

Reserved

Case :- ELECTION PETITION No. - 1 of 2009

Petitioner :- Chandra Narain Tripathi

Respondent :- Kapil Muni Karwariya

Petitioner Counsel :- In Person, Narendra Kumar Pandey, Smt. Sudha Pandey

Respondent Counsel :- K.N. Tripathi, K.R. Singh, Ravi Shankar Prasad, S.C. Dwivedi

Hon'ble Shri Kant Tripathi, J.

1. Heard Mr. Keshari Nath Tripathi, learned Senior Counsel assisted by Mr. K.R. Singh and Mr. S.C. Dwivedi for the Objector respondent and Mr. Narendra Kumar Pandey for the petitioner.

2. In the instant Election Petition, the respondent (the returned candidate) has moved three interlocutory applications. The first interlocutory application (application no. 294721 of 2009) has been moved under Order VII Rule 11 of the Civil Procedure Code (hereinafter referred to as 'the Code') mainly on the ground that the petitioner's one of the proposers, viz. Pramod Kumar was not an elector from 1.1.2009 as the entry at serial no. 3 Part No.170 of the electoral roll relating to 261- Allahabad West Assembly Constituency, had been deleted (*Vilopit*) and the petitioner has annexed himself a copy of the electoral roll (Schedule 4) at page 60-61 of the election petition, which has been made by him as integral part of the election petition, therefore, according to the petitioner himself Pramod Kumar was not competent to act as one of the proposers. If the name of Pramod Kumar is taken away from the nomination paper filed by the petitioner, number of remaining proposers would be less than ten. As such the petitioner was neither a duly nominated candidate nor had any cause of action to file the election petition.

3. The second interlocutory application (A-13) has been filed under section 86 (1) of the Representation of People Act, 1951 (hereinafter referred to as 'Act of 1951'), mainly on the ground that the election petition, in view of section 81 (1) of the Act of 1951, could be filed only on one or more grounds as specified in section 100 and 101 of the Act by any 'candidate' at such election or any 'elector'. The term 'candidate' has been defined in section 79 (b) of the Act of 1951, according to which, 'candidate' means a person who has been or claims to have been 'duly nominated' as a candidate at any election. Admittedly the petitioner was not an elector of 51- Phulpur (Lok Sabha) Constituency. Moreover the petitioner was not a duly nominated candidate nor he has claimed as such in the election petition. It was submitted on behalf of the respondent that a person who was neither duly nominated nor claims to have been duly nominated, can not maintain an election petition, therefore, the instant election petition is not maintainable and is liable to

be dismissed.

4. The third interlocutory application (A-16) has been filed by the respondent under Order VI Rule 17 of the Code for addition of new paragraphs 80 A – 80 I in the written statement, which will be heard and disposed of separately.

5. The petitioner has filed counter affidavits against the aforesaid interlocutory applications (preliminary objections). Rejoinder affidavits on behalf of the respondent have also been filed.

6. Before entering into the merits of the aforesaid interlocutory applications, it seems to be just and expedient to refer to certain relevant facts of the case.

7. According to the notification dated 2.3.2009 issued by the Election Commission of India under section 14 of the Act of 1951, election of the Member of the House of People from 51- Phulpur Parliamentary Constituency of district Allahabad was to be held on 16.4.2009. The petitioner and the respondent and other persons filed their nominations. The returning officer found the nomination of the petitioner as invalid on the ground that proposers Onkar Nath Tripathi, Rajesh Kumar, Tarun, Ashok Kumar and Akhilesh Kumar Dubey were not electors and their names did not find place at listed serial numbers of part no.275 of "262- Allahabad North Assembly Constituency".

8. In the instant election petition, the petitioner has impugned the decision of the returning officer rejecting his nomination paper and has stated relevant grounds in paras 33, 55, 57, 58, 59, 63, 65 to 69, 71, 72, 74, 78 and 80 of the election petition, which will be dealt with hereinafter at the appropriate place.

9. In view of the fact that both the interlocutory applications moved under order VII rule 11 of the Code and section 86 (1) of the Act of 1951 have been moved almost on the same ground, therefore, they are being disposed of together.

10. Mr. K.N. Tripathi, learned senior counsel made the following submissions in support of the aforesaid interlocutory applications:

(a) that in view of section 4 (d) of the Act of 1951 no person shall be qualified to be chosen to fill a seat in the House of People unless he is an elector for any Parliamentary Constituency. The term "elector" has been defined in section 2(e) of the Act of 1951, according to which, "elector" in relation to a constituency means 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. The petitioner filed his nomination as an independent candidate and was not a candidate set up by any recognized political party, therefore, his nomination was required to be subscribed, according to proviso to section 33 (1) of the aforesaid Act, by ten proposers being electors of the 51- Phulpur Parliamentary Constituency. If the number of proposers is less than ten, the petitioner can not be said to be a duly nominated candidate. Section 79 (b) of the Act of 1951 defines the term "candidate", which means a person who has been or claims to have been duly nominated as a candidate at any election. Section 81 of the aforesaid Act provides that an election petition calling in question any election may be presented to the High Court on one or more of the grounds specified in sub- section (1) of section 100 and section 101 of the Act by any candidate at such election or any elector. By virtue of section 86 (1) of the Act of 1951, it is imperative on the High Court to dismiss an election petition, which does not comply with the provisions of section 81 or section 82 or section 117. The order dismissing an election petition under section 86 (1) shall be deemed to be an order under clause (a) of section 98 of the Act of 1951. Section 98 reads as follows:

"98. At the conclusion of the trial of an election petition the High Court shall make an order-
(a) dismissing the election petition; or
(b) declaring the election of all or any of the returned candidates to be void; or
(c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected;"

(b). that section 100 of the Act of 1951 lays down the grounds for declaring an election to be void. According to section 100 (i)(c) of the said Act if the High Court is of the opinion that any nomination has been improperly rejected, it shall declare the election of the returned candidate to be void. The petitioner had no locus to file the instant election petition, firstly, on the ground that he was not an elector from 51- Phulpur Parliamentary Constituency, and secondly, he was neither a duly nominated candidate nor claims in the election petition to be a duly nominated candidate. Mere filing of the nomination by the petitioner is not sufficient to treat him as a duly nominated candidate. If a person is not a duly nominated candidate at the election and his nomination is rejected, he can not be included in the list of contesting candidates and

will not be a candidate in the election. Section 79 of the Act provides that even a person who claims to be a duly nominated candidate at the election would be a candidate. In other words, if the nomination of a candidate is rejected, he will be a candidate for the purpose of Part VI and VII of the Act of 1951, provided he is a duly nominated candidate. Therefore, it was incumbent upon the petitioner to plead specifically that he had been duly nominated and despite that his nomination paper has been rejected. If the nomination of a duly nominated candidate is rejected improperly and he claims to have been duly nominated, he can maintain an election petition but if he is not a duly nominated candidate, he can not maintain an election petition. According to the petitioner himself (through Schedule 4 of the Election Petition) the name of the proposer No.2 Pramod Kumar had been deleted from the Electoral Roll, therefore, he was not an elector nor competent to act as a proposer. After excluding his name from the nomination, the petitioner can not be said to be a duly nominated candidate.

(c). that the main question involved in the present matter is whether the petitioner has specifically pleaded in the Election Petition that he was a duly nominated candidate at the election. The meaning of the word "duly" has come up for interpretation by courts of law on several occasions. In this connection a reference may be made to "Words and Phrases", Volume 13-A, pages 399 to 404 and onwards, where the word "duly" has been interpreted in different context. "Duly" is not synonymous with 'legally' or 'substantially' and latter two words are not equivalent to the first word. The word "duly" means 'regularly, in due time, proper manner, in accordance with what is required or suitable, fittingly, becomingly, regular. "Duly" applies to regularity and compliance with requirement. In some cases it has been interpreted to mean 'in a proper way', or 'regularly, or 'according to law', that is 'according to statute governing the subject', and implies the 'existence of every fact essential to perfect regularity of procedure'. The word "duly" does not relate to form merely, but includes both form and substance'. "Duly" also means 'by a proper procedure, in a proper way, in due manner, time and degree as it ought to be; properly; sufficiently; in due, fit or becoming manner, properly, regularly, sufficiently, timely or orderly. The word "**duly**" when used before any word implying action, means that the act

was done properly and does not relate to form merely, but includes form and substance, implying existence of every fact essential to perfect regularity of procedure, and observance of statutory requirements, and means generally according to law, or some rule of law or practice; by proper or procedure.

