

(1966) 10 GUJ CK 0003
In the Gujarat High Court

Barot Jaganath Maganlal and Another	APPELLANT
Vs	
Parshottamdas Nathubhat Brahmbhatt and Others	RESPONDENT

Date of Decision : 11-10-1966

Acts Referred:

Bombay General Clauses Act, 1904 — Section 13
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 3
Gujarat Municipalities Act, 1963 — Section 14
Gujarat Municipalities Election Rules, 1964 — Rule 12, 14, 7(1)

Citation : (1967) 8 GLR 9

Hon'ble Judges : P.N. Bhagwati, J

Bench : Single Bench

Judgement

P.N. Bhagwati, J.—The dispute in this petition concerns the validity of the election from Ward No. 7 to the Mehsana Borough Municipality. The town of Mehsana is a Municipal Borough within the meaning of the relevant provisions of the Gujarat Municipalities Act, 1963, (hereinafter referred to as the Act). The general municipal election to the Mehsana Borough Municipality was due to be held in September 1965 and the Collector of Mehsana in exercise of the power conferred upon him under Rule 7(1) of the Gujarat Municipalities Election Rules, 1964, (hereinafter referred to as the Rules) issued a notice dated 18th June 1965 fixing the various stages of the election. The general election was fixed on 12th September 1965 and the dates for the nomination of the candidates were 18th and 19th August 1965, the date for scrutiny of the nomination papers was 21st August 1965, the last date for withdrawal of candidature was 23rd August 1965 and the date for publishing the list of validly nominated candidates was 2nd September 1965. There were two general seats and one seat reserved for women in Ward No. 7 and the petitioner and respondents Nos. 1 and 4 to 7 were the candidates for the two general seats while respondents Nos. 8, 9, and 10 were the candidates for the reserved seat for women. The first respondent's name was included in the list of voters for Ward No. 7 at S. No. 41 and though the age of the first respondent was 32 years, it was shown as 59 years in the entry in the list of voters. Two nomination papers were, therefore, filed

nominating the first respondent as a candidate from Ward No. 7, one showing the correct age, namely, 32 years and the other showing the age as 59 years in consonance with the entry in the voters' list. The former nomination paper was given Serial No. 102 while the latter was given Serial No. 103. On 21st August 1965 being the date fixed for scrutiny of the nomination papers, both the nomination papers were found to be in order and were accepted by the Returning Officer. Now according to the first respondent, as he was nominated as a candidate from Ward No. 7 under two nomination papers and both of them were accepted by the Returning Officer, he was advised by the Returning Officer to withdraw one of the two nomination papers in order to avoid unnecessary complication by duplication and, therefore, he made an application dated 22nd August 1965 to the Returning Officer stating that two nomination papers had been filed nominating him as a candidate for the election and therefore, out of the two nomination papers, he may be permitted to withdraw the nomination paper bearing Serial No. 103 in which his age was shown as 59 years. The application was presented by the first respondent personally to the Returning Officer and at that time also the first respondent made a statement before the Returning Officer that he was withdrawing the nomination paper bearing Serial No. 103 and an endorsement recording that statement was made by the Returning Officer at the foot of the application. Though the application was merely for withdrawal of one out of the two nomination papers and the petitioner did not seek by the application to withdraw his candidature for the election, the Returning Officer treated the application as an application for withdrawal of the candidature and made an order on the application sanctioning the withdrawal of the candidature of the first respondent from the election. The Returning Officer also, purporting to act under Rule 12(3) of the Rules, published a notice on the same day declaring that the first respondent had withdrawn his candidature for the election from Ward No. 7. Thereafter, on the next day, i. e. 23rd August 1965, another notice under Rule 12(3) was issued by the Returning Officer declaring the names of 47 other candidates who had withdrawn their candidature for the election from other Wards. The list of validly nominated candidates was then published by the Returning Officer on 2nd September 1965 under Rule 14 and this list did not contain the name of the first respondent and the only names mentioned in the list were those of respondents Nos. 4 to 10 as validly nominated candidates for Ward No. 7. The first respondent thereupon addressed a letter dated 4th September 1965 requesting the Returning Officer to give reasons as to why the first respondent was not shown as a validly nominated candidate in the list. The reply which the Returning Officer gave by his letter dated 5th September 1965 was that since both the nomination papers of the first respondent were accepted, they had merged into one nomination by reason of Rule 10(5) and the withdrawal of one nomination paper by the first respondent, therefore, operated as withdrawal of the nomination itself under Rule 12 and the petitioner was, accordingly, not entitled to have his name included in the list of validly nominated candidates published under Rule 14. The first respondent being aggrieved by this decision of the Returning Officer, preferred a petition being

