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**(2000) 04 CAL CK 0019**

**In the Calcutta High Court**

**Case No : Income-tax Reference No. 39 of 1995**

Commissioner of Income Tax

APPELLANT

Vs

Kwality Ice Creams (P.) Ltd.

RESPONDENT

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**Date of Decision : 27-04-2000**

**Acts Referred:**

Income Tax Act, 1961 — Section 147

**Citation :** (2000) 163 CTR 341 : (2000) 245 ITR 252 : (2001) 115 TAXMAN 287

**Hon'ble Judges :** Y.R. Meena, J;R.K. Mazumdar, J

**Bench :** Division Bench

**Advocate :** Khaitan, for the Respondent

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## **Judgement**

D. Basu, J.—This Rule is directed against the election held on February 26, 1964, of the Commissioners of the Siliguri Municipality, on the basis of a final electoral roll prepared in pursuance of the decision contained in the order of the Registering Authority dated October 21, 1960, which is at annex. G-2 of the petition.

2. The Petitioners, who were originally five in number, brought this petition under Order 1, Rule 8 of the CPC alleging that 240 other persons were affected by the impugned proceedings and in similar circumstances. Subsequently, some of these persons have come upon the record as added Petitioners so that the number of Petitioners at the hearing has gone up to 24. The Petitioners' case is that they are all residents of Ward No. 17 of the Municipality--in the area called Milanpalli--and are thus entitled to be enrolled in the electoral roll of that Ward. In fact, their names were duly included in the preliminary electoral roll which was published sometime in September, 1963, under the West Bengal Commissioners of Municipalities (First General Election) Order, 1963. But the Petitioners' names were excluded from the final electoral roll published on November 12, 1963. This led the Petitioners to inquiry and the Petitioner No. 1 filed a petition to the Registering Authority, namely, the Sub-divisional Officer (Respondent No. 1), for copies of the proceedings which was refused on February 4, 1964, on the ground

that certified copies were not available from his office, as the matter related to Municipal election. But, subsequently, the copies were supplied to the Petitioner and from this document it was discovered by the Petitioner that one Binoy Kr. Mukherjee (Respondent No. 4) filed an objection on October 3, 1963, against the inclusion of 222 names in the preliminary electoral roll, on the ground that these persons did not reside anywhere within the area of Ward No. 17, and that in pursuance of this objection Respondent No. 2 (K.B. Bhattacharya) issued notices on October 11, 1963, to the Petitioners to appear before him on October 18, 1963, for a hearing of the objection raised by Respondent No. 4, who was a sitting Commissioner of the Ward and a candidate for the ensuing Municipal election. From the copies it also appeared to the Petitioners that the notices issued by the Registering Authority were directed not to their respective residences at Milanpalli but to different other places like Khalpara, Gatiganagar and the like where the Petitioners did not actually reside. In the circumstances, the letters which were purported to have been sent under certificate of posting were not received by the Petitioners. The Petitioners' case is that they were always and have been residing at Milanpalli within Ward No. 17 and that some of them own immovable property situated at that place, and that the sending of the notices addressed to the Petitioners at wrong addresses was done by the Municipal Authorities to serve the interest of Respondent No. 4. As a result of non-service of these letters the Petitioners could not appear before Respondent No. 2, K.B. Bhattacharya, an officer subordinate to the Registering Authority, on October 18, as directed in the notices. In view of their absence, Respondent No. 2 made the report (at annex. G) in the following words:

As far as s1s. 1 to 54, 56 to 57, 59 to 70 and 72 to 221, the persons, the inclusion of whose names in Ward No. 17 were objected to, did not appear before me nor did they represent their case in any other way, though notice under certificate of posting was issued to them. So an ex parte decision may be taken and their names may be deleted from the electoral roll.