11. Mr. K.N. Tripathi placed reliance on the following cases in support of his submissions:

(a) *H.L. Trehan vs. Union of India*, (1989) 1 SCC 764 (769) Para 11;

(b) *Charan Lal Sahu vs. Giani Zail Singh*, AIR 1984 SC 309 (paras 6 to 13, 16);

(c) *Charan Lal Sahu vs. K.R. Narayanan and another*, AIR 1998 SC 1506 (paras 2,3,8,10,13,16,19 to 23);

(d) *Charan Lal Sahu vs. Neelam Sanjeeva Reddy*, (1978) 2 SCC 500;

(e) *Charan Lal Sahu vs. Shri Fakhruddin Ali Ahmad*, AIR 1975 SC 1288;

(f) *J.H. Patel vs. Subhan Khan*, (1996) 5 SCC 312 (para 20);

(g) *Sharif-ud-Din vs. Abdul Gani Lone*, AIR 1980 SC 303 (para 18);

(h) *Jyoti Basu vs. Debi Ghosal*, AIR 1982 SC 983 (Para 8).

12. In the case of *H.L. Trehan* (supra) the Supreme Court referred to with approval the definition of word "duly" in Concise Oxford Dictionary as meaning "rightly, properly, fitly" and in Stroud's Judicial Dictionary, 4th Edition, as meaning, "done in due course and according to law". The Supreme Court has considered on different occasions the meaning and import of words 'duly nominated' in connection with an election petition challenging the election to the office of President of India. The definition of word "candidate" in section 79(b) of the Act of 1951 is practically the same as in section 13 (1) of the Presidential and Vice-Presidential Elections Act, 1952 (Act No. 31 of 1952), which says "candidate means a person who has been or claims to have been duly nominated as a candidate at an election".

13. In the case of *Charan Lal Sahu vs. Giani Zail Singh* (supra), dealing with the locus standi of a candidate to file an election petition under Presidential and Vice-Presidential Elections Act, 1952, the Supreme Court held that the claim to have been duly nominated can not be made by a person whose nomination paper does not comply with the mandatory requirements of section 5B (1)(a) of the said Act. That is to say, a person whose nomination paper, admittedly, was not subscribed by requisite number of electors as proposers and seconders can not claim that he was duly nominated. Such a claim can only be made by a person who can show that his nomination paper conformed to the provisions of section 5B and yet it was rejected, that is wrongly rejected by the Returning Officer, (Para 11). It further

states in para 12 that an occasion for a person to make a claim that he was duly nominated can arise only if his nomination paper complies with the statutory requirements which governs the filing of nomination paper and not otherwise.

14. In the case of **Charan Lal Sahu vs. K.R. Narayanan and another** (supra) the Supreme Court held that neither of petitioners was a candidate as neither of them was duly nominated nor could he claim to have been duly nominated as a candidate in as much as the nomination papers filed by both of them did not comply with the mandatory requirement of section 5 (1)(a) of the said Act in respect of petitioner no.1 and of section 5(2) as regards the petitioner no.2, they had no locus standi to maintain the petition. While deciding the case, the Supreme Court relied upon its earlier decisions in the cases of **Charan Lal Sahu vs. Neelam Sanjeeva Reddy** (supra) and **Charan Lal Sahu vs. Shri Fakhruddin Ali Ahmad** (supra).

15. In **J.H. Patel's** case (supra), the Supreme Court held that "It is not merely a question of equity but a question of principle that a person who deliberately and designedly fails to disclose information within his personal knowledge and fails to produce material in that behalf thereby virtually engineering the rejection of his nomination can not be permitted to raise a fresh ground which adversely affect the opposite party.

16. In the case of **Sharif-ud-Din** (supra) the Supreme Court held that "But if a law even though it may be procedural in character insists that an act must be done in a particular manner, and further provides that certain consequences should follow, if the act is not done in that manner, courts have no option but to enforce the law as it is. A rule of limitation, for example, which is generally considered as procedural in character is strictly enforced by courts since the rule lays down that no court shall entertain the suit, an appeal or an application which barred by law."

17. In the case of **Jyoti Basu** (supra), it has been held that "A right to elect, fundamental though it is to democracy, is anomalously enough, neither a fundamental right nor a common law right. It is pure and simple a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of Statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction and

a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to Election Law unless statutorily embodied. In the trial of election dispute the court is put in a straight jacket."

18. It was also submitted by Mr. K.N. Tripathi that the petitioner had disclosed incorrect part numbers of the elector roll relating to five proposers, namely, Onkar Nath Tripathi, Rajesh Kumar, Tarun, Ashok Kumar and Akhilesh Kumar Dubey in the nomination paper. The name of proposer no.2 Mr. Pramod Kumar had already been deleted from the part number of the elector roll as mentioned in the nomination paper and this fact is admitted to the petitioner in para 48 of the election petition, therefore, the petitioner failed to make compliance of the mandatory requirement of supplying correct part numbers of the elector rolls of his proposers. As such the petitioner's nomination paper was not subscribed by ten proposers and he was not a duly nominated candidate and the election petition filed on his behalf is not maintainable.

19. Mr. N.K. Pandey, learned counsel for the election-petitioner, in reply, submitted as under:

(a). that the election petitioner nowhere admitted in the election petition that he did not fill up and furnish the correct part numbers of the elector rolls of his proposers and in place of correct part numbers, he mentioned incorrect part numbers. Order VI Rule 2 of the Civil Procedure Code specifically provides that every pleading shall contain, and contain only, a statement in a concise form of the material facts on which party pleading relies for his claim or defence, as the case may be, but not the evidence to which they are to be proved. The election petitioner filed his nomination paper as an independent candidate and his nomination was subscribed by ten proposers, whose details have been specified in para 37 of the election petition, which is being reproduced as follows:

"37. That it is pertinent to mention here that the ten persons who were the proposers of the election petitioner are as follows:

1. Ram Narayan, S/o Surya Deen Dwivedi, R/o Village Deoria, Post Hanumanganj, District Allahabad.

2. Pramod Kumar S/o Shri Hira Lal, R/o House No.1, Kala Danda, Allahabad.

3. Himansu, S/o Shri Ramanand, R/o Housr No.16, Clive Road, Allahabad.

4. Bhuvneshwar Dwivedi, S/o Shri Ram Sajeewan, R/o House

No.3-G/2, Shivkuti, Allahabad.

5. Onkar Nath Tripathi, S/o Shri Brij Nath Tripathi, R/o House No.803/28-B/A, Allahpur Mohile Nagar, Allahabad.

6. Rajesh Kumar S/o Onkar Nath Tripathi, R/o House No.803/28-B/A, Allahpur Mohile Nagar, Allahabad.

7. Rakesh Kumar, S/o Paras Nath, R/o House No.8/3, Muir Road, Allahabad.

8. Tarun, S/o Shri Shashikant, R/o House No.767/28-B/1, Allahpur Mohile Nagar, Allahabad.

9. Ashok Kumar, S/o Shri Ram Kumar, R/o House No.763/28-B/1, Allahpur Mohile Nagar, Allahabad.

10. Akhilesh Kumar Debey, S/o Shri Rang Nath Dubey, R/o House No.28-B/118-A, Allahpur Mohile Nagar, Allahabad.”

(b). that the returning officer rejected the petitioner's nomination on the ground that the petitioner had not disclosed correct Part No. of the Electoral Roll of 262- Allahabad (North) Assembly Constituency relating to the proposer numbers 5, 6, 8, 9 and 10 but he found that the proposer no.2 Pramod Kumar was competent to subscribe the candidature of the petitioner. The Annexure no. 4 of the election petition has been filed only by way of evidence, and the facts disclosed in the election petition regarding proposer no.2 Pramod Kumar, do not in any way give the inference that the petitioner admits that Pramod Kumar was not eligible to act as a proposer. In para 39 of the election petition, the petitioner has made specific assertion in regard to proposer no.2 Pramod Kumar.