Special Civil Application No. 956 of 1965 in this Court on 6th September 1965-challenging the validity of the decision and immediately after presenting the petition, the first respondent applied for an interim injunction restraining the Returning Officer from proceeding to hold the election. On the application of the first respondent, an interim injunction was issued by this Court restraining the Returning Officer from holding the election from Ward No. 7 and the result was that the election from Ward No. 7 could not be held on the appointed day, namely, 12th September 1965. The petition was resisted on behalf of the petitioner and respondents Nos. 4 to 10 on various grounds of which one was in the nature of a preliminary objection and that was that the Returning Officer whose action was challenged in the petition was not a Court or Tribunal within the meaning of Article 227 and the petition filed under Article 227 was, therefore, not maintainable. This preliminary objection found favour with Vakil J. who heard the petition and by an order dated 30th October 1965, the learned Judge dismissed the petition on the view that the Returning Officer was neither a Court nor a Tribunal within the meaning of Article 227 and the petition could not, therefore, lie to challenge the decision of the Returning Officer. (See *Purushottam v. D.V. Patel* VII G.L.R. 443). After the dismissal of the petition, the Collector fixed 14th November 1965 as the date for holding the election from Ward No. 7 and at the election the petitioner and respondent No. 4 were elected to fill the two general seats and respondent No. 10 was elected to fill the seat reserved for women. The first respondent thereupon filed Miscellaneous Application No. 38 of 1965 in the Court of the Assistant Judge, Mehsana, on 30th November 1965 for setting aside the election from Ward No. 7 inter alia on the ground that the first respondent was wrongly kept out of the election by treating his candidature as withdrawn when in fact there was no withdrawal of candidature by him and excluding his name from the list of validly nominated candidates published under Rule 14. There were also other grounds on which the election of the petitioner and respondents Nos. 4 and 10 was challenged but those grounds are not material for the purpose of the present petition and it is not, therefore, necessary to refer to them. The application was made u/s 14 of the Act and the petitioner and respondents Nos. 4 to 10 were joined as parties to the application. The learned Assistant Judge who heard the application came to the conclusion that the Returning Officer was wrong in treating the application of the first respondent for withdrawal of the nomination paper bearing No. 103 as an application for withdrawal of the candidature and holding on the strength of that application that the first respondent had withdrawn his candidature for the election from Ward No. 7 and on that basis excluding the name of the first respondent from the list of validly nominated candidates published under Rule 14. The learned Assistant Judge took the view that there was in the circumstances non-compliance with Rule 14 and this non-compliance kept the first respondent out of the election, materially affecting the result of the election in so far as it concerned the petitioner and respondents Nos. 4 and 10. The learned Assistant Judge in this view of the matter set aside the election of the petitioner and respondents Nos. 4 and 10 from Ward No. 7 and directed the

Returning Officer to include the name of the first respondent as a validly nominated candidate in the list prepared under Rule 14 and thereafter to hold the election from Ward No. 7 according to rules. This order of the learned Assistant Judge is now challenged on the present petition.

2. One of the contentions urged by Mr. I.M. Nanavati, learned advocate appearing on behalf of the petitioner at the hearing of the petition was that even if there was non-compliance with Rule 14 as held by the learned Assistant Judge and such non-compliance materially affected the result of the election of the petitioner and respondent No. 4 justifying the setting aside of their election, the election of respondent No. 10 was not materially affected by such non-compliance since respondent No. 10 was a candidate for the seat reserved for women while the first respondent who was excluded was a candidate for the general seat and the election of respondent No. 10 was therefore in any case not liable to be set aside. To this contention a preliminary objection was raised by Mr. P. D. Desai, learned advocate appearing on behalf of the first respondent and that preliminary objection was that this contention was not taken in the petition and in any event it was respondent No. 10 alone and not the petitioner who was competent to raise this contention. The preliminary objection was well founded and realising its force, Mr. I.M. Nanavati on behalf of the petitioner applied for leave to amend the petition by transposing respondent No. 10 as petitioner No. 2 and re-numbering the original petitioner as petitioner No. 1 and introducing paragraph 15A in the petition in terms of the draft amendment handed in by him. The draft amendment sought to embody the contention that even if there was non-compliance with Rule 14, such non-compliance did not materially affect the result of the election of respondent No. 10, since she was a candidate for the seat reserved for women and the election of respondent No. 10 was, therefore, in any case not liable to be set aside. The amendment was resisted by Mr. P. D. Desai on behalf of the first respondent but since the contention which was sought to be raised by the amendment was a pure contention of law, I allowed the amendment with the result that the original petitioner became petitioner No. 1 and the original respondent No. 10 became petitioner No. 2. I shall, however, for the sake of convenience continue to refer to petitioner No. 1 as petitioner and petitioner No. 2 as respondent No. 10.