On the strength of this report the Registering Authority made the following order on October 21:

Seen Commissioners of Municipalities Order (1963). The parties to whom notices were served as per serial at C above did not attend hearing though called so to do. As such, their cases are decided ex parte. Objection petition against their names allowed. Their names may be deleted from the Municipal electoral roll. (Annex. G-2)

3. The Petitioners' case is that, in pursuance of the above order of the Registering Authority, their names were deleted from the final electoral roll without giving them an opportunity of being heard either before Respondent No. 2 or Respondent No. 1, and that the order passed by the Registering Authority and the election held in pursuance thereof are ultra vires and illegal on various grounds, which will be stated hereafter. Separate affidavits-in-opposition have been- filed by Respondent No. 1 for himself and Respondent No. 2; Respondent

No. 4, i.e., the objector, Respondent No. 5, the Chairman of the Municipality; and the State of West Bengal, Respondent No. 6. The averments made in these counter-affidavits will be referred to at proper places.

4. Several preliminary objections have been raised to this petition:

5. Firstly, it is urged that the Petitioners not having appealed to the District Magistrate, u/s 529A of the Act, within 15 days from the date of publication of the final electoral roll (which was November 27, 1963), are not entitled to any relief under Article 226 of the Constitution. Section 529A of the Act says:

(1) Any person aggrieved by any entry in or omission from the final electoral roll published u/s 21 may, within 15 days from the date of publication on such roll, appeal to the District Magistrate, and if the District Magistrate on such appeal directs any modification or addition to be made in such roll, the roll shall be amended accordingly and the amendment so made shall be published in the same manner as the final roll.

(2) No entry in or omission from a final electoral roll published u/s 21 shall be liable to be called in question otherwise than by such appeal.

6. The answer to the preliminary point based on the foregoing section has been offered by Sinha J. (as he then was) in *Amulya Ratan Karmakar and Others Vs. The Commissioner of Basirhat Municipality and Others*, , and I need only summarise the reasons given therein:

7. Section 529A affords remedy where the complaint of the person aggrieved is only as regards the correctness of a particular entry in the electoral roll and he seeks to have it amended by the inclusion or omission of a particular name or names. It cannot, accordingly, serve as an alternative remedy to exclude the constitutional remedy under Article 226 where the Petitioner challenges the electoral roll as a whole on the ground that it has been prepared in violation of the provisions of the statute and is, therefore, no electoral roll at all. In such a case mandamus would issue to compel the Statutory Authority to act according to law.

8. Similar view has been taken by the other High Courts, e.g., *Dev Prakash Balmukand Vs. Babu Ram Rewti Mal and Others*, , *Hariprasad Khadak Singh Vs. State of Madhya Pradesh and Others*, and, in fact, the point is covered by the Supreme Court decision in *Chief Commissioner, Ajmer Vs. Radhey Shyam Dani*, , where the Court upheld an order allowing a petition under Article 226, holding that no valid election to a Municipality could be held on the basis of an electoral roll, which had been prepared in contravention of the statutory provision, e.g., a provision which requires the adjudication of claims to be enrolled, after hearing objections thereon. The Court observed as follows:

It is of the essence of these elections that proper electoral rolls should be maintained; it is necessary that after the preparation of the electoral roll opportunity should be given to the parties concerned to scrutinise whether the

persons enrolled as electors possessed the requisite qualifications. Opportunity should also be given for the revision of the electoral roll and for the adjudication of claims to be enrolled therein and entertaining objections to such enrolment. Unless this is done, the entire obligation cast upon the authorities holding the election is not discharged and the elections held on such imperfect electoral rolls would acquire no validity and would be liable to be challenged at the instance of the parties concerned.

9. It may be added that it is not necessary for such challenge that the statutory provision in question has been violated in the case of every name on the electoral roll. As has been explained by Lord Denning in the Court of Appeal in the case of *R. v. Paddington Valuation Officer* (1965) 3 W.L.R. 426 (C.A.), if a mandatory provision of the statute has been violated, affecting the roll as a whole or a substantial part thereof, mandamus would issue. The principle laid down therein with respect to a valuation roll should also apply in the case of an electoral roll. The case of the Petitioners before me is that the violation of the statutory provisions and the principles of natural justice, in the instant case, goes to the root of the electoral roll or, at least, a substantial part thereof.