(c). that the election petitioner has specifically stated in para 48 of the election petition that the schedule no.4 is the extract of the Electoral roll which is neither a certified nor authentic copy of the electoral roll.

(d). that the proposer No.2 Mr. Pramod Kumar is still residing at his own residence 1, Kala Danda, Allahabad and his name is registered at Electoral Roll no. 261- Allahabad (West) Legislative Assembly Constituency at serial no.3, Part No. 170, which is evident from Annexures SCA-1 and SCA-2 to the supplementary counter affidavit.

(e). that in view of the averments made in para 39 of the election petition, the proposer no.2 Pramod Kumar was fully eligible to act as proposer, therefore, the election petition can not be thrown out at this preliminary stage only on the basis of the entry of “deleted (Vilopit)” in the electoral roll annexed as Schedule no. 4 to the election petition.

(f). that the petitioner has further averred in para 54 of the election

petition regarding deposit of Rs. ten thousand in the government treasury on 4.4.2009 as required by section 34 of the Act of 1951 and also alleged that he had annexed the challan alongwith the nomination paper. The election petitioner has very specifically stated in the election petition that his nomination paper was duly filled in all respects and was fully complete.

(g). that the list of polling center and the electoral roll of all the Assembly segments were available on the website of the Election Commission and had been made available "on line" by the Election Commission of India. Relevant facts in regard to "on line" facility have been stated in paras 51, 64 and 65 of the election petition, which are reproduced as follows:

"51. That the 'Nirvachak Namawali, 2009' was prepared after revision in the month of January, 2009 and the Electoral Roll of each Assembly Constituency in the State of Uttar Pradesh including the Assembly Constituency of 51- Phulpur Parliamentary Constituency of District Allahabad were published on 10.01.2009 by Electoral Registration Officer/Election Commission of India. And, the Electoral Roll of every Assembly Constituency was made available on the Website provided by the Election Commission of India. Thus, the Returning Officer could easily check the name of any person by opening the Website as provided by the Election Commission of India to this effect that whether his name is recorded as an elector in the respective Electoral Roll of the Assembly Constituency or not?"

64. That it is relevant to mention here at this time that the Election Commission of India has made elaborate arrangement and provided the entire Electoral Roll and List of Polling Stations/Centres of District Allahabad to the Returning Officer which could also be ascertained by opening the Website on the Computer which is installed in the room of the Returning Officer where the scrutiny of the nomination papers took place.

65. That the Returning Officer could very easily verify and could search the name of Proposer Nos. 5, 6, 8, 9 & 10 in the Electoral Roll of 262- Allahabad (North) Assembly Constituency, Namewise/Polling Station /Polling Centre-wise, but the Returning Officer and the Asst. Returning Officer willfully and deliberately have not done this exercise."

(h) that it was not necessary to use the expression specifically in the election petition that the election petitioner was a duly nominated candidate. The entire facts stated in the election petition disclose that the petitioner has set up the case that he was a duly nominated candidate, therefore, the election petition can not be discarded on the ground that the petitioner has not specifically pleaded that he was a duly nominated candidate. The petitioner's nomination was valid in all respects except

that he had disclosed Part No. 275 of electoral roll instead of Part No. 276 relating to the proposers no.5, 6, 8, 9 and 10, therefore, the defect was not a defect of substantial character and as such the provisions of section 36 (4) of the Act of 1951 were attracted in the matter, which provides that the returning officer shall not reject any nomination paper on account of any defect, which is not of a substantial character. According to section 33(4) of the Act of 1951, the returning officer was required, on presentation of the nomination paper, to satisfy himself that the names and electoral roll numbers of the candidate and his proposers as entered in the nomination paper are the same as those in the electoral rolls. If there was some defect technical, printing or clerical etc. it was obligatory on the part of the returning officer to permit the petitioner to correct the defect and this obligation has been imposed on the returning officer according to the proviso to section 33 (4) of the Act of 1951, which reads as follows:

“33(4). 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 as entered in the nomination paper are the same as those entered in the electoral rolls:

Provided that no misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposer or any other person, or in regard to any place, mentioned in the electoral roll or the nomination paper and no clerical, technical or printing error in regard to the electoral roll numbers of any such person in the electoral roll or the nomination paper, shall affect the full operation of the electoral roll or the nomination paper with respect to such person or place in any case where the description in regard to the name of the person or place is such as to be commonly understood; and the returning officer shall permit any such misnomer or inaccurate description or clerical, technical or printing error to be corrected and where necessary, direct that any such misnomer, inaccurate description, clerical, technical or printing error in the electoral roll or in the nomination paper shall be overlooked.”

(i) that the petitioner filed his nomination on 4.4.2009 at about 1.57 PM. The oath was administered by the competent authority the same day at 2.00 PM. The scrutiny of the nomination paper was to be held on 6.4.2009 at 11.00 AM. The petitioner has pleaded in para 58 of the election petition that the Returning Officer and Assistant Returning Officer after satisfying themselves with the entries made in the nomination paper issued receipt of the nomination paper. In para 59 of

the election petition it is mentioned that the returning officer did not point out any defect in the nomination paper.

(j) In view of the facts pleaded in various paragraphs of the election petition the petitioner was a duly nominated candidate and his nomination had been improperly rejected, therefore, the petitioner had a cause of action to file the election petition.

20. Mr. N.K. Pandey relied on the following case laws in support of his submissions:

- (a) ***Uttamrao Shivdas Jankar vs. Ranjitsinh Vijaysinh Mohite-Patil, AIR 2009 SC 2975;***
- (b) ***Chandra Shekhar Chaturvedi vs. Rajesh Nandini Singh, AIR 2000 MP 156;***
- (c) ***Somnath Rath v. Bikaram K. Aruk and others, AIR 1999 SC 3417;***
- (d) ***Somnath Rath v. Bikaram Keshari Aruk and others, AIR 1999 Orissa 119;***
- (e) ***Surendra Nath Khosla and another v. S. Dalip Singh and others, AIR 1957 SC 242;***
- (f) ***H.D. Revanna vs. G. Puttaswamy Gowda and others, (1999) 2 SCC 217;***
- (g) ***D. Ramachandran v. R.V. Janakiraman and others, (1999) 3 SCC 267;***
- (h) ***Rakesh Kumar v. Sunil Kumar, AIR 1999 SC 935;***
- (i) ***Ajayab Singh and another vs. Karnail Singh and others, 6 ELR 368 (F.B.);***
- (j) ***Ram Awadesh Singh v. Smt. Sumitra Devi & others, AIR 1972 SC 580;***
- (k) ***Hira Singh Pal v. Madan Lal, AIR 1968 SC 1179;***
- (l) ***Rangilal Choudhury vs. Dahu Sao and others, AIR 1962 SC 1248;***
- (m) ***Virender Nath Gautam v. Satpal Singh & others, (2007) 3 SCC 617;***
- (n) ***Mayar (H.K.) Ltd. and others vs. Owners & Parties, Vessel M.V. Fortune Express and others (2006) 3 SCC 100;***
- (o) ***Rabinder Singh Sohail v. Sh. Hirta Singh Gabaria, AIR 1998 Punjab & Haryana 271.***

21. ***In the case of Uttamrao (supra)***, in paras 27, 28, 29 and 35, the Apex Court propounded the following principles:

“27. Section 100 of the Act provides for the grounds for declaring election to be void inter alia in a case where a nomination has been improperly rejected. Improper rejection of a nomination, on a plain reading of the aforementioned

provision, in our opinion, would not mean that for the said purpose an election petitioner can only show an error in the decision making process by a Returning Officer but also the correctness of the said decision. Indisputably, there exists a distinction between a decision making process adopted by a statutory authority and the merit of the decision. Whereas in the former, the court would apply the standard of judicial review, in the latter, it may enter into the merit of the matter. Even in applying the standard of judicial review, we are of the opinion that the scope thereof having been expanded in recent times, viz., other than, (i) illegality, (ii) irrationality and (iii) procedural impropriety, an error of fact touching the merit of the decision vis-a-vis the decision making process would also come within the purview of the power of judicial review...”

