeding never could have been contemplated by the legislature, and the inconvenience of it is too obvious for argument".

Of course, this case is upon the interpretation of the provisions of the Municipal Elections Act, 1875 of England. But the observations, quoted above, furnish some valuable guidance for this case also where the Act has considered recording of the serial number in the nomination paper to be of importance. It also shows that if a defect of a substantial character is made in the filing of the nomination form, the fact that the candidate was well known and there could be no mistake about his identity would not rectify the defect and validate the nomination paper.

26. In Baldwin's case nomination paper was filed under the Municipal Corporations Act, 1882, for election as rural district councilors and the omission was not with respect to the serial number. We do not think that it is of much assistance in this case. For the same reason the case of the *Queen v. Tugwell* is of little assistance.

27. Great reliance was placed by the learned counsel for respondent No. 2 on the decision of their Lordships of the Supreme Court in Karnail Singh's case. The majority judgment of the Tribunal has also relied upon this decision. It is clear from that judgment that the only defect pointed out in the nomination form was that the name of the sub-division was not stated at column No. 8 along with the number on the electoral roll which was required by Foot Note No. 6 of the nomination paper to be recorded where the electoral roll is sub-divided into parts and separate serial numbers are

assigned to the electors entered in each part. We have gone through the judgment of the Election Tribunal also in that case, and find that there Were two sub-divisions in the constituency and separate electroral rolls were prepared for each of them but the electoral roll of one of the sub-divisions had the names of not more than 800 voters, and it was only the electoral roll of the other sub-division which contained the names of more than 1400 electors. The serial number of the candidate, in question, was 1400, and therefore, the Returning Officer could easily find out the name of the candidate, in question, on the relevant electoral roll. There was sufficient material in the nomination paper of the candidate, in question, to enable the Returning Officer to compare the name and the serial number of the nomination paper with the name and serial number in the relevant electoral roll. The entry about the serial number in that case could at worst be said to suffer from inaccurate description. The defect was not of total omission of the serial number of the relevant list. No support can be drawn from this ruling for the view that whatever mistake may be made in the completion of the nomination proper in the prescribed form it can be overlooked if at the time of scrutiny the candidate can show from other material that he was entitled to stand as a candidate.

28. To our mind, the giving of the serial number from a superseded electoral roll and not from the electoral roll in force is equivalent to giving no number at all and it cannot be said to be a technical defect of unsubstantial character within the meaning of Section 36(4) of the Act. On a perusal of the minority judgment itself we find that it took the view that the defect in this case was of substantial character but the learned members were influenced by the fact that there was no dispute about the identity of respondent No. 2 and that he was able to produce a certified copy of the entry regarding his name in the relevant electoral roll. The following extracts from their judgment may be usefully given:

> "But Section 36, sub-clause 4 reads as under:
> 'The Returning Officer shall not reject any nomination paper on the ground of any technical defect which is not of a substantial character'.

Further sub-clause 2 of Section 36 provides :

> 'That the Returning Officer shall then (at the time of scrutiny of the nomination paper) examine the nomination papers and shall decide all objections, which

may be made to any nomination, and may, either on such objections or on his own motion, after such summary inquiry, if any, as he thinks necessary refuse any nomination paper on any of the following grounds,

(d) That there has been any failure to comply with any of the provisions of Section 33 or Section 34'.