10. It has, secondly, been urged that the Court should in the exercise of its discretion refuse to interfere under Article 226 of the Constitution and that the Petitioners should be left to their statutory remedies. This contention is also unsound.

11. No doubt, in *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, the Supreme Court sounded a restrictive note against disturbing democratic institutions by interference under Article 226 where the statutory remedy by way of election petition has not been availed of and this decision has been followed by some High Courts even in relation to elections to local bodies. But, as has been pointed out by this Court repeatedly, the decision in *Ponnuswami's* case has no direct bearing upon elections held under local self-Government Acts, which are not governed by Article 329(b) of the Constitution. *Narendra Nath Chatterjee Vs. Commissioners of Bally Municipality*, *Nitya Gopal De Vs. The State of West Bengal and Others*, . Nor does the decision in *B.M. Ramaswamy Vs. B.M. Krishnamurthy and Others*, apply to the instant case for that decision rests on Section 30 of the Representation of the People Act, 1950, which has no bearing upon the case before me.

12. Apart from that the statutory machinery which is referred to in Section 529A of the Act before me is an appeal to the District Magistrate. But it is highly doubtful whether the Petitioners could get any relief from the District Magistrate in the circumstances of this case and on the grounds upon which the Petitioners rely in the instant proceeding, such as the vires of the Election Order, 1963. It may be pointed out in this context that the other remedy prescribed in Section 36 of the Act specifically excludes from its scope the cases of wrongful inclusion or exclusion of names into or from the electoral roll.

13. This preliminary objection, therefore, must fail.

14. Still another preliminary objection is founded on delay. It has, however, been pointed out to me that the Petitioners' prayer for certified copies of the impugned proceedings dated January 29, 1964, was first turned down by the Registering Authority and that it was only on February 13, 1964, that the copies were supplied and the Petitioners came to Court" on February 17, 1964, On behalf of the Respondents, however, it has been urged that the delay between November 12, 1963, the date of publication of the final roll, and January 29, 1964, has not been explained. But it is difficult to agree with this contention, because the materials on record do not lead to the conclusion that the Petitioners had actual knowledge of the impugned order at any earlier point of time than alleged by the Petitioners. Hence, this objection too must be rejected.

15. The first ground urged on behalf of the Petitioners is that Rule 9(3) of the West Bengal Commissioners of Municipalities (First General Election) Order, 1963 (hereinafter referred to as "the Order"), on the basis of which notice was admittedly issued against the Petitioners by post under certificate of posting, is ultra vires Sections 510 and 511 of the Act. The question arises in this way:

16. Rule 9(3) of the Order prescribes how notice is to be served upon the objector and the persons against whom the objection has been laid as regards the inclusion of any name in the preliminary electoral roll. It says:

Every such notice shall be in writing and shall be served....

(b) on the person against whom objection is taken under sub-paragraph (2) at the address of such person given in the objection.

Provided that a notice may be served by the Registering Authority by sending it to the person concerned by post under certificate of posting.

17. The Petitioners' contention is that the provision in the Order for service by post, in any case, is ultra vires the provisions of Section 510-511 which lay down the procedure for effecting service of notices etc., where service is required by or under the Act; and under these provisions of the Act service by post is permissible only in specified contingencies, so that the provision in the Order providing for service in any contingency is ultra vires.

18. While Section 510 deals with the case where service is required to be made upon a person as owner or occupier, Section 511 deals with other cases. In view of the provisions of Sub-rule (1) and (2) of Rule 9 of the Order, it seems that Section 511 is the relevant provision relating to the instant case. Nevertheless, the provisions of both Sections 510 and 511 may be examined:

(i) u/s 510, service by post is permissible under Clause (b) only where "the owner or occupier is not found".

(ii) u/s 511 service by post is permissible

(a) under Clause (b) "if such person is not found;

(b) under Clause (c) "if such person does not reside in the municipality and his address elsewhere is known to the Commissioners.

