
(2012) 06 MAD CK 0134
In the Madras High Court
Case No : O.O.J.E.P. No. 6 of 2009

K. Kalaimani

APPELLANT

Vs

Mathiarasan S. and Others

RESPONDENT

Date of Decision : 13-06-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 6 Rule 16, Order 6 Rule 17, Order 7 Rule 11, Order 8 Rule 3
Constitution of India, 1950 — Article 136, 14, 324
Representation of the People Act, 1950 — Section 16
Representation of the People Act, 1951 — Section 100, 100(1)(c), 100(1)(d)(i), 101, 10A

Citation : (2012) 4 CTC 43 : (2012) 4 MLJ 865

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Advocate : K. Shaktivel, for the Appellant; T.S. Venkatesh, BSG Firm and M.R. Raghavan, for the Respondent

Final Decision : Allowed

Judgement

V. Dhanapalan, J.—This Election Petition has been filed, praying for a declaration that the rejection of nomination of the petitioner filed for 197-Ilayangudi Assembly Constituency, Tamil Nadu, by the Returning Officer, is improper, illegal, void and contrary to the provisions of the Representation of the People Act, 1951, and the Returning Officer's instructions, 2009, issued by the Election Commission of India, and to set aside the entire election process including the election of first respondent as returned candidate. The case of the petitioner goes thus:

1.1. Election Commission of India, in short, "ECI", announced and notified the poll schedule on 16.7.2009 for by-elections to Tamil Nadu Legislative Assembly for 78 Bargur, 103 Thondamuthur, 134 Kambam, 197 Ilayangudi and 226 Srivaikundam Assembly Constituencies. The date of filing nomination was on 22.7.2009; last date for filing nomination was on 29.7.2009; scrutiny of

nomination was on 30.7.2009; last date of withdrawal was 1.8.2009; date of election was 18.8.2009 and the date of counting of votes and declaration of result was on 21.8.2009.

1.2. Petitioner filed his nomination with the Returning Officer of 197-Ilayangudi Constituency as duly nominated candidate of Makkal Manadu Katchi, which is a registered party with ECI, under the provisions of the Representation of the People Act, 1951, in short, "the Act". He popularised the object of his party among the voters of 197-Ilayangudi Constituency and he had high hopes to secure the maximum number of votes in the scheduled by-election. His party also, recognising his work, nominated him as a party candidate and he was asked to file the nomination paper with the Returning Officer of the constituency. He filled up the nomination form in accordance with the rules and submitted the same with the Returning Officer on 27.7.2009. At the time of filing the nomination, the Returning Officer or his subordinates did not make any preliminary enquiry upon perusing the nomination paper or about the basic details mentioned thereof as indicated in the Hand Book of Returning Officers, issued by ECI. The following persons proposed the petitioner in his nomination, whose names admittedly find place in the electoral rolls prepared under the relevant enactment under the supervision of ECI:

1. Sethu, S/o. Sadayandi
2. Ambalam, S/o. Sellam
3. Thangasami, S/o. Ramanathan
4. Manimaran, S/o. Ganesan
5. Vijayarangam, S/o. Dhana Karuppu Udayar
6. Chockalingam, S/o. Ponnusamy
7. Kalaichandran, S/o. Chockalingam
8. Krishnan, S/o. Karuppaiah
9. Shanmugam, S/o. Chellaiah
10. Malai Raju Thevar, S/o. Muniyandi.

1.3. Petitioner requested for the Electoral Roll of 197-Ilayangudi Constituency for verification of entries of the serial numbers of the proposers with the Returning Officer, who did not provide the same but informed that any discrepancy in the serial number could be rectified and necessary intimation also would be given in this regard at the time of scrutiny as per Section 36 (4) of the Act. His party also submitted Forms A and B with the Chief Electoral Officer on 29.7.2009 in compliance with its instructions, dated 17.7.2009.