It will thus be seen that at the scrutiny stage it is the duty of the Returning Officer under Section 30 sub-clause 2, if a defect is pointed out to him or noticed by him in the nomination paper, to hold an inquiry which has to be of a summary nature and thereafter refuse any nomination paper on the ground that there has been a failure to comply with any of the provisions of Section 33. But his duty does not end there. His further duty under sub-clause 4 of Section 36 is that he shall not reject any nomination paper on the ground of any technical defect which is not of a substantial character. It cannot, therefore, be said that just because there has been a failure to comply with any of the provisions of Section 33, as in the present case, the Returning Officer can reject the nomination paper. In the present case, by making a wrong entry relating to his serial number in the electroral roll, the petitioner failed to comply with the provisions of Section 33 read with Rule 4 of the Rules made under the 1951 Act. But merely because of this failure to comply with the provisions of the law the Returning Officer could not reject the nomination paper; it was his duty to hold a summary inquiry to satisfy himself whether the candidate was in fact enrolled as a voter and was qualified for membership of the Legislative Assembly or not. Of coarse, he could not at the scrutiny stage hold a lengthy inquiry. The only function of the electoral roll number required to be given in column No. 8 of the candidate is that the Returning Officer may be easily able to trace out the entry relating to the candidate in the electoral roll, to satisfy himself whether the candidate was or was not enrolled or was or was not qualified. In the present case it is an admitted fact that the candidate produced a certified copy of the entry in the correct electoral roll of Ladpura constituency relating to him. Under Section 36, Sub-Section 7(A) the production of a certified copy of an entry made in the electoral roll of any constituency is a conclusive evidence of the right of the elector named in that entry to stand for election etc. Therefore, if the Returning Officer had discharged his duties prescribed by Sub-Section 2 of Section 36 and made a summary inquiry by just caring to look into the certified copy of the entry, he could find out that the name of the petitioner was entered in the correct electoral roll. But the Returning Officer failed in his duty to do so.

Had a certified copy of the entry made in the correct electoral roll of the Ladpura

constituency not been produced by the petitioner at the scrutiny stage for the examination and the satisfaction of the Returning Officer that he was enrolled as a voter in the electoral roll of Ladpura constituency, the defect in his nomination paper relating to the electoral roll number in column No. 8 of the nomination paper would have been, though technical, but of a substantial character. Because the Returning Officer, in that case, could not without holding a lengthy inquiry find out whether or not the petitioner was enrolled in the correct electoral roll of Ladpura constituency. He had no duty to examine the whole list of Ladpura constituency and hold a lengthy inquiry to discover this fact as to whether or not the petitioner was enrolled. He could in that case have been justified in rejecting the nomination paper on account of the technical defect of giving a wrong electoral roll number in column No. 8 of the nomination paper as the defect would have been of a substantial character. But in the present case since the petitioner was present and made a certified copy of the entry relating to him in the electoral roll readily available to the Returning Officer at the time of the scrutiny of his nomination papers, it cannot be said that the Returning Officer could have experienced any difficulty in finding out that the petitioner was duly enrolled. Therefore, this defect in the nomination paper lost its substantial character".

29. It would appear from the above extract that in the view of the majority also the defect in this case could not be said to be of a non-substantial character. If a certified copy of the electoral roll of 1952 had not been produced at the time of scrutiny the two members who decided this point against the petitioner would have been prepared to hold that the nomination paper in this case was not improperly rejected. Whether the defect was substantial or not it ought to have been determined from the nature of the defect itself and should not have been made to depend upon what further evidence was produced at the scrutiny stage. If the nomination paper had been completed in the prescribed form as required by section 33(1) and the objection of the petitioner at the time of scrutiny were that respondent No. 2 was not the person whose name appeared at a particular serial number of the relevant electoral roll the question of identity would have arisen. If the objection were that the name of respondent No. 2 was not on the relevant electoral roll the question of taking assistance from the electoral roll or from the certified copy of the relevant serial number would have arisen. In the present case the objection was neither with respect to the identity of the respondent No. 2, nor with respect to his name not being in the relevant electoral roll. Therefore, the considerations which weighed with the majority of the Tribunal were not relevant. The

simple question was whether Ex. P2/A was completed in the prescribed form and this could be gathered only from a perusal of the nomination paper in the light of the provision of section 33 of the Act and Rule 4 and Schedule II of the Rules. From a perusal of the nomination paper and the relevant provisions of the Act and the Rules the majority of the Tribunal were of the view that the defect was of a substantial character In their view even if the electoral roll of Ladpura constituency of 1952 were produced in the case the defect would not have lost its substantial character. According to them, however, the defect which was substantial lost its substantial character simply because the certified copy from the electoral roll of 1953 was produced at the scrutiny stage. With due deference to the learned members of the Tribunal we feel that the view taken by them was not only erroneous in law but the error is apparent on the face of the judgment.