19. But the proviso to Rule 9(3) of the Order permits service by post at the first instance and, in any case or contingency, whether or not it comes within the foregoing Clauses of Section 510 or Section 511. In fact, none of the conditions specified in the sections existed in the instant case and nobody took the trouble of inquiring whether such conditions were present, because of the proviso to Rule 9(3). The proviso to Rule 9(3) of the Order must, therefore, be held to be ultra vires, unless saved by the provisions of Section 24(2) of the Act in pursuance of which the Order has been made by the State Government. This Sub-section of Section 24 says:

The State Government may issue such orders as it may consider necessary to give effect to the provisions of this Act in regard to the holding of the first general election referred to in Sub-section (1) and in regard to any matter incidental and ancillary thereto.

20. No authority is required to assert that neither the power "to give effect to the provisions of this Act" nor the ancillary power added to it can empower the State Government to override or modify the express provisions of the Act.

21. Nor can it be supported by the rule-making power of the Government u/s 44 or the like, because in exercise of the rulemaking power the provisions of the statute cannot be modified unless such power is conferred by the statute itself. No such power is conferred by this Act. On the other hand Clause (h) of Section 44 expressly says that the residuary power under that Clause can be exercised only where the Act is silent.

22. The next argument advanced by Mr. Roy on behalf of the Petitioners is that the impugned order of the Registering Authority, by which the names of the Petitioners were omitted from the final roll, is ultra vires the terms of the Order itself for several reasons:

(i) Para. 12 of the Order says:

On the date which is fixed for the hearing may be adjourned, the Registering Authority shall hold a summary inquiry into the claims or objections preferred after considering any evidence produced shall record orders without allowing or disallowing the claims or objections. For the purposes of the inquiry the preliminary electoral roll, as published, shall be presumed to be correct and complete until the contrary is proved.

It has been rightly contended by Mr. Roy that the points for decision before the Registering Authority were--

(a) whether the objection preferred by B.K. Mukherjee to the inclusion of the names of the Petitioners in the preliminary roll should be allowed;

(b) whether the statutory presumption of correctness of the preliminary electoral roll which included the Petitioners was rebutted by any evidence produced in support of the objection. Hence, even though the Petitioners did not appear or adduce any evidence on their behalf, the Registering Authority could not interfere with the preliminary roll unless he was satisfied that the presumption had been rebutted and that the entries against which the objections had been preferred had been wrongly made. Now, from the impugned order at annex. G-2 it is evident that the Authority did not take into consideration at all the statutory presumption and did not come to any finding that- the entries in the preliminary roll in question were wrong, or that the presumption was rebutted, B.K. Mukherjee, the objector, did not adduce any evidence before him and the sole basis of his order was the fact that "the parties to whom notices were served as per serial C above did not attend hearing though called so to do.

I agree with Mr. Roy that in this state of affairs, the impugned order must be held to be ultra vires para. 12 of the Order, and also vitiated by an error of law apparent on the face of the record.

23. Of course, the Authority made the impugned order in pursuance of the report at annex. G placed before him by Respondent No. 2, a subordinate of his, who recommended that the objection should be allowed. But this report does not improve the position of the Respondents in any way. Firstly, the Registering Authority in his order does not expressly rely on this report but simply reproduces the reason given in the report that the objection should be allowed ex parte solely because the persons against whom the objection had been preferred did not appear, "though notice under certificate of posting was issued to them". Incidentally, it may be pointed out that though the subordinate reported that the notices had been issued upon the Petitioners, the Registering Authority, without having further materials, recorded the finding that "notices were served" on the Petitioners. As the record stands, this only establishes in what perfunctory manner the Authority purported to perform his statutory function in a matter where so many persons were concerned. Be that as it may, the objector does not appear to have adduced any evidence before Respondent No. 2 or Respondent No. 1 of his objection.

24. I have no hesitation to hold that the impugned order at annex. G-2 must be struck down because it is ultra vires para. 12 of the Order. No attempt was made by the Statutory Authority to determine whether the Petitioners did in fact reside outside Ward No. 17 as alleged in the objection and did not even call for the other records of the Municipality or of the State Government which might throw light upon the question. It is needless for me to give elaborate reasons to reject the contention that the provisions of Rule 12, dealing with a quasi-judicial function (as I shall hold presently), should be construed as directory.