1.4. On the date of scrutiny, namely, 30.7.2009, the petitioner developed a sudden asthmatic problem on account of prolonged traveling and canvassing in

the said constituency and hence he had to rush for immediate medical treatment at Saligramam Hospital, Ilayankudi. He, to avoid any technical objections, asked his representative viz., Arulmozhi to represent him before the Returning Officer during the time of scrutiny and asked him to clarify the doubts, if any, regarding his nominations. He issued necessary authorisation letter to the said Arulmozhi. When he was undergoing treatment at 11.00 a.m., he was informed that his representative was not permitted to enter the office of the Returning Officer under the pretext of not possessing authorisation letter. He was further orally informed by his party members that the Returning Officer, in spite of the authorisation letter being shown by his representative, not only refused to entertain him to clarify the serial number discrepancies but also his nomination was rejected. Despite his bad health condition, the petitioner contacted the Returning Officer over phone around 11.10 a.m. and the Returning Officer instructed the petitioner to come over to his office to set right the small issue appeared to have figured relating to serial numbers of three proposers mentioned in the nomination papers. The Returning Officer, however, did not reveal the details like names, serial numbers etc. to the petitioner. There were no other objections whatsoever concerning the details mentioned in the nomination and there was no dispute relating to the identity of the proposers also.

1.5. Upon receipt of oral instructions from the Returning Officer, the petitioner reached the office of the RO around 12.30 p.m., but, to his shock and surprise, the RO had already left his office and returned only around 3.30 p.m. on 30.7.2009. The petitioner pointed out and identified the correct serial numbers of the proposers with the Returning Officer and requested him to accept the nomination. He also preferred a representation in this regard.

1.6. Even though the petitioner was orally informed that his nomination was rejected, in reality, no such order was given to him on 30.7.2009. His repeated requests to the RO to pass orders did not yield any result. The indifferent attitude of the RO prompted the petitioner to request the party leader at Chennai to make a necessary representation with the Chief Electoral Officer and requested them to initiate necessary steps against the Returning Officer at Ilayangudi. His party also preferred a representation dated 1.8.2009 to ECI at New Delhi by fax and post. As there was no effective response from the authorities responsible for conducting the elections and as the petitioner could not reach Chennai to initiate further legal action, his party, through its Secretary, with the instructions of the petitioner over phone, filed W.P. No. 15308 of 2009 before this High Court for issuance of a writ of mandamus, directing the respondents named therein to accept the nomination of the petitioner in 197 Ilayangudi Constituency. This High Court dismissed the Writ Petition on a technical ground that the petitioner's party cannot challenge the rejection of nomination papers of the petitioner. Aggrieved by portions of the said order, the petitioner's party preferred W.A. No. 1106 of 2009 and similarly the ECI, New Delhi; the Chief Electoral Officer, Chennai; and the Returning Officer preferred W.A. No. 1142 of 2009. A Division Bench of this Court, by its judgment dated

17.8.2009, while dismissing W.A. No. 1106 of 2009 preferred by the petitioner's party, held in W.A. No. 1142 of 2009 that it was open to the candidate himself to take steps after the results of the election were declared. Hence, the petitioner has filed this Election Petition, on the ground that the Returning Officer had improperly rejected his nomination without passing any orders in terms of the provisions of the Act, Rules and the instructions issued by ECI.