3. The first contention urged on behalf of the petitioner was that Section 14 contemplates a separate application for challenging the election of each councillor and a joint application challenging the election of three councillors, namely, petitioner and respondents Nos. 4 and 10 from Ward No. 7, was, therefore, not competent under the section and the application made by the first respondent was accordingly liable to be dismissed. This contention is obviously unfounded and no elaborate argument is necessary in order to repel it. The short answer to this contention is provided by Section 13 of the Bombay General Clauses Act, 1904, which declares that in all Bombay Acts unless there is anything repugnant in the subject or context, words in the singular shall include the plural and vice versa. Section 14 Sub-section (1) says that if the validity of

any election of a councillor is brought in question by any person qualified to vote at the election to which such question refers or by any candidate for such election, such person may, at any time within fifteen days after the date of the declaration of the result of the election, apply to the District Court of the district within which the election has been or should have been held, for the determination of such question. The words "a councillor" in the section must, in view of Section 13 of the Bombay General Clauses Act, 1904, include "councillors" and it must, therefore, follow as a logical corollary that if any person qualified to vote at an election desires to raise a question concerning the validity of the election of more councillors than one, he can make one single application to the District Court for the determination of such question u/s 14 Sub-section (1). Moreover the procedure prescribed by the CPC is clearly applicable to the inquiry contemplated by Section 14. The applicability of the procedure prescribed by the CPC would seem to follow by necessary implication from Section 14 Sub-section (4) and as a matter of fact while dealing with the corresponding Section 22 of the Bombay District Municipal Act, 1901 which was almost in identical terms with Section 14 of the present Act, a Division Bench of the Bombay High Court in *Hambirrao Bhaurao Patil v. Balisha Ganpat Kamble* 62 Bom. L.R. 749, held, relying on Sub-section (2B) of Section 22 which was in identical terms as Sub-section (4) of Section 14, that the inquiry contemplated in Section 22 is a judicial inquiry, the authority holding that inquiry is a judicial authority and the procedure prescribed by the CPC in so far as it may apply is applicable to that inquiry. The application u/s 14 Sub-section (1) would therefore be governed by the provisions of the Code of Civil Procedure. Now Order 1 Rule 3 of the CPC provides that all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such person, any common question of law or fact would arise. This rule would clearly on the facts of the present case justify the filing of a single application for challenging the election of the petitioner and respondents Nos. 4 and 10 since the right to relief against them arises out of the same act or transaction and if separate applications were filed, common questions of law and fact would arise. The first contention urged on behalf of the petitioner must, therefore, be rejected.

4. The next contention urged on behalf of the petitioner was that the ground on which the first respondent challenged the election of the petitioner and respondents Nos. 4 and 10 was not a ground which fell within the four corners of Section 14 Sub-section (5) and the application of the first respondent was, therefore, not maintainable. This contention was objected to on behalf of the first respondent and the objection was that this contention was not taken in the petition and it was, therefore, not open to the petitioner to raise it before the Court. There was force in the objection and the petitioner, therefore, applied for leave to amend the petition by incorporating this contention in the petition. This amendment was also, like the earlier one, opposed on behalf of the first

respondent but in view of the fact that it raised merely a question of law without involving any investigation of facts, I allowed the amendment and the contention was incorporated in paragraph 15B of the petition. Now there can be no doubt that on a plain grammatical construction and in the context and setting in which it occurs, Section 14 Sub-section (5) is exhaustive of the grounds on which the election of an elected candidate can be set aside by the Judge hearing an application u/s 14 and, therefore, unless one of the grounds set out in Section 14 Sub-section (5) is made out to the satisfaction of the Judge, the election challenged in the application would not be liable to be set aside. The question which, therefore, arises for consideration is whether the ground on which the first respondent impugned the validity of the election of the petitioner and respondents Nos. 4 and 10 was a ground covered by Section 14 Sub-section (5). On behalf of the first respondent reliance was placed on the last part of Sub-clause (iv) of Clause (a) of Section 14 Sub-section (5) which provides:

14. (5) (a) If the Judge is satisfied:

(iv) that the result of the election, in so far as it concerns the elected candidate, has been materially affected.... by any non-compliance with the provisions of this Act or any rules or orders made under this Act the Judge shall set aside the election of the elected candidate....

and it was contended that the ground taken in the application of the first respondent was covered by this provision. It was urged that there was in the present case non-compliance with Rule 14 or at any rate with Rule 12 and such non-compliance had materially affected the result of the election of the petitioner and respondents Nos. 4 and 10 and the case. was, therefore, within the last part of Section 14 Sub-section (5) Clause (a) Sub-clause (iv). This contention requires an examination of the ground on which the validity of the election of the petitioner and respondents Nos. 4 and 10 was challenged on behalf of the first respondent.