30. We now proceed to examine whether certiorari lies in the circumstances of this case? It has been argued by Mr. Pathak that formerly the view was taken in English courts that certiorari lies when there was absence or excess of jurisdiction or failure to exercise jurisdiction by the inferior Courts as well as when the judgment was erroneous on the face of the record. However, laterly the scope of the writ of certiorari was somewhat restricted but again in the case of *R. v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw* the scope was amplified and it was held that it goes when on the face of the order the grounds on which an inferior court had made it were not such as to warrant the decision to which it had come. We have perused the judgment in the aforesaid case and find that it is an authority for the proposition that a writ of certiorari goes when on the face of it the judgment or order of the inferior court is erroneous. There was an appeal in the Court of Appeal against the judgment of the Division Court, referred to above. But the view taken by Division Court was upheld and the appeal was dismissed. In the appellate judgment in the aforesaid case *R v. Northumberland* Compensation Appeal Tribunal. Ex parte Shaw (1952) 1 All ER 122), it was held that certiorari to quash the decision of a statutory tribunal lay not only where the tribunal had exceeded its jurisdiction but also where an error of law appeared on the face of the record. This court too has held in *Nanag Ram v. Ghinsi Lal,* [9] and *Sriniwas v. Collector, Sawai Jaipur,* [10] that certiorari lies when there is a mistake apparent on the face of the record. In the case of Nangram the Collector while fixing the standard rent of the premises had wrongly interpreted the words "let on the 1st day of September 1939" occurring in section 1(b)(i) of Schedule II of the Jaipur Rent Control Order of 1947 as meaning the premises which were given on rent on the

1st day of September, 1939. This court held on a petition being filed for a writ of ceritorari that the plain meaning of section 1 of schedule II was that if the premises were already on hire on 1-9-1939, the rent payable on that day should be regarded as basic rent for fixing the standard rent. The judgment of the Collector was held to be erroneous on its face and was quashed by a writ of certiorari. In the case of Sriniwas (K) also a similar question arose and it was held that on a bare reading of the Collector's order it could be known that fair rent in that case could be determined under Schedule II of the Jaipur Rent Control Order of 1947 and the error of law was held to be patent on the face of the record and the collector's order was quashed. Their Lordships of the Supreme Court also in *T. C. Basappa v. T. Nagappa,* [11] , and *Hari Vishnu Kamath v. Ahmad Ishaque,* [12] have taken the same view. In Basappa's case it was held that

> "An error in the decision or determination itself may also be amenable to a writ of certiorari but it must be a manifest error apparent on the face of the proceedings, i.e., when it is based on clear ignorance or disregard of the provisions of law.
> In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision".

That was also a case under the Representation of the People Act. The Tribunal concerned set aside the election of successful candidate and an application under Article 226 of the Constitution was filed for a writ of certiorari in the High Court. The High Court holding that there was no evidence whatsoever on some of the issues, set aside the judgment of the Tribunal as it was thought that it constituted a mistake apparent on the face of the record. When an appeal was taken to the Supreme Court their Lordships found in respect of certain issues that it could not be said that there was no evidence whatsoever to support the finding of the Tribunal on those issues and, therefore, allowed the appeal and set aside the judgment of the High Court. However on one of the issues their Lordships found that there was no evidence and the finding was based merely on a surmise and nothing else. Their lordships observed :

> "If the Tribunal had on the basis of these facts alone declared the appellant to be the duly elected candidate holding that he could have secured more votes than respondent No. 1 obviously this would have been an error apparent on the face of the record, as such conclusion would rest merely on a surmise and nothing else".

These observations of their Lordships go to show that if there is no evidence which term evidently means "legally admissible evidence" the judgment can be set aside on a writ of certiorari.