“28. The Returning Officer is a statutory authority. While exercising his power under Section 36 of the Act, he exercises a quasi-judicial power. For the said purpose, the statute mandates him to take a decision. A duty of substantial significance is cast on him. As in the present case, by his order the fulcrum of the democratic process, viz., election can be set at naught. Improper rejection of nomination paper, in the instant case, may lead a party not to enter into the fray of elections. It is also now a trite law that once a finding is arrived at by the Election Tribunal that the order of rejecting the nomination was improper which would take within its umbrage not only the decision making process but also the merit of the decision, no further question is required to be gone into. The Tribunal had no other option but to set aside the election of the winning candidate.”

“29. While exercising his quasi-judicial power, in terms of the provisions of the Act, it was incumbent upon the Returning Officer to follow the instructions contained in the Handbook. It provides for: (i) opportunity to be given to candidate to rebut the objections by placing sufficient materials on record: (ii) A presumption of validity of such nomination paper.”

...

“35. The presumption of correctness of the nomination paper being statutory in nature, as intention of the Parliament as also the Election Commission was that even if somebody had filed an improper nomination, but for which he can be given benefit of doubt being a possible subject matter of an election petition where the question would be gone into in details, it was for the respondent herein to prove that the nomination paper prima facie did not contain the signatures of the proposers and, thus, were liable to be rejected.”

22. In the case of **Chandra Shekhar Chaturvedi (supra)**, the Madhya Pradesh High Court considered the ambit and scope of sections 33 of the Act of 1951 and laid down the following principle in para 20 of the judgment:

“20. According to sub-section (4) of section 33 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 as entered in the nomination paper are the same as those entered in the electoral rolls. Sub-section (4) of section 33 is governed by the proviso which provides no misnomer or inaccurate description or clerical technical or printing error in regard to the name of the candidate or his proposer or any other person, or in regard to any place, mentioned in the electoral roll or the nomination paper and no clerical, technical or printing error in regard to the electoral roll numbers of any such person in the electoral roll or the nomination paper, shall affect the full operation of the electoral roll or the nomination paper with respect to such person or place in any case where the description in regard to the name of the person or place is such as to be commonly understood. The Returning Officer is required to permit any such misnomer or inaccurate description or clerical, technical or printing error to be corrected and where necessary direct that any such misnomer, inaccurate description, clerical technical or printing error in the electoral or in the nomination paper shall be overlooked.The Returning Officer is entitled and if is satisfied, is obliged to permit correction of such misnomer or inaccurate description. He is also entitled and if satisfied, obliged to direct that such misnomer and/or in-accurate description etc. be ignored or overlooked. This power clearly clothes the Returning Officer with a jurisdiction to direct correction of the electoral roll to avoid the misnomer or inaccurate description etc. and also clothes in with the jurisdiction to ignore or over look the said misnomer or inaccurate description etc. It cannot be contended that if the Registration Officer has no power under section 23 of 1950 Act, the Returning Officer would also have no powers under section 33 (4) proviso of 1951 Act to direct correction in the electoral roll or nomination form or to over look or ignore such misnomer or inaccurate description.”

23. In the case of **Somnath Rath (supra)**, the Apex Court held that the improper rejection of the nomination paper by itself without anything more is a ground under section 100(1)(c) to declare the election of the returned candidate, void.

24. In the case of **Somnath Rath (supra)**, the Orissa High Court held in para 6 of the judgment that it depends on the facts and circumstances of each case to find as to what mistake in a nomination paper can be considered a mistake of substantial nature. The Returning Officer should not reject a nomination paper merely on a mistake of technical or formal nature, where the identity of the candidate can be ascertained by him on the material made available to him. He should also give an opportunity to the candidate or his representative present at

the time of scrutiny to remove the defect. However, in case neither the candidate nor his representative be present and without removing such defect in the nomination paper the identity of the candidate cannot be ascertained, then there is no statutory duty cast on the Returning Officer to make a roving enquiry by going through the material placed before him and to remove such defect himself. To cast an obligation on the Returning Officer to look through the entire electoral roll of a particular part with a view to finding out the identity of the candidate or proposer is not the requirement of the law. The Orissa High Court further held that improper rejection of nomination paper by itself without anything more has been retained as a ground to invalidate the election, but, it should further be proved that the result of the election, in so far as it contains an elected candidate, has been materially affected. In other words, improper rejection of a nomination affects the election but the person who is really affected is the person whose nomination paper has been rejected.

25. In **Surendra Nath Khosla's case (supra)**, the Apex Court held that improper rejection of a nomination paper is conclusive proof of the election being void.

26. In **Rakesh Kumar's case (supra)**, the Apex Court considered the ambit and scope of the proviso to section 36 (5) of the Act of 1951 and held as follows:

“.....The proviso to Section 36(5) of the Act lays down: Provided that in case (an objection is raised by the returning officer or is made by any other person) the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.”.....”Through the proviso, the legislature has provided that in case an objection is raised during the scrutiny, to the validity of a nomination paper of a candidate, the Returning Officer, may, give an opportunity to the concerned candidate to rebut the objection by giving him time not later than the next day. This is in accord with the principles of natural justice also.....the proviso to Section 36(5) of the Act warranted the holding of a summary enquiry, to determine the validity of the nomination paper by the returning officer, while exercising his quasi-judicial function. In the present case, the respondent had sought an opportunity to meet the objection, but even if he had not sought such an opportunity, the returning officer ought to have granted him time to meet the objection in the interest of justice and fair play.”

27. In the case of **Ajayab Singh and another (supra)**, the Election Tribunal, Hissar

while arriving at the conclusion that the nomination was improperly rejected, held that omission to disclose the name of the part in which the candidate's name was entered, was only a technical defect not of a substantial character.

28. In **Ram Awadesh Singh (supra)**, the Apex Court examined the ambit and scope of section 33 (4) of the Act of 1951 and laid down the following principles:

“The first question that we have got to decide is whether the defects found in the nomination paper of the appellant are of substantial character. As mentioned earlier, the appellant was fully qualified to be nominated for the election. The only thing said against his nomination is that his nomination paper was not properly filled in. We have earlier seen that a duty is imposed on the Returning Officer by sub-s. (4) of S. 33 to look into the nomination paper when it is presented and to satisfy himself that the names and the electoral roll numbers of the candidate and that of the proposer as entered in the nomination paper are the same as those entered in the electoral roll.”

“.....But the implication of Section 33 (4) is that a wrong entry in a nomination paper as regards the name of the candidate or the proposer or their electoral roll numbers is not a matter of substantial importance. That is why the legislature requires the Returning Officer to look into them and if there are any mistakes to get them corrected. What is of importance in an election is that the candidate should possess all the prescribed qualifications and that he should not have incurred any of the disqualifications mentioned either in the Constitution or in the Act. The other information required to be given in the nomination paper is only to satisfy the Returning Officer that the candidate possesses the prescribed qualification and that he is not otherwise disqualified. In other words those informations relate to the proof of the required qualifications.”

29. In the case of **Hira Singh Pal (supra)**, the Apex Court has held as follows:

“..... As mentioned earlier, the errors found in the nomination papers are purely clerical errors. The Returning Officer had the duty to scrutinise the nomination papers when they were presented for finding out whether there were any clerical mistakes in the same. Under that provision he was required to find out whether the names of the candidates as well as their proposers and seconders were correctly mentioned in the nomination papers. He was also required to see whether their place in the electoral roll was correctly mentioned in the nomination papers. Evidently the Returning Officer failed in his duty.

Further, when he scrutinised the nomination papers on January 21, 1967, he had before him all the required information. It may be that while scrutinising the first nomination paper (marked as No. 5) he had no material before him to find out whether the proposer of the candidate was really an elector in the constituency or not; but when he came to the second nomination paper where the proposer's name as well as his place in the electoral roll is correctly mentioned, it was improper on his part to have rejected that nomination paper. It is true that in that nomination paper, it had been mentioned that the candidate's name is found at serial No. 504 of part 2 of 9-Arki Assembly Constituency, though in fact it is found at serial No. 504 in part 12 of that constituency; but from the first nomination paper, the Returning, Officer could have easily found out the correct part of the electoral roll. All the required information was before him. Obviously he rejected the nomination papers for the reason that the respondent was only a dummy candidate but that was not a matter for him to decide. If he was a dummy candidate there was occasion for him to withdraw his candidature after the scrutiny of the nomination papers. Therefore it is quite clear that the respondent's nomination papers were improperly rejected. Such a rejection was impermissible under s. 36 and the same is a ground for setting aside the election under s.100 of the Representation of the People Act.”