5. The complaint with which the first respondent came to the learned Assistant Judge was that though he had not applied for withdrawal of his candidature for the election, the Returning Officer had by misconstruing his application erroneously declared him as having withdrawn his candidature under Rule 12 and on that basis wrongfully excluded him from the list of validly nominated candidates published under Rule 14. The case of the first respondent thus rested on a two-fold ground; one was that the Returning Officer had wrongly treated him as having withdrawn his candidature under Rule 12 and the other was that the Returning Officer had improperly excluded him from the list of validly nominated candidates published under Rule 14. Now manifestly the second grievance of the first respondent followed necessarily as a logical corollary from the first, for the exclusion of the first respondent from the list of validly nominated candidates published under Rule 14 was a direct consequence of the Returning Officer treating the first respondent as having withdrawn his candidature under Rule 12 and if the action treating the candidature of the first

respondent as withdrawn under Rule 12 was wrong, the exclusion of the first respondent from the list of validly nominated candidates would clearly be in non-compliance with Rule 14. But, contended Mr. I. M. Nanavati on behalf of the petitioner, the decision of the Returning Officer under Rule 12 that the first respondent had withdrawn his candidature was final and binding and was not open to challenge in an application u/s 14 and, therefore, so long as it was not set aside in an appropriate proceeding such as a petition under Article 226 or a suit, it was not possible to say that the exclusion of the first respondent from the list of validly nominated candidates in conformity with such decision amounted to non-compliance with Rule 14. This contention plausible though it may seem, is in my view wholly unfounded and must be rejected. It is undoubtedly true that there is implicit in Rule 12 a power in the Returning Officer to decide whether a particular candidate has withdrawn his candidature by an appropriate notice given under that Rule but there is nothing in the Act or the Rules which makes the decision of the Returning Officer final and binding. Rule 12 is in this respect unlike Rule 11 which makes the order passed by the Collector in appeal against an order of the Returning Officer rejecting a nomination paper final. Of course this finality provided in Rule 11 is only an ad hoc finality for the smooth functioning of the machinery of election and the decision of the Returning Officer or the Collector can always be challenged in an application preferred u/s 14 after the completion of the election but even this ad hoc finality is not given to the decision of the Returning Officer under Rule 12. Section 14 Sub-section (1) in terms makes the decision of the Returning Officer under Rule 12 open to challenge in an application under that sub-section. The provision enacted in Section 14 Sub-section (1) has already been reproduced above and it is clear that under that sub-section an application can be made by any person qualified to vote at an election to bring the validity of the election into question. Now it is well settled that the word "election" in a provision like Section 14 Sub-section (1) must receive a broad and liberal interpretation so as to connote the entire process of election which consists of several stages and embraces many steps which may have an important bearing on the result of the process and culminating ultimately in the declaration of the result of the election. In the case of Patel Kanchanbhai Mangalbai and Another Vs. Maneklal Maganlal Gandhi and Others, , I had occasion to consider the true meaning and import of the word "election" as used in Section 24(1) of the Gujarat Panchayats Act, 1962, which is a section in identical terms as Section 14(1) of the present Act. There the question was whether the decision of the Returning Officer rejecting a nomination paper could be questioned in an application u/s 24(1) and having regard to the terms of Section 24(1), the determination of the question depended upon whether questioning the decision of the Returning Officer amounted to bringing the validity of the election in question within the meaning of the section. Following the decision of the Supreme Court in N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, , I held that the word "election" in Section 24(1) had a wide meaning and it was used to connote the entire process culminating in a candidate being declared elected and it embraced