31. In Hari Vishnu Kamath's case it was held that "a writ of certiorari can be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record". That case was also under the Representation of the People Act. The Election Tribunal in that case dismissed the election petition on the ground that the election had not been materially affected by the erroneous reception of the votes. The unsuccessful party moved the High Court of Nagpur under Articles 226 and 227 of the Constitution for the issue of a writ of certiorari on the ground that the decision of the Election Tribunal was illegal and without jurisdiction. There were several points involved which are not material to the facts of the present case. One of the points raised in that case was that the decision of the tribunal that the result of the election had not been materially effected by the erroneous reception of votes was erroneous on its face. Two of the three Judges held that the decision of the Tribunal that the result of the election had not been materially affected by the erroneous reception of the votes was one within its jurisdiction and that it could not be quashed under Article 226 even if it made a mistake of fact or law. The 3rd Judge held that

> "As in arriving at that decision the Tribunal had taken into consideration irrelevant matters, such as the mistake of the polling officer in issuing wrong ballot papers and its effect on the result of the election, it had acted in excess of its jurisdiction".

He accordingly held that the decision should be quashed leaving it to the Election Commission to perform their statutory duties in the matter of the election petition. The petition was, however, dismissed in accordance with the majority opinion. An appeal was taken to the Supreme Court on a certificate granted under Article 132(1) of the Constitution. One of the points raised before their Lordships of the Supreme Court was that in maintaining the election of respondent 1 on the basis of 301 votes which were liable to be rejected, under rule 47(1) (c) the Tribunal was in error. Their Lordships held that this was an error on the part of the Election Tribunal and it was an error manifest on the face of the record and called for interference by certiorari.

32. As has been said about in the present case the judgment of the majority is erroneous on its face. They have been influenced by irrelevant considerations and having held that the defect, in question, was of a substantial character though technical and should not have been cured even if the electoral roll were produced at the scrutiny stage they have held that it lost its substantial character on the production of a certified copy of the electoral roll at the time of scrutiny. The judgment is a speaking judgment and from its very face it can be gathered that it is erroneous. The majority judgment so far as this point which relates to Issue No. 2 regarding proper or improper rejection of the nomination paper Ex. p. 2/A is concerned is liable to be quashed on a writ of certiorari.

33. Point No. (2) - If the nomination paper of Respondent No. 2 is held to be properly rejected, would he have any locus standi to file an election petition and raise questions of major and minor corrupt practices alleged by him in his petition?

34. Mr. Pathak argued that if the court finds that the judgment of the Tribunal on Issue No. 2 is erroneous on its face and the nomination paper is not found to have been improperly rejected then the respondent No. 2 had no locus standi to file the election petition. He argued that an election petition can be filed under section 81 of the Act by any candidate at such election or any elector. It was argued that respondent No. 2 was not an elector in the constituency of Sironj. Further it was argued that he could not be said to be a candidate at the election also because the term "candidate" as defined in section 79(b) means a person who has been or claims to have been duly nominated as a candidate at any election. It was urged that respondent No. 2 was not duly nominated as his nomination paper was rejected. It was argued that he cannot be said to be claiming to have been duly nominated because the expression "claims to have been duly nominated" means not that he simply alleges to have been duly nominated but that his claim to have been duly nominated was correct. Mr. Tyagi argued that the expression "claims to have been duly nominated" does not mean that the claim should be found to be right. It simply means that the candidate considers himself *bona fide* to have been duly nominated. We do not consider it necessary to go into this question as to our mind without pronouncing any opinion thereon we can grant the relief prayed for in the petition.

35. Point No. (3) - Is the judgment of the majority erroneous on its face on issue No.

7(a) regarding the obtaining of assistance by the petitioner from Sri Bakshi Executive Engineer Irrigation, Bundi?

36. On this point also the minority judgment is in favor of the petitioner but the majority judgment is against him. It was argued by Mr. Pathak that the judgment of the majority on this point also is erroneous on its face. The judgment does not disclose that there was any direct evidence to show that the petitioner had obtained any assistance for the furtherance of the prospects of his election from Sri Bakshi. It was argued that all that the judgment shows is that Mr. Bakshi said in the presence of some people at Sironj that he was deputed by Sri Brij Sunder Sharma to make a survey of the tank. It was argued that it has not been held that Sri Bakshi was an agent of the petitioner. Whatever therefore, Sri Bakshi said could not have any effect against the petitioner. It was urged that under no provision of the Evidence Act which applies to the trial of the election petition under the Act such evidence could be admissible against the petitioner, and therefore, the Tribunal having acted upon inadmissible evidence the judgment on this point is erroneous on its face and should be quashed.