2. First respondent/returned candidate has filed a counter affidavit, stating as follows:

2.1. He was elected from 197-Ilayangudi Assembly Constituency, Tamil Nadu, in the by-election conducted on 18.8.2009. The election petitioner has contested the election as an independent candidate and he does not belong to any recognized political party. The nomination form was not filled up by the petitioner in accordance with the rules. There is no reference in which electoral roll of the Assembly Constituency the names of the proposers are found. No details were given about the serial number in the electoral roll or in the nomination form and particularly when it is not disclosed whether all the 10 proposers are from Ilayangudi Assembly Constituency. He has nothing to do with the dispute in question and it is between the petitioner and the Returning Officer. Neither the petitioner nor his authorised agent attended the scrutiny. There are defects in the nomination paper filed by the election petitioner and they are not minor discrepancies. The election petitioner cannot expect the RO to scan through the entire electoral roll and suo motu rectify the defects in the absence of the election petitioner or his authorised agent at the time of scrutiny. It is not a curable defect and it is the duty of the election petitioner to attend the scrutiny to assist the Returning Officer. The Returning Officer's Handbook cannot override the Act and the Rules. Even assuming that any directions are given, it is never stated that they are mandatory on the part of the RO to take upon the responsibility to correct the errors and discrepancies in the nomination paper even in the absence of the election petitioner or his authorised agent. There is no failure on the part of the Returning Officer either at the time of presentation of nomination paper or at the time of scrutiny and he discharged his duty only as per law. The discrepancy between the serial numbers of the proposers in the electoral roll and the nomination form is of substantial character because the election petitioner is not set up by a recognised political party and he is only an independent candidate. Re-scrutiny cannot be ordered in this case as the petitioner has not filed any representation. The issue involved in Bargur and Srivaikundam Assembly Constituencies was different, as the election petitioners therein were present in the scrutiny. There is no arbitrary exercise of power by any authority and re-scrutiny cannot be ordered as claimed by the election petitioner.

2.2. This respondent, who was set up by a recognized political party, won the election and challenging the said election and unnecessarily dragging this respondent for a trial will undermine the ethos of democracy. There is no

instruction by any authority making the RO to scrutinise the nomination paper on his own to find out the defects and then rectify the same. If the election petitioner or his authorised agent failed to attend the scrutiny, all the references in the Handbook and the Sections in the Act are of no use to the petitioner. Therefore, the rejection of the nomination paper by the RO is not arbitrary and illegal but is perfectly justified. No role is played by this respondent in rejection of the nomination of the election petitioner by the Returning Officer. The Election Petition itself has become in fructuous, as the term of the 13th Assembly has already been over and new Tamil Nadu Legislative Assembly (14th Assembly) has been constituted in May, 2011. Even assuming that whatever stated by the election petitioner is correct, the election of this respondent cannot be set aside when no fault is attributed to him in the entire process,

3. The quintessence of the contention of Mr. K. Sakthivel, learned counsel for the election petitioner, is that the rejection of nomination of the petitioner by the Returning Officer was arbitrary and non est in law and, therefore, the election of the first respondent/returned candidate has to be set aside. He would also contend that the petitioner was not communicated the order of rejection with cogent reasons, in spite of repeated requests. He would cite the following authorities:

(i) Hira Singh Pal Vs. Madan Lal,

7. That, however, is not the end of the matter. All that we have to consider in this appeal is whether the Returning Officer was right in rejecting the nomination of the respondent. 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 21.1.1967, he has 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 has 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 u/s 36 and the same is a ground for setting aside the election u/s 100 of the Representation of the People Act.

(ii) Jagannath Ramchandra Nunekar Vs. Genu Govind Kadam and Others,

11. The Returning Officer, who commenced the scrutiny of the nomination paper at 11 a.m. on 11.1.1986 proceeded to reject the nomination paper of the appellant on the ground that the certified copy of the relevant entry in the electoral roll could not be treated as a certified copy of an electoral roll which was in force at that time. Under the proviso to Section 36(5) of the 1951 Act, it is 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. "The Returning Officer did not choose to wait even for a few hours on 11.1.1986 before the Returning Officer, even before the final list of candidates, who had filed valid nomination papers, was published on the notice board. The Returning Officer had acted on his own information in rejecting the nomination paper of the appellant, namely, that there was a revision in 1985 and that the certified copy which had been produced was from an electoral roll which had become defunct. If that was so, he should have secured the necessary material from the concerned Electoral Registration Officer and placed it before the appellant before rejecting the nomination paper.