all the stages leading upto the final declaration of the result of the election. This decision though given in reference to Section 24(1) of the Gujarat Panchayats Act, 1962, applies with equal force in the construction of Section 14(1) of the present Act, for not only are the two Acts in *pari materia* but the provisions enacted in Section 24(1) of the Gujarat Panchayats Act, 1962 and Section 14(1) of the present Act are also identical. In view of this decision it is clear that an aggrieved person would be entitled to challenge in an application u/s 14(1) all the steps in the election culminating in the declaration of the result of the election. One of the steps in the process of election would be the decision on the question whether a particular candidate has withdrawn his candidature for the election and this decision can, therefore, certainly be questioned in an application u/s 14(1). It is of course true that the Judge hearing the application would not be entitled to set aside the election unless one of the grounds set out in Section 14 Sub-section (5) Clause (a) is made out, but the decision of the Returning Officer under Rule 12 would certainly be open to challenge in the application. Now if the decision under Rule 12 is not final and binding and is open to challenge, it is obvious that the whole substratum of the argument on behalf of the petitioner must disappear. In that event if the Judge hearing the application finds that the decision of the Returning Officer under Rule 12 was wrong, the inevitable conclusion which he would have to reach would be that the candidate whose candidature was erroneously treated as withdrawn continued to be a validly nominated candidate and was entitled to have his name included in the list of validly nominated candidates published under Rule 14 and in excluding his name from such list, there was clearly non-compliance with Rule 14. The first respondent was, therefore, entitled to ask the learned Assistant Judge to set aside the election on the ground that the Returning Officer had wrongly excluded him from the list of validly nominated candidates published under Rule 14 by erroneously treating his candidature as withdrawn under Rule 12 though in fact no notice of withdrawal of candidature was given by him and there was, therefore, non-compliance with Rule 14.

6. The question can also be looked at from another point of view. Rule 12 empowers the Returning Officer to treat a candidate as having withdrawn his candidature only if he gives notice of withdrawal of candidature according to the provisions of Rule 12 and it would, therefore, follow *a fortiori* that if the Returning Officer treats the candidature of a candidate as withdrawn without there being a notice given by such candidate withdrawing his candidature under Rule 12, the Returning Officer would be clearly acting in non-compliance with Rule 12. The last part of Sub-clause (iv) of Section 14 Sub-section (5) Clause (a) contains what may be called a residuary provision and the word "non-compliance" used in that provision must be read not in a narrow and pedantic sense to refer only to some positive requirement of the Act or the Rules but in a wide and liberal sense to mean non-observance or breach of any provision of the Act or Rules whether of a positive or a negative kind. Vide the decision of Supreme Court in *Durga Shankar Mehta Vs. Thakur Raghuraj Singh and Others*, .

It must, therefore, follow that if, as alleged by the first respondent, no notice was given by the first respondent with drawing his candidature for the election, the decision of the Returning Officer that the first respondent had withdrawn his candidature for the election clearly amounted to non-observance or breach of Rule 12 and there was accordingly non-compliance with that Rule. The ground on which the first respondent sought to set aside the election was, therefore, covered by the last part of Section 14 Sub-section (5) Clause (a) Sub-clause (iv).

7. That takes me to the merits of the ground relied upon by the first respondent in support of his application. Now so far as the validity of this ground is concerned, there is no doubt that the learned Assistant Judge was right in taking the view that this ground was well-founded. The application which was made by the first respondent to the Returning Officer on 22nd August, 1965 was an application for withdrawal of the nomination paper bearing Serial No. 103 and I do not think how it can be reasonably construed as an application for withdrawal of candidature of the first respondent. The first respondent pointed out clearly and specifically in the application that two nomination papers had been filed nominating him as a candidate for election from Ward No. 7 and that out of those two nomination papers, he wished to withdraw only one nomination paper which bore Serial No. 103 and in which his age was shown as 59 years. The first respondent did not seek to withdraw the other nomination paper bearing Serial No. 102 which had been accepted by the Returning Officer and under which he was validly nominated as a candidate for the election. Even in the statement made by him before the Returning Officer at the time of the presentation of the application, he made it clear that what he was withdrawing was only the nomination paper bearing Serial No. 103 and not the other nomination paper bearing Serial No. 102. The clear and manifest intention of the first respondent, therefore, was that only the nomination paper bearing Serial No. 102 should continue to be operative and that could be only for the purpose of enabling the first respondent to stand as a candidate for the election. It is therefore clear that the first respondent did not intend to withdraw his candidature for the election but his intention was that since there were two nomination papers nominating him as a candidate one may be withdrawn as superfluous. The argument which found favour with the Returning Officer and which was repeated before me on behalf of the petitioner was that as soon as both the nomination papers were accepted by the Returning Officer, they merged into one single nomination of the first respondent and, therefore, the withdrawal of either of the two nomination papers amounted to withdrawal of the nomination within the meaning of Rule 12. But this argument is wholly devoid of merit. It is based on nothing but legal casuistry. The question is not whether the two nomination papers on acceptance merged into one nomination or whether there were as many nominations as nomination papers. That is entirely irrelevant. The only question which is material and which requires to be determined is whether the application of the first respondent was an application for withdrawal of candidature and that must depend upon the plain natural construction of its words. And if one looks at the