25. (ii) The impugned order is ultra vires also because of the contravention of para. 9(2) of the Order which says--

When objection is made to the inclusion in the preliminary electoral roll of the name of any persons recorded therein, the Registering Authority shall serve on such persons a notice stating the grounds of such objection and specifying the place and the time fixed for the hearing of such objection and notifying him that he may produce...such evidence as he may wish to adduce.

26. It is clear from para. 12 of the Order that it is the Registering Authority, and none else, who must hear the objection and make his order allowing or disallowing the objection after considering any evidence. The "hearing of such objection" referred to in para. 9(2) cannot mean hearing of such objection by any person other than the Registering Authority and the notice issued upon the party affected by the objection must specify the place and date of hearing before the Registering Authority. But in the instant case, the notices in annex. E show that the notice specifies that hearing shall be before Respondent No. 2 and at 3 p.m. on October 18, 1963. From annexes. G-1 and G-2 it appears that the objection was placed before the Registering Authority on October 20, 1963, and that he adjourned the hearing for looking into the certificates of posting and the text of the Order and that eventually he made the impugned order on October 21, 1963. No notice was, however, issued upon the Petitioners to appear before the Authority either on October 20 or October 21. Hence, even it were conceded for the time being that the words "summary inquiry" in para. 12 enabled the Authority to have an inquiry made by a subordinate officer and the notices in annex. E series gave to the Petitioners notices of such inquiry, there was no notice served upon the Petitioners for the hearing to be made before the Registering Authority and what the latter did was done without issuing the notice required by para. 9(2) and also para. 10 of the Order.

27. The impugned order must, therefore, be held to be ultra vires or without jurisdiction on this account as well.

28. (iii) The third argument of Mr. Roy is that the Order does not confer upon the Registering Authority any power to delegate his duty of hearing objections to any other persons and that, accordingly, the inquiry by Respondent No. 2, the report of the latter and the impugned order of the Registering Authority, solely founded on that report, are ultra vires.

29. This argument too must be upheld because, even if it were contended on behalf of the Respondents that the words "summary inquiry" were wide enough to enable the Registering Authority to take the assistance of a subordinate, the answer would be that the Order itself makes provision for such assistance where it is contemplated by the Order, e.g., in para. 4, which has been relied upon on behalf of the Respondents. There is no such provision in paras. 11-12 which expressly provide what has to be done in deciding an objection. On the other hand, para. 11 requires the Chairman and other officers of the Municipality to "render necessary assistance to the Registering Authority in the discharge of his duties". There is no mention of any subordinate of the Registering Authority in this behalf. That the hearing of the objection must be made by the Registering

Authority personally and on the basis of evidence produced before himself, and not some other person, is made clear by the Order by more than one of its provisions, e.g.,

(a) Para. 10: The Registering Authority shall cause to be published...a notice showing generally the dates on which and the places at which he shall sit for hearing claims and objections.

(b) Para. 11: The Registering Authority shall dispose of all claims and objections.

(c) Para. 12: On the date which is fixed for the hearing...the Registering Authority shall hold a summary inquiry...and after considering any evidence produced shall record orders....

30. The notices at annex. E series which asked the persons affected to appear before Respondent No. 2 and to produce evidence before him, on the threat that in case of non-appearance "an ex parte decision will be taken"--presumably by the person who issued the notice--the report submitted by Respondent No. 2, recommending an ex parte decision and the impugned order of the Registering Authority solely on the basis of that report, without even requiring the Petitioners to appear before him or notifying that the objection will be heard by himself, are thus clearly ultra vires the provisions of paras. 10-12 of the Order.

31. Apart from being vitiated on the ground of ultra vires the delegation of the function of hearing the objection to Respondent No. 2 by the Registering Authority and making an order without requiring the parties to appear before him and to lay evidence in support of or in opposition to the objection, constitute a refusal to exercise his statutory jurisdiction and duty to hear on the part of the Registering Authority for which mandamus would lie.