30. In the case of **Rabinder Singh Sohail (supra)**, the Punjab and Haryana High Court held in paras 48 and 49 as follows:

”48. Shri Sukhbir Singh, learned counsel for the respondent, has further argued that the electoral roll number was incorrectly recorded in the case of the petitioner as well as his proposer. It is pointed out that the name of the petitioner as well as his proposer. It is pointed out that the name of the petitioner was mentioned to be existing at Sr. 127 in the electoral roll but that was not correct. A copy of the electoral roll relating to the year 1995 has been placed on record to show that the name of Archna w/o Naresh Kumar finds its place at Sr. No. 127. Similarly, the name of Biru Ram s/o Ram Lakha is found at Sr. No. 217 in the electoral roll relating to the year 1995 whereas the name of Harjinder Singh was mentioned by the petitioner in his papers. Shri R.C.. Dimri has explained that the petitioner filed an official copy of the electoral roll number relating to himself as well as his proposer along with his nomination paper. If there was any mistake in the official copy of the electoral roll issued by the Tehsildar

(Elections), that was not a mistake on the part of the petitioner.

49. On a consideration of the plea raised by the respondent, it is found that the mistake in the electoral roll has to be explained by the election office. If the petitioner obtained an official copy of the electoral roll and filed the same along with his nomination paper, he cannot be allowed to suffer. It is also to be noticed that the copy of electoral roll filed by the petitioner along with his nomination paper related to the year 1997 whereas the respondent has filed the copy of the electoral roll prepared in the year 1995. Be that as it may, the point raised by Shri Sukhbir Singh, learned counsel for the respondent, is to be rejected inasmuch as both the parties have filed official copies of the electoral rolls.”

31. In the case of **Rangilal Choudhury (supra)**, the Apex Court while considering the scope of section 33(4) of the Act of 1951, held that:

“.....The purpose of this provision is that the returning officer should be able readily to check that the proposer and the candidate are voters on the electoral roll. In the present case only the serial number and the house number are mentioned in columns 2 and 5 and not the name of the constituency and the number of the part. Undoubtedly therefore there was a defect in these two columns. Apparently the constituency was the same, viz., Dhanbad, as will appear from the address given in column 4. No part number could be given as the electoral roll in this particular case was not numbered by Parts. The question is whether in these circumstances this defect can be called a defect of a substantial character. In this connection we cannot ignore the provisions of s. 33(4) of the Act, which casts a duty on the returning officer to satisfy himself 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 roll and gives him the power to permit the removal of any defect in this connection. The returning officer does not seem to have noted this defect in the form for if he had done so he would have given an opportunity to the proposer to make the corrections. It is true that the failure of the returning officer to give this opportunity for correction does not mean that the defect can be ignored, if it is of a substantial character. But considering the purpose for which the electoral roll numbers are given, it seems that the returning-officer found no difficulty in checking that the proposer as well as the candidate was a voter on the electoral rolls.....”

32. In the case of ***H.D. Revanna (supra)***, the Apex Court, while considering as to how a preliminary objection has to be dealt with, laid down the following principles:

“23. This Court has repeatedly pointed out the distinction between “material facts” and “particulars”. In so far as “material facts” are concerned, this Court has held that they should be fully set out in the Election Petition and if any fact is not set out, the petitioner can not be permitted to adduce the evidence relating thereto later; nor will he be permitted to amend the petition after expiry of the period of limitation prescribed for an Election Petition. As regards particulars, the consistent view expressed by this Court, is that the petition can not be dismissed in limine for want of particulars and if the Court finds that particulars are necessary, an opportunity should be given to the petitioner to amend the petition and include the particulars. The Constitution Bench in Balwan Singh v. Shri Lakshmi Narain & Ors., [1960] 3 S.C.R. 91 held that an election petition was not liable to be dismissed in limine merely because full particular of a corrupt practice alleged were not set out. It was observed that if an objection was taken and the Tribunal was of the view that particulars had not been set out, the petitioner had to be given an opportunity to amend or amplify the particulars and that it was only in the event of non-compliance with the order to supply the particulars, the charge could be struck out.”

....

“27. The test in all cases of preliminary objection is to see whether any of the reliefs prayed for could be granted to the petitioner if the averments made in the petition are proved to be true. If the answer to the question is in the affirmative, the maintainability of the petition has to be upheld. In the present case we have no doubt that if the allegations contained in the election petition are proved to be true by the petitioner therein, he will be entitled to get the relief set out in the prayer portion.”

33. In ***D. Ramachandran's case (supra)***, the Apex Court had dealt with the questions relating to preliminary objections and ambit and scope of Order VII Rule 11 of the Code and propounded the following principle:

“8. We do not consider it necessary to refer in detail to any part of the reasoning in the judgment; instead, we proceed to consider the arguments advanced before us on the basis of the pleadings contained in the election petition. It is well settled that in all cases of preliminary objection, the test is to see whether any of the reliefs prayed for could be granted to the appellant if the averments made in the petition are proved to be true. For the purpose of considering a preliminary objection, the averments in the petition should be

assumed to be true and the Court has to find out whether those averments disclose a cause of action or triable issue as such. The Court can not probe into the facts on the basis of the controversy raised in the counter.

9. ...

10. *On the other hand, Rule 11 of Order VII enjoins the Court to reject the plaint where it does not disclose a cause of action. There is no question of striking out any portion of the pleading under this rule. The application filed by the first respondent in O.A. No. 36/97 is on the footing that the averments in the election petition did not contain the material facts giving rise to a triable issue or disclosing a cause of action. Laying stress upon the provisions of Order VII, Rule 11 (a), learned senior counsel for the first respondent took us through the entire election petition and submitted that the averments therein do not disclose a cause of action. On a reading of the petition, we do not find it possible to agree with him. The election petition as such does disclose a cause of action which if unrebutted could void the election and the provisions of O.VII R.11(a) C.P.C. can not therefore be invoked in this case. There is no merit in the contention that some of the allegations are bereft of material facts and as such do not disclose a cause of action. It is elementary that under O.VII R.11(a) C.P.C., the Court can not dissect the pleading into several parts and consider whether each one of them discloses a cause of action. Under the rule, there can not be a partial rejection of the plaint or petition.*

See Roop Lal Sathi Versus Nachhattar Singh Gill (1982) 3 S.C.C. 487. We are satisfied that the election petition in this case could not have been rejected in limine without a trial."

34. In the case of **Virender Nath Gautam (supra)**, the Apex Court, while considering the necessity of disclosing material facts in the election petition, propounded the following principles:

"29. From the relevant provisions of the Act reproduced hereinabove, it is clear that an election petition must contain a concise statement of 'material facts' on which the petitioner relies. It should also contain 'full particulars' of any corrupt practice that the petitioner alleges including a full statement of names of the parties alleged to have committed such corrupt practice and the date and place of commission of such practice. Such election petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") for the verification of pleadings. It should be accompanied by an affidavit in the prescribed form in support of allegation of such practice and particulars thereof.

.....

31. The expression 'material facts' has neither been defined in the Act nor in the Code. According to the dictionary meaning, 'material' means 'fundamental', 'vital', 'basic', 'cardinal', 'central', 'crucial', 'decisive', 'essential', 'pivotal', 'indispensable', 'elementary' or 'primary'. [Burton's Legal Thesaurus, (Third edn.); p.349]. The phrase 'material facts', therefore, may be said to be those facts upon which a party relies for his claim or defence. In other words, 'material facts' are facts upon which the plaintiff's cause of action or the defendant's defence depends. What particulars could be said to be 'material facts' would depend upon the facts of each case and no rule of universal application can be laid down. It is, however, absolutely essential that all basic and primary facts which must be proved at the trial by the party to establish the existence of a cause of action or defence are material facts and must be stated in the pleading by the party.”