application, it is clear that the application was merely an application for withdrawal of one only out of two nomination papers, intending to leave the other nomination paper unaffected for the purpose of contesting the election as a candidate and it was not an application for withdrawal of candidature by the first respondent. As a matter of fact the application clearly evinced the intention of the first respondent to stand as a candidate for the election though under the nomination paper bearing Serial No. 102. It may be pointed out that the application of the first respondent for withdrawal of the nomination paper bearing Serial No. 103 was clearly ill-conceived for there is no provision in the Rules which authorizes a candidate to withdraw a nomination paper which has been filed nominating him as a candidate. The nomination paper is in fact not filed by the candidate himself but it is filed by the nominators under Rule 8 and if at all there can be any question of withdrawal of the nomination paper, it would be the nominators and not the candidate who would be entitled to withdraw the nomination paper. But, as pointed out above, there is no provision for withdrawal of the nomination paper once it is validly accepted by the Returning Officer and the only right which is given to the candidate is to withdraw his candidature by giving notice in accordance with the provisions of Rule 12. It would, therefore, appear that the application of the first respondent for withdrawal of the nomination paper bearing Serial No. 103 was misconceived and the Returning Officer could not possibly have permitted the first respondent to withdraw that nomination paper. But that apart, it is clear that the application was not an application for withdrawal of candidature and the decision of the Returning Officer under Rule 12 treating the first respondent as having withdrawn his candidature was, therefore, erroneous and the resultant exclusion of the name of the first respondent from the list of validly nominated candidates published under Rule 14 was also consequently illegal and invalid and there was accordingly non-compliance not only with Rule 12 but also with Rule 14.

8. The next contention urged on behalf of the petitioner was that whatever might be the decision in regard to the merits of the dispute between the parties, the first respondent was in any view of the matter not entitled to have the election set aside since it was necessary in order to bring the case within Section 14 Sub-section (5) Clause (a) Sub-clause (iv) that non-compliance with Rule 12 or Rule 14 should have materially affected the result of the election of the petitioner and respondents Nos. 4 and 10 and there was no plea to that effect in the application of the first respondent nor was any evidence led on behalf of the first respondent to establish such plea. It was insisted and quite strenuously-that the application did not disclose any cause of action since it did not contain an averment that non-compliance with Rule 12 or Rule 14 had materially affected the result of the election of the petitioner and respondents Nos. 4 and 10 and the learned Assistant Judge had, therefore, committed an error of law apparent on the face of the record in entertaining the application and granting relief on the application. Now it is no doubt true that it is an essential requirement of Section 14 Sub-section (5) Clause (a) Sub-clause (iv) that the result of the election in so

far as it concerns the elected candidate should have been materially affected by the non-compliance with some provision of the Act or Rules complained of in the application before the Judge hearing the application can set aside the election of the elected candidate but the question is whether it is necessary that the application should set out this particular averment on pain of the application being dismissed in limine by the Judge hearing it u/s 14. Now ordinarily there can be no doubt that this is an averment which must be made in the application and must be proved by leading proper evidence before the Judge for unless the petitioner satisfies the Judge that the result of the election has been materially affected the Judge would not be able to set aside the election u/s 14 Sub-section (5) Clause (a) Sub-clause (iv). But there is a difference where the complaint is that by reason of non-compliance with some provision of the Act or Rules a candidate has been kept out of the arena of contest at the election, In such a case the law presumes that the result of the election has been materially affected by the exclusion of the candidate from the election and the burden is thrown on the other side to rebut the presumption and to prove the contrary. This presumption is raised because by the very nature of things it would not be possible for a candidate who has been excluded from the election to show how the votes would have been cast if he had been allowed to enter the contest, if the presumption were not raised and the burden of proving that the result of the election has been materially affected were cast on the candidate who has been excluded from the election, it would be well-nigh impossible for such candidate to show that if he had been allowed to contest the election, the bulk of the votes would have been cast in his favour and he would have been elected in preference to the other candidate or candidates. The law, therefore, raises a presumption that where a candidate has been excluded from the election, the result of the election, must be held to be materially affected unless the other side shows to the contrary and this presumption would apply whatever be the cause of the exclusion, whether it be an improper rejection of the nomination paper or, as in the present case, a wrong decision that the candidate has withdrawn his candidature though in fact he has not. This proposition is now well-settled by the decision of the Supreme Court in Surendra Nath Khosla Vs. Dalip Singh, where the Supreme Court dealing with a case of improper rejection of nomination paper observed as far back as 29th November 1956:

it may be pointed out that almost all the Election Tribunals in the country have consistently taken the view that there is a presumption in the case of improper rejection of a nomination paper that it has materially affected the result of the election. Apart from the practical difficulty, almost the impossibility, of demonstrating that the electors would have cast their votes in a particular way, that is to say, that a substantial number of them would have cast their votes in favour of the rejected candidate, the fact that one of several candidates for an election had been kept out of the arena is by itself a very material consideration. Cases can easily be imagined where the most desirable candidate from the point of view of electors and the most formidable candidate from the point of view of

the other candidates may have been wrongly kept out from seeking election. By keeping out such a desirable candidate, the officer rejecting the nomination paper may have prevented the electors from voting for the best candidate available. On the other hand, in the case of an improper acceptance of a nomination paper, proof may easily be forthcoming to demonstrate that the coming into the arena of an additional candidate has not had any effect on the election of the best candidate in the field. The conjecture therefore is permissible that the legislature realising the difference between the two classes of cases has given legislative sanction to the view by amending Section 100 by the Representation of the People (Second Amendment) Act, (27 of 1956), and by going to the length of providing that an improper rejection of any nomination paper is conclusive proof of the election being void. For the reasons aforesaid, in our opinion, the majority decision of the fourth issue namely, that in a case where a nomination paper has been improperly rejected, there is a strong presumption that the result of the election has been materially affected, is correct.

9. This decision no doubt related to a case where a candidate was kept out of the election by reason of improper rejection of his nomination paper but the principle of this decision must apply equally where a candidate has been kept out of the election for any other reason such as a wrong decision treating his candidature as withdrawn though in fact there was no withdrawal by him. The law, therefore, raises a presumption in cases of this kind where a candidate has been kept out of the election and the presumption is that the result of the election must be held to be materially affected unless the other side proves the contrary. Now it is an elementary rule of pleading which is found enacted in Order 6 Rule 13 of the CPC that neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied. Therefore, according to this rule of pleading, it was not necessary for the first respondent to allege in his application that the result of the election of the petitioner and respondents Nos. 4 and 10 was materially affected by non-compliance with Rule 12 or Rule 14. As soon as the first respondent established that there was non-compliance with Rule 12 or Rule 14 and as a result of such non-compliance he was kept out of the election, the law would raise a presumption that the result of the election was materially affected and the burden of proving that the result of the election was not materially affected would be on the petitioner and the other respondents seeking to uphold the validity of the election. The first respondent was, therefore, not bound to allege in the application that the result of the election was materially affected by his exclusion from the election resulting from non-compliance with Rule 12 or Rule 14 and if the case of the petitioner or other respondents was that the result of the election was not materially affected and the first respondent was, therefore, not entitled to have the election set aside, it was for them to allege and prove that case.

10. But quite apart from this point and even if the view be taken that the first

respondent was bound to aver in his application that the result of the election was materially affected by reason of his exclusion from the election consequent upon non-compliance with Rule 12 or Rule 14 and in the absence of such averment the application did not disclose a cause of action, I would still in the exercise of my discretion under Article 227 of the Constitution refuse to interfere with the order made by the learned Assistant Judge setting aside the election. It is well-settled that the remedy under Article 227 of the Constitution is an extraordinary remedy which a party is not entitled to claim as a matter of right. It is a discretionary remedy which the Court grants where substantial justice requires its interposition. It is not granted merely for the purpose of correcting errors of law. As observed by the Supreme Court in *D.N. Banerji Vs. P.R. Mukherjee and Others*, "unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for High Courts under Articles 226 and 227 of the Constitution to interfere". It may be that the learned Assistant Judge committed an error of law in granting relief on the application even though the application did not disclose a cause of action, but that would not be sufficient to warrant interference by the Court in the exercise of its extraordinary power under Article 227. The petitioner and the other respondents who were opposing the application of the first respondent were well aware that the question whether the result of the election was materially affected by the exclusion of the first respondent from the election was an important question for the decision of the application. But even so they did not lead any evidence bearing upon this question. When the matter came to the stage of arguments before the learned Assistant Judge, the only argument which they advanced was that the first respondent had failed to aver and prove that the result of the election was materially affected and the first respondent was, therefore, not entitled to have the election set aside. The argument proceeded upon the basis that the burden of proving that the result of the election was materially affected was on the first respondent and since the first respondent had failed to aver and prove that fact, the application was liable to fail. It was not the case of the petitioner and the other respondents that though the burden of proving that the result of the election was not materially affected was on them and they had evidence to discharge that burden, they were misled into not leading such evidence by reason of absence of proper averment in the application nor was that the complaint of the petitioner and respondent No. 10 in the present petition. Vide paragraph 13 of the petition. It is, therefore, not possible to say that any injustice, grave or otherwise, was caused to the petitioner and respondent No. 10 by reason of the learned Assistant Judge granting relief on the application without there being an averment that the result of the election was materially affected. Such being the case, it would be merely promoting technicality without furthering the ends of justice to interfere with the order passed by the learned Assistant Judge setting aside the election. On the contentions as raised, it would have made no difference to the result of the application even if an averment had been made in the application that the result of the election was materially affected and the petitioner and respondent No. 10 had had an opportunity of