32. The fourth argument of Mr. Roy is that the Registering Authority had a quasi-judicial obligation in the matter of hearing the objection and that, he having acted in contravention to the principles of natural justice, his impugned decision is void.

33. The first question is, whether the function of the Registering Authority under para. 12 of the Order is a quasi-judicial function.

34. I am inclined to hold in the affirmative upon a number of considerations:

(i) One of the tests for imputing a quasi-judicial obligation upon an administrative authority is the existence of a *lis inter partes*. This has been established in England in cases like *Errington v. Minister of Health* (1935) 1 K.B. 249 (271), *R. v. Brighton Rent Tribunal* (1950) 1 A.E.R. 946 and in our country in the observations of Das J. in *Province of Bombay Vs. Kusaldas S. Advani and Others*, , which have been followed in subsequent cases, such as *Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others*, , *Radeshyam Khare and Another Vs. The State of Madhya Pradesh and Others*, and *Shivji Nathubhai Vs. Union of India (UOI) and Others*, . The

observations of Das J. in *Province of Bombay Vs. Kusaldas S. Advani and Others*, are illuminating:

...If a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a *lis* and *prima facie* and in the absence of anything in the statute to the contrary, it is the duty of the authority to act judicially and the decision of the authority is a judicial act.

It must be noted that, in the instant case, an objection having been preferred by a person to the inclusion of another's name in the preliminary electoral roll the Registering Authority is to decide the *lis* or dispute between the objector and the other person as to whether the name of the latter shall remain on the electoral roll. There is nothing in the Order to exclude quasi-judicial duty expressly. On the other hand, the provisions for hearing, notice, evidence etc., already referred to, confirm the quasi-judicial obligation arising from the *lis*. The decision, accordingly, is stamped with the quasi-judicial obligation.

(ii) The express provisions of para. 12 itself also lead to the same conclusion: The Registering Authority is required to decide the dispute not upon his subjective considerations but upon such evidence as may be produced, and he cannot make any decision contrary to the entry in the preliminary roll unless and until the contrary is "proved".

(iii) The functional test is also satisfied. It has been established since the celebrated opinion of Holt, C.J. in the case of *Ashby v. White* (1703) 2 Ld. Raym. 938, which was upheld by the House of Lords (1704) 1 BPG. 62 (H.L.), that to deny a man his right to vote is to deny him a right of property for which a cause of action lies before the Courts of law. To delete from the preliminary roll the name of a person already recorded therein, therefore, constitutes a deprivation of property; which can be done by a Statutory Authority only in a quasi-judicial manner: *Cooper v. Wandsworth Board* (1863) 14 C.B. (N.S.) 180, *Smith v. Queen* (1878) 3 App. Cas. 624.

35. I have no doubt in coming to the conclusion that whatever might be the nature of the other functions of the Registering Authority under the Order, his function of hearing the objection under para. 12 is of a quasi-judicial nature. It follows, therefore, that in performing his function under para. 12 of the Order, the Registering Authority must comply with the principles of natural justice and this the Respondent No. 1 has failed to do in more than one respects:

(a) By omitting to notify to the parties affected of the date and place of hearing before himself.

(b) By acting solely upon the report of another person vide *Bombay Municipal Corporation Vs. Dhondu Narayan Chowdhary*, , *R. v. Barry* (1953) 2 A.E.R. 1005 (1007), *Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road*

Transport Corporation and Another, .

(c) By deciding without evidence against a statutory presumption.

36. In view of my above findings it is not so much necessary to come to a finding as to whether the Petitioners were in fact residents of Milanpalli or of different other places as mentioned in the notices at annex. E, for, even if these notices were served, it gave no notice to the Petitioners of the time and place of the hearing before the Registering Authority whose duty it was, under the Order, to hear the dispute.

37. Nevertheless, I may point out the evidence on the record as to the Petitioners not being residents of Milanpalli, as urged in the objection of Respondent No. 4, is one-sided and in favour of the Petitioners:

(a) The objector adduced no evidence as to the Petitioners' residence outside Ward No. 17 before either Respondent No. 1 or 2.