35. While considering true import of order VII Rule 11 of the Code in the case of **Mayar (H.K.) Ltd.(supra)**, the Apex Court laid down the following law in para 11 and 12:

“11. Under Order 7 Rule 11 of the Code, the Court has jurisdiction to reject the plaint where it does not disclose a cause of action, where the relief claimed is undervalued and the valuation is not corrected within a time as fixed by the Court, where insufficient court fee is paid and the additional court fee is not supplied within the period given by the Court, and where the suit appears from the statement in the plaint to be barred by any law. Rejection of the plaint in exercise of the powers under Order VII Rule 11 of the Code would be on consideration of the principles laid down by this Court. In *T. Arivandandam vs. T.V. Satyapal and Another*, (1977) 4 SCC 467, this Court has held that if on a meaningful, not formal, reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the Court should exercise its power under Order VII Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. In *Roop Lal Sethi vs. Nachhattar Singh Gill*, (1982) 3 SCC 487, this Court has held that where the plaint discloses no cause of action, it is obligatory upon the court to reject the plaint as a whole under Order VII Rule 11 of the Code, but the rule does not justify the rejection of any particular portion of a plaint. Therefore, the High Court could not act under Order VII Rule 11(a) of the Code for striking down certain paragraphs nor the High Court could act under Order VI Rule 16 to strike out the paragraphs in absence of anything to show that the averments in those paragraphs are either unnecessary, frivolous or vexatious, or that they are such as may tend to prejudice, embarrass or delay the fair trial of the case,

or constitute an abuse of the process of the court. In *ITC Ltd. Vs. Debts Recovery Appellate Tribunal*, (1998) 2 SCC 70, it was held that the basic question to be decided while dealing with an application filed by the defendant under Order VII Rule 11 of the Code is to find out whether the real cause of action has been set out in the plaint or something illusory has been projected in the plaint with a view to get out of the said provision. In *Saleem Bhai and Others vs. State of Maharashtra and Others*, (2003) 1 SCC 557, this Court has held that the trial court can exercise its powers under Order VII Rule 11 of the Code at any stage of the suit before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial and for the said purpose the averments in the plaint are germane and the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage. In *Popat and Kotecha Property vs. State Bank of India Staff Association*, (2005) 7 SCC 510, this Court has culled out the legal ambit of Rule 11 of Order VII of the Code in these words :

"19. There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence of a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time, it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities."

12. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The Court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the Court exercising the powers under Order VII Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue

influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order VII Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants.”

36. After a survey of the aforesaid decisions relied upon by the learned counsel for the petitioner and the respondent, the following legal principles relevant for the present matter have emerged out:

(A). If a nomination is filed by a person not set up by any recognized political party, he shall not be deemed to be a duly nominated unless the nomination paper is subscribed by ten proposers being electors of the Constituency. If the number of proposers is less than ten, the person filing the nomination, shall not be deemed to be a duly nominated candidate. If any proposer is not an elector of the Constituency, he is not competent to subscribe the nomination paper and to act as a proposer;

(B). An election petition for declaring the election to be void is maintainable at the instance of an elector of the Constituency or the candidate. The term “candidate” means a person who has been or claims to have been duly nominated as a candidate at the election, therefore, the election petition must disclose material facts to make out the case that the election petitioner has been duly nominated or he claims to have been duly nominated. In absence of such material facts, the election petition will not be maintainable. The term “duly nominated” has to be understood to mean that the nomination fulfils all the statutory requirements and is not in any way contrary to law;

(C). If the facts pleaded in the petition prima facie make out the case of improper rejection of the nomination paper by the Returning Officer, the petition would be maintainable for declaring the election of the returned candidate as void;

(D). The election petition must contain a concise statement of material facts on which the petitioner relies. What particulars could be said to be 'material facts' would depend upon the facts of each case and no rule of

universal application can be laid down. It is, however, absolutely essential that all basic and primary facts, which must be proved at the trial by the party to establish the existence of a cause of action or defence, are material facts and must be stated in the pleading by the party;

(E). There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence of a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time, it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities;

(F). The plaint can not be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint;

(G). In all cases of preliminary objection, the test is to see whether any of the reliefs prayed for could be granted to the applicant if the averments made in the petition are proved to be true. For the purpose of considering a preliminary objection, the averments in the petition should be assumed to be true and the Court has to find out whether those averments disclose a cause of action or triable issue as such. The Court can not probe into the facts on the basis of the controversy raised in the counter;

(H). The petition/plaint can be rejected under Order VII Rule 11 of the Code if it does not disclose a cause of action. It is elementary that under Order VII R.11(a) C.P.C., the Court can not dissect the pleading into several parts and consider whether each one of them discloses a cause of action. Under the rule, there can not be a partial rejection of the plaint or petition. While deciding the question whether the plaint discloses a cause of action or not, the Court has to read the entire plaint as a whole. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose the material facts are required to be stated but not the evidence. So long as the plaint discloses

some cause of action which requires determination by the court, mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint;

(I). If the defect in any nomination paper is not of a substantial character, the Returning Officer can not reject the nomination paper, therefore, the facts to show that the defect noticed by the Returning Officer was not of a substantial character are relevant and material to question the legality of the nomination rejection order passed by the Returning Officer. Whether the defect is of a substantial character or not is a question of fact which is to be decided on the basis of the facts and circumstances of the case and the relevant evidence to be adduced and no hard and fast rule can be laid down in this regard;

(J). The election petition alleging the facts that the defect noticed by the Returning Officer were liable to be corrected under the proviso to section 33 (4) of the Act of 1951 are relevant and material to impugn the nomination rejection order. Whether the proviso to section 33 (4) of the aforesaid Act are attracted to the facts and circumstances of the case or not, is the question to be decided finally after evidence.

(K). When any objection is raised by the Returning Officer or is made by any other person, the candidate should be allowed time to rebut the objection within such time as may be given by the Returning Officer not later than the next day but one following the date of scrutiny. If the election petition contains allegations regarding violation of section 36 (5) of the Act of 1951 by the Returning Officer, it can not be rejected at the preliminary stage and it has to be subjected to the final trial.

37. The interlocutory applications filed on behalf of the respondent no.2 under Order VII Rule 11 of the Code and section 86(1) of the Act of 1951 are liable to be dealt with according to the aforesaid settled legal principles. Keeping in view the facts and circumstances of the case and submissions of the learned counsel for the petitioner and the respondent, the following three questions arise for determination at this preliminary stage:

- (i) Whether the facts pleaded in the election petition disclose any cause of action?
- (ii) Whether the petitioner, on the basis of the facts alleged in the election petition, claims to have been duly nominated?
- (iii) Whether the petition discloses that the nomination paper filed by the petitioner was improperly rejected?

38. It is not in dispute that the petitioner filed his nomination on 4.4.2009 at about 1.57 PM as an independent candidate, which was subscribed by ten proposers detailed in para 37 of the election petition and was complete in all respects except that wrong Part no.275 of the Electoral roll relating to the proposers Omkar Nath Tripathi, Rajesh Kumar, Tarun, Ashok Kumar and Akhilesh Kumar Dubey had been disclosed in the nomination paper. The Returning Officer taking into account the said incorrect disclosure by the petitioner, rejected his nomination on 6.4.2009 and held that names of said proposers no. 5,6,8,9 and 10 were not found at the listed serials of Part No. 275 of 262- Allahabad (North) Assembly Constituency. The petitioner has challenged the decision of the Returning Officer by way of this election petition and has pleaded relevant facts in paras 33, 55, 57, 58, 59, 63, 65 to 69, 71, 72, 74, 78 and 80 of the election petition.

39. In para 33 of the election petition, the petitioner has categorically pleaded that his nomination paper was duly complete in all respects. The statements made in para 33 of the election petition are reproduced as follows:

"33. That the election petitioner, filed his nomination paper on 04.04.2009, duly filled in all respect and fully completed, according to the provisions of Section 33 of the Representation of People Act 1951, to contest the election of Member of Parliament from 51-Phulpur Parliamentary Constituency of District Allahabad."

40. In para 55 of the election petition, the petitioner has very specifically stated that the petitioner had filed a valid nomination as required by section 33 of the Act of 1951, which was duly signed by his proposers. The petitioner has further pleaded in para 57 of the petition that all the necessary documents required for valid nomination had been annexed with the nomination paper including the Electoral roll relating to the petitioner.

41. The petitioner has alleged in paras 58 and 59 of the petition that the Returning Officer and the Assistant Returning Officer, after satisfying themselves with the entries made in the nomination paper issued receipt containing the date, time and place of scrutiny of the nomination paper and at that time the Returning Officer did not point out any defect in the nomination paper, therefore, the petitioner was sure that his nomination paper was complete in all respects.