37. On behalf of respondent No. 2 it was argued by Mr. Tyagi that the evidence led by respondent No. 2 before the election tribunal was quite sufficient to prove that it was at the instance of the petitioner that Sri Bakshi had gone to Sironj and canvassed for him.

38. We have considered the arguments of the learned counsel. We find the majority judgment has considered the evidence of only four witnesses on this point. They were Mohmud Khan (P. W. 10), Ghanshyam Saran Bhargava (P. W. 14), Sheikh Chand Khan (P. W. 17) and Kesri Mal Jain (P. W. 22). Out of these witnesses, Mohmud Khan, Sheikh Chand Khan and Kesri Mal Jain had stated that towards the end of September one day at the tank in the vicinity of Sironj they happened to be present and that Sri Bakshi, Executive Engineer, Irrigation, came to inspect the tank. Sri Bakshi talked to the people who had collected there and said they should vote for the congress candidate, and he would remove their difficulty and repair the tank. It has also been stated in the judgment that Shikh Chand Khan further deposed that Sri Bakshi had also said that he had been deputed by Sri Brij Sunder Sharma to make a survey of the tank. It, therefore, appears that there was not a single witness who had deposed that Sri Bakshi had been deputed in his presence by Sri Brij Sunder (the petitioner) to make the survey of the tank. The statement alleged by Chand Khan to

have been made by Sri Bakshi as to his having been deputed by the petitioner cannot under the Indian Evidence Act be admissible against the petitioner. We may say here that section 90(3) of the Act has provided that the provisions of the Indian Evidence Act, 1872, shall subject to the provisions of the Act be deemed to apply in all respects to the trial of an election petition. It has not been shown that there is any special provision in the Act which makes the statement like the one, in question admissible against a third party. Of course, had some witnesses come forward to say that Sri Brij Sunder Sharma had told him that he had deputed Sri Bakshi such a statement would have been admissible as an admission of Sri Brij Sunder Sharma but the statement put by Chand Khan into the mouth of Sri Bakshi, referred to above, could not be taken as an admission of Sri Brij Sunder Sharma. The admission, of course, of an agent under certain circumstances may be admissible against the principal. But it has not been held in the judgment that Sri Bakshi was an agent of Sri Brij Sunder Sharma. From the judgment of the Tribunal it is clear that it is based on inadmissible evidence so far as the question of deputing of Sri Bakshi by the petitioner is concerned. The remaining 3 witnesses have only said that Sri Bakshi had been to Sironj towards the end of September and he talked to the people who had collected there and said that they should vote for the Congress candidate and he would remove their difficulty and repair the tank. This fact alone would not prove that Sri Bakshi had been asked by the petitioner to canvass for him, or to render him assistance in the matter of his coming election in any other way. In Basappa's case their Lordships of the Supreme Court held that it was an error apparent on the face of the record if some finding is based on no evidence and is simply based on conjectures and surmises. Legally inadmissible evidence also amounts to no evidence in the eye of law and if a finding is based thereon it will also be an error on the face of the record. In an unreported case of *Pyarey Lal v. Motilal,* [13] this view was taken by this court in which certiorari was prayed for against the judgment of the election tribunal. To our mind, the judgment of the majority so far as this point is concerned is erroneous on its face and is liable to be quashed by a writ of certiorari.

39. Point No. 4 - Are the minority and majority judgments erroneous on their face so far as issues Nos. 51 (a) and 16 (a) arc concerned?
AND
Point No. 5 - Whether the majority judgment is erroneous on its face so far as issue No. 16(b) relating to the payment of travelling allowances and not entering them in the return of election expenses is concerned?