(b) Respondent No. 1, who has filed affidavit on behalf of himself and Respondent No. 2, states that he has no personal knowledge as to whether the Petitioners are residents of Ward No. 17 or not (para. 4).

(c) In para. 1 of the petition the Petitioners state that they are residents of Milanpalli which is within Ward No. 17, and in para. 7 a list of two of the Petitioners is given (annex. E) who own pucca residential buildings at Milanpalli. There is no effective denial of these statements in the affidavit of Respondent No. 1, and not even in the affidavit of Respondent No. 4, on whose objection the impugned order has been made.

38. Curiously, the Municipal Chairman, who has filed a counter-affidavit, makes the statement that it is not possible to trace out the residences of the Petitioners because they have not given their fathers' names. This seems to be a lame excuse because annex. I to this counter-affidavit, namely, a copy of the assessment list of the Municipality, does not contain fathers' names. It is too much to believe that the Municipality could not trace out the residence of as many as 214 persons who were entered in the preliminary roll in the due course of official business. The riddle of "Rampratap Agarwala" (para. 11 of the counter-affidavit of Respondent No. 5) is also dispelled by para. 17 of the affidavit-in-reply of the Petitioner where it is stated that Rampratap Agarwala is the brother of Joynarayan Agarwala, the Petitioner, and that they are joint owners of the building in question which is admittedly within Ward No. 17.

39. Further, Petitioners have on their side the affidavit of P.K. Basu, one of the sitting Commissioners of the Municipality, who says that the Petitioners are known to him as residents of Ward No. 17 and that some of these are his neighbours, including Petitioner No. 1, who is an Advocate at Siliguri.

40. In fact, the affidavit of the Municipal Chairman itself demolishes the objection raised by Respondent No. 4. The objection petition which is at annex. D

categorically states that none of the Petitioners lives within Ward No. 17 and the notice issued by Respondent No. 2 at annex. E is that "he (the Petitioners individually) does not live in the Ward", which is mentioned as Ward No. 17. It is curious, however, to note that the notices at annex. E series mention Khalpara, Ganganagar and the other places specified in the objection petition as included in Ward No. 17 itself and in para. 10 of his counter-affidavit, the Municipal Chairman says:

As already stated, the old Ward No. 1 has been split up into three Wards being Nos. 16, 17 and part of Ward No. 18; parts of Khalpara and Ganganagar are included in Ward No. 17 and the address of all the addressees was given in Ward No. 17.

41. After this, it is hardly open to contend, as the objector did, that the Petitioners are not residents of Ward No. 17, whether the locality at which they reside be called Milanpalli, Khalpara, Ganganagar or the like. But nothing herein stated will preclude the Registering Authority from determining the objections in question upon the evidence that may be adduced before him and according to law.

42. In fine, it cannot be held that the final electoral roll in question is invalid not only because of the invalidity of Rule 9(3) of the statutory Order under which the objections were disposed of Reading to the omission of the Petitioners therefrom, but also because of the contravention of various other provisions of the Order in arriving at that decision. Such an electoral roll cannot form the basis of a valid election under the law as held in Radheshyam's case Supra.

43. In the result, the proper order should be as follows: The election which was allowed to be held by permission of the Court while issuing the Rule nisi on condition that the results thereof should not be published, must be quashed with respect to Ward No. 17. The impugned order at annex. G-2 of the petition should also be quashed. Respondents 1 and 6 shall, however, be at liberty to hold a fresh election of Ward No. 17 after the preparation of a fresh final electoral roll according to law. In case Respondent No. 4 pursues his objections against the Petitioners, Respondent No. 1 shall start with a fresh service of the objections upon the Petitioners, in accordance with the provisions of the Act, and then hear and determine the objections according to law, as explained herein.

44. The Rule will be made absolute on these terms. Petitioners will get their costs from Respondents 1 and 4, assessed at 5 gold mohurs.