42. In para 63 of the election petition, the petitioner has alleged that the Returning Officer informed that wrong Part No. 275 of the Electoral Roll relating to the proposers no. 5,6,8,9 and 10 had been disclosed by him in the nomination paper and orally required the petitioner to come after one hour as he was to check the names of the proposers in the Electoral Roll. It has been further pleaded in para 66

of the petition that after about one hour (at about 2.00 PM) the Returning Officer again took out the petitioner's nomination paper and at that time the petitioner orally informed the Returning Officer that due to mistake wrong Part No. 275 was mentioned in the nomination paper but in fact it was Part No. 276 and further informed the Returning Officer that the copy of the Electoral Roll annexed with the nomination paper was supplied by the officials of the District Election Office and he had wrongly mentioned Part No. 275 on the first page, though on subsequent pages correct Part No. 276 had been mentioned, therefore, due to this, wrong part number was mentioned on the nomination paper. Para 66 of the petition is being reproduced as follows:

66. "That it is further most respectfully submitted that after one hour, the nomination paper of election petitioner was again taken out by the Returning Officer at about 02.00 PM and at this time election petitioner orally pointed out that due to mistake the Part Number (BHAG SANKHYA) of the Electoral Roll '275' is wrongly mentioned but in fact it is Part No. '276' and also told that the election petitioner was supplied by the officials of the District Election Office the first page of the Part No. 275 of Electoral Roll of 262-Allahabad (North) Assembly Constituency but the subsequent pages are the extract of the Electoral Roll of Part No. 276 in respect of Proposer Nos. 5, 6, 8, 9 & 10 and by mistake same was wrongly mentioned in the Nomination Paper as Part No. 275 (BHAG SANKHYA – 275) in place of Part No. 276 (BHAG SANKHYA- 276)."

43. In para 67 of the election petition, the petitioner has very specifically stated that he gave written representation on 6.4.2009 itself at about 2.00 P.M. to the Returning Officer in which he clearly stated that the entries in the nomination paper were made on the information given by the officials of the District Election Office and in place of correct part no. 276, part No.275 had been mentioned due to clerical or technical mistake. The petitioner has further pleaded in para 67 that in the nomination paper the name, number of Legislative Assembly Constituency and serial number of the proposers no. 5, 6, 8, 9 and 10 were rightly mentioned except the wrong part no. 275. All the proposers no.5, 6, 8, 9 and 10 were residents of the same and one residential area of Mohalla Allahpur and all they were recorded as electors of 262- Allahabad (North) Assembly Constituency, which is part of 51-Phulpur - Allahabad Parliamentary Constituency. Para 67 of the election petition is

reproduced as follows:

“That the election petitioner has also submitted an own-hand written representation on 06.04.2009 at about 02.00 PM to the Returning Officer Shri Rajeev Agarwal wherein it is clearly mentioned that the entries in the nomination paper were made on the information given by the officials of the District Election Office and in place of Part No. 276 it is wrongly mentioned as Part No. 275 which is an clerical or technical mistake. Since in the nomination paper the Name, Number of the Legislative Assembly Constituency and the Serial Number of the Proposer Nos. 5, 6, 8, 9 & 10 is rightly mentioned, but due to mistake the Part Number of the Electoral Roll is mentioned as Part No. 275 in place of Part No. 276. But the aforesaid proposer Nos. 5, 6, 8, 9 & 10 are residents of same & one residential area of Mohile Nagar Allahpur, Allahabad which is attached to the same and one polling centre and further all these proposers are recorded electors of 262 – Allahabad (North) Assembly Constituency which is part of the 51- Phulpur Allahabad Parliamentary Constituency. A photocopy of the hand-written representation submitted at about 02.00 PM on 06.04.2009 before the Returning Officer is hereby annexed and marked as SCHEDULE No.8 to this election petition, which is an integral part of this election petition.”

44. The petitioner has stated in para 69 of the election petition that he had annexed first page of extract of electoral roll of Part No.275 alongwith the relevant extract of Part no. 276 of the Electoral Roll alongwith his representation dated 6.4.2009 and requested the Returning Officer either to permit him to remove the defect or to correct the same. But the Returning Officer neither provided any opportunity to the petitioner to cure the defect nor overlooked the mistake, which was not substantial in nature. Para 69 of the election petition is reproduced as follows:

“69. That in the hand-written representation which was submitted by the election petitioner on 06.04.2009 at about 02.00 PM before the Returning Officer, election petitioner

has also annexed the first page of the extract of Electoral Roll of Part -275 along with the relevant extract of Part No. 276 of the Electoral Roll of 262- Allahabad (North) Assembly Constituency in respect of the Proposer Nos. 5, 6, 8, 9 & 10 as provided from the office of District Election Officer, Allahabad and requested the Returning Officer either permit him to remove the defect or correct the same, but in spite of his best efforts neither the Returning Officer afforded reasonable opportunity by permitting the petitioner to cure the defect nor overlooked the same which is not substantial in nature.”

45. The petitioner has further pleaded in para 71 of the election petition that he pointed out the Returning Officer that his nomination paper could not be rejected on technical or flimsy grounds and the Returning Officer could overlook the error which was not substantial in nature and also referred to the proviso to section 33 (4) of the Act of 1951 read with the instructions contained in the Hand Book for the Returning Officers 2009. Para 71 of the election petition is reproduced as follows:

*“71. That the election Petitioner has also pointed out to the Returning Officer that his nomination paper cannot be rejected on technical & Flimsy ground and the Returning Officer can overlook the error which is not substantial in nature in view of the proviso of Section 33 (4) of R.P. Act 1951 read with the Instructions as contained in the Hand Book For Returning Officers 2009 specially in Chapter-VI Para 9.4 as issued by the Election Commission of India itself. The photo copy of the relevant extract of Chapter-VI (which provides scrutiny) of The Handbook For Returning Officers 2009 issued by the Election Commission of India, is hereby annexed and marked as **SCHEDULE NO.9** to this election petition, which is an integral part of this election petition.”*

46. The petitioner has further pleaded in para 72 of the election petition that the Returning Officer did not provide any opportunity to the petitioner to cure the defect as provided by the proviso to section 33 (4) of the Act of 1951. Similar averments have been made in para 74 of the election petition. Paras 72 and 74 of the election petition read as follows:

“72. That the election petitioner humbly requested that the Returning Officer cannot reject the nomination paper on technical and flimsy grounds or on the ground of error or defect which is not

substantial in nature, without affording a reasonable opportunity to the election petitioner to cure or remove the defect in the time allowed by the Returning Officer as contained in Section 36(5) of the R.P. Act, 1951.

74. That it is pertinent to mention here that the entire Electoral Roll of 262 – Allahabad (North) Assembly Constituency of 51- Phulpur Parliamentary Constituency was with the Returning Officer in the room where the scrutiny took place on 06.04.2009, but inspite of pointing out by the election petitioner that the Part No. 275 is wrongly mentioned in place of Part 276 and without verifying the names of the aforesaid Proposer Nos. 5, 6, 8, 9 & 10 of the election petitioner from Part No.276 of the Electoral Roll of 262- Allahabad (North) Assembly Constituency the Returning Officer willfully & deliberately not considered the petitioner's request and without affording an opportunity by permitting the election petitioner to remove the defect, improperly rejected his nomination paper and said that "How an Advocate of High Court can commit such mistake?."

47. The petitioner has pleaded in para 78 of the petition that in view of the proviso to section 36(5) of the Act of 1951, if any objection is raised by the Returning Officer or is made by any other person, the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny and the Returning Officer shall record his decision on the date to which the proceedings have been adjourned. But the Returning Officer as well as the Assistant Returning Officer acted contrary to the aforesaid proviso and did not provide any opportunity to the petitioner to rebut the objection. Para 78 of the election petition is reproduced as follows:

78. That in view of the proviso of section 36 (5) of the R.P. Act, 1951, if an objection is raised by the Returning Officer or is made by any other person the candidate concerned may be allowed time to revert it not later than the next day but one following the date fixed for scrutiny, and the Returning Officer shall record his decision on the date to which the proceedings have been adjourned. But in the present case the Returning Officer and Assistant Returning Officer acted contrary to the above mentioned provision and without affording a reasonable opportunity

to election petitioner illegally, arbitrarily and willfully & deliberately rejected the nomination paper of the election petitioner vide order dated 06.04.2009.”