40. In the minority judgment the Chairman has held that a general kitchen was run by the petitioner at Sironj and Lateri and that the expenses of that kitchen had not been shown in the return of the election expenses filed by the petitioner. He has, however, not been able to find as to how many workers were fed at Lateri. He has not been able to find that the total expenses of the petitioner went beyond the limit for election expenses set in Schedule 5 of the Act for Rajasthan Assembly. In their majority judgment the two members of the tribunal too have held that kitchens were run at Sironj and Lateri by the petitioner. They have also said that travelling allowances were paid by the petitioner to his agents and neither the kitchen expenses nor the travelling expenses have been shown in the return of the election expenses. However, they too have not been able to say that the total of election expenses went beyond the sum prescribed for Rajasthan Assembly in Schedule 5 of the Act. Neither the Chairman nor the two members have, therefore, been able to record a finding that the petitioner was guilty of any major corrupt practice within the meaning of section 123 of the Act. However, they have held that the fact that certain expenses incurred by the petitioner were not shown in the return of his election expenses made him guilty of minor corrupt practice under section 124(4). Mr. Pathak argued that there was not sufficient evidence to show that the expenses on the kitchens and travelling expenses of the agents and canvassers were borne by the petitioner. On the other hand, Mr. Tyagi argued that there was evidence to show that the expenses were incurred by the petitioner himself. We do not want to enter into this question because even if a candidate is found guilty of minor corrupt practice under section 124 his election cannot be set aside and we can give the relief claimed to the petitioner even without going into this question.

41. Point No. 6 - Is the order of the tribunal so far as disqualification of the petitioner is concerned illegal and ultra vires?
AND
Point No. 7 - Is the order of the tribunal dated the 30th April, 1956, liable to be quashed?

42. Mr. Pathak argued that under section 98 of the Act the only order which an election tribunal can make should be to the following effect :

(a) dismissing the election petition; or

(b) declaring the election of the returned candidate to be void; or
(c) declaring the election of the returned candidate to be void and the petitioner or any other candidate to have been duly elected; or
(d) declaring the election to be wholly void.

It was argued that under section 98 the tribunal is not authorized to make an order that any of the parties to the election petition be disqualified. Mr. Pathak also argued that there is another section, namely, Section 99 under which certain orders may be made by the election tribunal at the time of making an order under section 98. But even under section 99 although a finding might be recorded whether any corrupt or illegal practice has or has not been proved to have been committed by, or with the connivance of any candidate or his agent at the election, and the nature of that corrupt or illegal practice and the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice and the nature of that practice, no power has been given to the election tribunal to order that the candidate be disqualified to stand for the election to the Parliament or to the State Assembly or to vote at such elections.

43. We have considered the arguments of Mr. Pathak. On a reference to section 98 and section 99 of the Act we find that no power has been given to the tribunal to make any order of disqualification as has been made in this case. The tribunal is entitled only to record a finding under section 99(1) (i) or name the persons proved to have been guilty of any corrupt or illegal practice and the nature of that practice under section 99(1) (a) (ii) of the Act. It is not the business of the tribunal to go any further. We are supported in this view by the judgment of this Court in *Pyarelal v. Motilal* referred to above in which a similar question arose and it was held by this court that the election tribunal is not authorised to make any order declaring a candidate to be disqualified under section 141 of the Act. In this matter the tribunal has gone beyond its jurisdiction and the order of the Tribunal in this respect too can be quashed on a writ of certiorari.

44. The petition is allowed and the order of the Election Tribunal dated the 30th April, 1956, setting aside the election of the petitioner and disqualifying him from the date of the order for membership of Parliament and of the Legislature of every State for a period of 6 years and also for voting at any election for a similar period is set aside in view of the allegations made by the petitioner in respect of the conduct of the

proceedings of the Election Tribunal which he did not press at the time of the arguments, we order that the parties shall bear their own costs.

Petition allowed.

Cases Referred.

1. (1880) 5 CPD 253
2. (1929) 1 KB 273
3. (1868) 3 QB 704
4. AIR 1954 SC 510
5. 10 ELR 189
6. AIR 1956 SC 140
7. 1 ELR 182
8. (1951) 1 All ER 268
9. ILR (1951) 1 Raj 639
10. ILR (1951) 1 Raj 724
11. AIR 1954 SC 440
12. AIR 1955 SC 233
13. D. B. Civil Writ Pet. No. 247 of 1953, D/-31-1-1955