12. It is no doubt true that the electoral right is a statutory right and a person who wishes to contest an election should comply with the law applicable to elections strictly. But in the instant case, we find that there is no default at all on the part of the appellant. He had actually produced before the Returning Officer a certified copy which he had obtained within less than 24 hours from the Electoral Registration Officer of the constituency where he was residing and that he had not done anything to mislead the Returning Officer. Unless the certified copy produced before the Returning Officer itself on the face of it showed that the electoral roll from which a certified copy had been prepared had been substituted by another electoral roll, the Returning Officer was not justified in not treating the production of the certified copy prepared on 8.1.1986 as sufficient compliance u/s 33(5) of the 1951 Act particularly having regard to the close proximity between the date of preparation of the certified copy and the date of the production of the certified copy. In the circumstances, unless there was any evidence to the contrary the Returning Officer should have treated the certified copy produced before him as a certified copy of the electoral roll for the time being in force of the constituency to which it is related. It is clear from the evidence of the Tahsildar that there was no other roll which had taken the place

of the supplement in which the name of the appellant had been entered. Even the second copy supplied on 10.1.1986 had been prepared from the same supplement. Both the first certified copy and the second certified copy were copies of the same original. Sub-section (7) of Section 36 of the 1951 Act lays down a rule of evidence. It says that a certified copy of an entry in the electoral roll for the time being in force of a constituency shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency, unless it is proved that he is subject to a disqualification mentioned in Section 16 of the 1950 Act. In the absence of any such objection on the part of any other candidate or any information which the Returning Officer may have had with regard to the disqualification of the appellant, the Returning Officer should have in the circumstances of this case proceeded to accept the certified copy produced along with the nomination paper and acted upon it. We hold that the certified copy produced along with the nomination paper and acted upon it. We hold that the certified copy produced along with the nomination paper satisfied the requirement of Section 33(5) of 1951 Act.

13. We are of the view that in the circumstances the appellant who was an innocent person has been denied the right to contest the election unreasonably. We hold that the rejection of the nomination paper of the appellant was improper. It follows that the election of respondent 1 should be declared void in view of the provisions contained in Section 100(1)(c) of the 1951 Act. We, therefore, allow this appeal, set aside the judgment of the High Court and declare the election of respondent 1 to the Maharashtra Legislative Assembly from Jaoli constituency void.

(iii) Rakesh Kumar Vs. Sunil Kumar,

19. The Election Commission of India has issued instructions in exercise of its statutory functions. Those instructions are contained in the Hand Book for Returning Officers. Chapter VI of the Handbook deals with scrutiny of nomination papers by the returning officer. The learned single Judge of the High Court has referred to various provisions of the instructions and has rightly come to the conclusion that the Re-turning Officer did not follow those instructions while scrutinising the nomination papers, thereby adopting a wrong procedure. We agree with the view of the High Court in that behalf. We are unable to persuade ourselves to agree with the submission of Mr. Mishra that the returning officer was justified in rejecting the nomination paper of the respondent for non-compliance with the requirements of Section 33(1), as amended, without any further enquiry. The argument overlooks the proviso to Section 36(5) of the Act as well as the instructions issued by the Election Commission of India Through Secretary Vs. Ashok Kumar and Others, . The legislature in its supreme wisdom did not amend the proviso to Section 36(5) of the Act after Section 33(1) was amended in 1996, thereby clearly exhibiting its intention that the said proviso was required to be given its full effect, more particularly because the duty which a returning officer performs while scrutinising the nomination papers is quasi

judicial in character, even after Section 33(1) had been amended.

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.

20. 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. Since, no other candidate had raised any objection to the claim of the respondent of being the official candidate of BJP, and the objection had been raised by the Returning Officer suo motu, the mandate of 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.

(iv) Election Commission of India v. Ashok Kumar and Others (supra)

13. Article 324 of the Constitution contemplates constitution of the Election Commission in which shall vest the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the legislature of every State and of elections to the officers of President and Vice-President held under the Constitution. The words "superintendence, direction and control" have a wide connotation so as to include therein such powers which though not specifically provided but are necessary to be exercised for effectively accomplishing the task of holding the elections to their completion.