48. The petitioner has lastly alleged in para 80 of the election petition that he gave a representation on 6.4.2009 to the Observer of the Election Commission but he also failed to give any due consideration. Para 80 of the petition is as follows:

*“80. That the election petitioner approached the Election Observer appointed by the Election Commission of India for 51- Phulpur Parliamentary Constituency through his representation dated 06.04.2009 which was received by the Observer at about 10.30 PM personally on 06.04.2009, wherein it is specifically mentioned that on enquiry during scrutiny, the election petitioner told the Returning Officer that the names of the Proposer Nos. 5, 6, 8, 9 & 10 are recorded in the Electoral List of Allahpur Mohile Nagar, Allahabad and these electors/proposers are attached with the Polling Centre situated at 'Sardar Patel Junior High School, Allahpur, Allahabad' and the names of the proposers may be traced/verified from those Parts of the Electoral Roll of Allahpur Mohile Nagar, Allahabad of 262- Allahabad (North) Assembly Constituency which are attached to the aforesaid polling centre/station and further mentioned that at the time of presenting nomination paper the entries in the nomination paper may be tallied with the Electoral Roll in view of Section 33 (4) of the R.P. Act 1951 and if there is any error or mistake the same may be corrected, and the election petitioner also mentioned that in view of the provisions of Section 36(5) of the R.P. Act 1951, the error or mistake can be cured upto the next date of the scrutiny, but the Returning Officer failed to do so. The photo copy of the Representation dated 06.04.2009 which was received at 10.30 PM by the Election Observer of 51- Phulpur Parliamentary, is annexed here with and marked as **SCHEDULE NO.12** to this election petition which is an integral part of this election petition.”*

49. In view of the aforesaid averments made in the election petition, the petitioner has questioned the legality of the nomination rejection order passed by the Returning Officer mainly on the ground that the defect of mentioning Part number

of the Electoral Roll in the nomination paper was not a defect of substantial character, therefore, the nomination paper ought not to have been rejected on the ground of incorrect disclosure of the Part Number of the Electoral Roll relating to the proposer nos. 5, 6, 8, 9 and 10. The mistake occurred on account of the fact that the Electoral Roll supplied to the petitioner by the District Election Office had a mention of part no.275 on its first page, therefore, the petitioner disclosed part no.275 on the nomination paper. The petitioner was entitled to rectify the error but the Returning Officer did not provide any opportunity to the petitioner to rectify the error which was merely clerical in nature and had no substantial character. The petitioner has further stated that the nomination ought not to have been rejected only on the ground of incorrect disclosure of part number of the Electoral Roll specially when other details of the aforesaid five proposers were correct and the Returning Officer could verify the correct part number from the Electoral Roll maintained in the Election Office and also from the website of the election department. It is also a case of the petitioner that he had a right under the proviso to sub-section (4) of section 33 of the Act of 1951 to rectify the aforesaid clerical error.

50. Therefore, the petitioner has specifically pleaded almost all the material facts and the relevant grounds in the Election Petition to question the legality of the nomination rejection order passed by the Returning Officer. At this stage merits of the pleadings can not be examined and they have to be taken at their face value. The petitioner's pleadings with regard to proposer nos. 5, 6, 8, 9 and 10 seem to be specific in all respects and contain concise statements of material facts.

51. It may not be out of context to mention that the Returning Officer did not find any defect in the nomination paper with regard to the remaining other five proposers, namely, Ram Narayan, Pramod Kumar, Himansu, Bhuvaneshwar Dwivedi and Rakeah Kumar. The Returning Officer, admittedly, rejected the nomination paper only on account of the aforesaid defects in regard to proposer no. 5, 6, 8, 9 and 10 only but the learned senior counsel for the respondent contended that the proposer no.2 Pramod Kumar, according to the petitioner's own assertion in para 48 read with schedule 4 of the election petition, was not an elector as his name had been deleted from the electoral roll, therefore, the petitioner was not a duly nominated candidate and his nomination was liable to be rejected on this ground alone. This objection of the respondent no.2 seems to be highly technical and does not appear to have any substance. In para 39 of the election petition, the petitioner has very specifically pleaded that the proposer no. 2 Pramod Kumar son of Hira Lal resident of House No.1, Kaladanda, Allahabad was

an elector at serial no.3, part no. 170 of the Electoral Roll of "261- Allahabad (North) Assembly Constituency" which is a segment of 51- Phulpur Parliamentary Constituency. Para 39 of the Election Petition is being reproduced as follows:

"39. That likewise the Proposer No.2 Pramod Kumar S/o Hira Lal R/o H. No.1 Kala Danda, Allahabad is recorded as an elector at Sl. No. 3 Part No. 170 of Electoral Roll of 261- Allahabad West Legislative Assembly Constituency which is also a segment of 51- Phulpur Parliamentary Constituency."

52. Therefore, according to para 39 of the Election Petition, the proposer no.2, Pramod Kumar was an elector recorded in the Electoral Roll of 51- Phulpur Parliamentary Constituency.

53. In this way the petitioner has nowhere admitted or otherwise stated in the election petition that the aforesaid proposer Pramod Kumar was not recorded as an elector in the Elector Roll of 51- Phulpur Parliamentary Constituency. No doubt he has annexed a copy of the relevant Electoral Roll as Schedule no.4 to the election petition and stated in para 48 of the election petition that the same is an integral part of the election petition but this much circumstance can not be taken as a basis to discard the averments made by him in para 39 of the election petition. The pleadings contained in paragraph 39 of the Election Petition can not be held to have lost its relevance only on account of the entry made in the Electoral Roll (Schedule 4) showing the name of proposer No. 2 Pramod Kumar as deleted. The entire election petition has to be read together to find out the true import of the petition. As such it is not legally permissible to overlook para 39 of the petition and to read the Schedule 4 in isolation for finding out the true intent of the petitioner. If the submission of the learned counsel for the petitioner that according to the Schedule 4 of the Election Petition the petitioner admits that the name of the proposer no.2 Pramod Kumar had been deleted from the relevant electoral roll is accepted, it would amount to make the allegations made in paragraph 39 of the Election Petition as redundant. No interpretation of any pleading making its certain contents as redundant is permissible in law, therefore, a reasonable approach has to be adopted to read the Election Petition as a whole and to find out its correct meaning intended to be conveyed by the petitioner. When the petitioner has specifically pleaded in paragraph 39 of the Election Petition that the proposer no. 2 Pramod Kumar was recorded as an elector in the Electoral Roll of the aforesaid Parliamentary Constituency, it can be easily inferred that the contents of the said paragraph 39 is one of the conscious pleadings of the petitioner, which he

intended to plead, therefore, the schedule 4 seems to have been filed by way of evidence with regard to the facts pleaded in various paragraphs of the Election Petition including paragraph 39 of the Election Petition. The Apex Court considered this aspect of the matter in the case of **Smt. Sahodrabai Rai vs. Ram Singh Aharwar and others, AIR 1968 SC 1079**, and held thatBut what we have said here does not apply to documents which are merely evidence in the case but which for reasons of clarity and to lend force to the petition are not kept back but produced or filed with the election petitions. They are in no sense an integral part of the averments of the petition but are only evidence of those averments and in proof thereof.... . In this view of the matter, the Schedule 4 of the Election Petition, which seems to be an evidence, can not be taken as a ground to reject the petition at this preliminary stage.

54. The allegations made in the election petition, which have been referred to hereinbefore, seem to be material facts to make out the case that the petitioner not only claims himself as a duly nominated candidate but also claims that his nomination paper was improperly rejected by the Returning Officer. In this view of the matter, the election petition can not be outrightly rejected on the ground that in the election petition the petitioner has not specifically used the terminology that he claims to have been duly nominated.

55. For the reasons discussed above, both the interlocutory applications have no merit and are accordingly rejected.

56. List the election petition on 16.5.2011 for disposal of the amendment application moved on behalf of the respondent and also for settlement of issues.

Dated:May 05, 2011.

RKSh.