denying that averment. I do not, therefore, see any reason why I should in the exercise of my discretion under Article 227 interfere with the order made by the learned Assistant Judge even if the contention of the petitioner on merits be well-founded.

11. It was then contended on behalf of the petitioner that in any event the learned Assistant Judge was in error in setting aside the election of respondent No. 10. Respondent No. 10 was admittedly a candidate for the seat reserved for women and the argument of the petitioner, therefore, was that the result of the election in so far as it concerned respondent No. 10 could not possibly be materially affected by reason of the exclusion of the first respondent who was a candidate for the general seat. Now it is true that the first respondent was a candidate for the general seat while respondent No 10 was a candidate for the seat reserved for women but that in my view makes no difference so far as the effect of the exclusion of the first respondent on the result of the election of respondent No. 10 is concerned. There was one single electorate for the general and reserved seats and the voting at the election for the general and reserved seats was common. There was no separate election for the reserved seat nor was there a separate election for the reserved seat. The voting for the general and the reserved seats being common, a voter could cast all the three votes in favour of a candidate for the general seat and he was not bound to cast any vote for a candidate for the reserved seat. The possibility cannot, therefore be ruled out that if the first respondent had been allowed to contest the election, the votes which were cast in favour of respondent No. 10 might have been diverted to the first respondent and that might have affected the election of respondent No. 10. There is no distinction in principle between the case of respondent No. 10 and the case of the petitioner and respondent No. 4 in so far as it concerns the question whether the result of the election was materially affected by reason of the exclusion of the first respondent from the election. The learned Assistant Judge was, therefore, not in error in setting aside the election of respondent No. 10 when he found that the first respondent was wrongly excluded from the election, by erroneously treating his candidature as withdrawn.

12. That takes me to the last contention urged on behalf of the petitioner. This contention was directed against the direction contained in the order of the learned Assistant Judge requiring the Returning Officer to include the name of the first respondent as a validly nominated candidate in the list published under Rule 14 and thereafter to proceed to hold the election for Ward No. 7 in accordance with the Rules. The argument was that this direction was beyond the scope and ambit of the power of the learned Assistant Judge u/s 14 and must, therefore, in any event be quashed and set aside. There is force in this argument and Mr. P. D. Desai on behalf of the first respondent was not in a position to show any provision of law under which such direction could be issued by the learned Assistant Judge. The complaint of the petitioner against the order of the learned Assistant Judge, must, therefore, succeed in so far as it relates to this direction.

13. These were all the contentions urged on behalf of the petitioner and since there is no merit in them the petition substantially fails, but since the direction contained in the order of the learned Assistant Judge requiring the Returning Officer to include the name of the first respondent as a validly nominated candidate in the list prepared under Rule 14 and thereafter to proceed to hold the election in Ward No. 7 according to the Rules is without jurisdiction, a writ will issue quashing and setting aside that direction. The rest of the order of the learned Assistant Judge setting aside the election of the petitioner and respondents 4 and 10 will stand. The petitioner and respondent No. 10 will pay the costs of the petition to the first respondent. Mr. I. M. Nanavati on behalf of the petitioner applies that the operation of the order of the learned Assistant Judge to the extent to which it has been maintained by me should be stayed for a period of fifteen days from the date of the signing of the judgment in order to enable the petitioner to file either an appeal under Clause 15 of the Letters Patent or an application for special leave to the Supreme Court. The petitioner through Mr. I.M. Nanavati is prepared to give an undertaking to this Court that he will apply for a certified copy of the judgment on or before 12th October, 1966. On this undertaking being given by the petitioner, I stay the operation of the order of the learned Assistant Judge for a period of fifteen day from the date of the signing of the judgment. If an application for a certified copy of the judgment is not made by the petitioner on or before 12th October, 1966 the stay will stand discharged.