28. Election disputes are not just private civil disputes between two parties. Though there is an individual or a few individuals arrayed as parties before the Court but the stakes of the constituency as a whole are on trial. Whichever way the lis terminates it affects the fate of the constituency and the citizens generally. A conscientious approach with overriding consideration for welfare of the constituency and strengthening the democracy is called for. Neither turning a blind eye to the controversies which have arisen nor assuming a role of over enthusiastic activist would do. The two extremes have to be avoided in dealing with election disputes.

(v) Ram Bhual Vs. Ambika Singh,

8. The decisions relied on by the learned counsel in Mohammad Zahoor Ali Khan

v. Mussumat Thakooranee Rutta Koer and Others (11 Moores Indian Appeals 468), and Secretary of State for India in Council v. Laxmibai and Another (50 Indian Appeals 49) that the pleadings in Muffassil Courts in our country are loosely drafted and a liberal construction has always to be given to such pleadings, cannot help the appellant. Here is a case of no pleading at all. How far the principles of those decisions can be applied to a High Court like the High Court of Allahabad, one of the chartered High Courts of this Country and that too, more than 50 years after independence, need not be answered in this case. This Court in Badat and Co. Vs. East India Trading Co., after referring to Order 8, Rules 3 and 4 of the Code of Civil Procedure, 1908, held that this construction of pleadings would not apply to the Original Side of the High Court of Bombay. But in any election petition, it is well settled by the decisions of this Court, that pleadings are very important and they, in fact, play a large part in adjudications arising under the Representation of the People Act, 1951. In Sushil Kumar Vs. Rakesh Kumar, this Court stated, "The pleadings in an election petition must likewise be construed strictly." Therefore, the attempt of learned counsel for the appellant to gloss over the failure to the appellant to deny the relevant and crucial allegations in the election petition, cannot succeed. The fact is that the pleadings as regards what transpired before the Returning Officer at the time of scrutiny of nominations remain un-rebutted in the pleadings of the appellant. The pleadings in the election petition also stand supported by the oral evidence of P. W. 1 and P. W. 2, in the light of the oral evidence of the appellant as R. W. 1 in which not even an attempt is made to deny the facts spoken to by P.W. 1 and P.W. 2. It is clear from Section 36(4) of the Act that the Returning Officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character. Section 33(4) of the Act provides that on the presentation of a nomination paper, the Returning Officer has to satisfy himself that the names and the 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. The proviso thereto clearly provides 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 with respect to such person or place and in a case where there was an error in the nomination paper in regard to the description, he shall direct that the same be corrected and he could even overlook such errors. It is in the context of the proviso to Section 33(4), that the case set up by the appellant, Sita Ram drawing the attention of the Returning Officer to the defect being only an error in the serial number and that Sant Lal, the ninth proposer, was actually at Serial No. 352 on the same page of the Voters' list assumes great significance. It is a minor defect which obviously should have been got corrected by the Returning Officer even while accepting the nomination and certainly he could not have rejected the nomination on the ground in the light of Section 36(4) of the Act. At the risk of repetition, we may

mention that there is no case for the appellant that Sant Lal was not the voter shown at Serial No. 352 in Part 91 of the Voters' list.

(vi) Anil Baluni Vs. Surendra Singh Negi,

19. Shri Mohta has also submitted that the result of the election should not be lightly interfered with and the election petitioner must lead strong and cogent evidence to establish his case for setting aside the election of a returned candidate. This principle is not of universal application. This is not a case where the election petition may have been filed on the ground of corrupt practice or improper acceptance or rejection of ballot papers or any error in counting of votes. The election petition has been filed on the ground that the appellant's nomination papers had been improperly rejected, which is a ground contemplated by Section 100(1)(c) of the Act. In such a case, the only issue before the Court is to examine the correctness and propriety of the order by which the nomination papers of a candidate are rejected and the scope of inquiry is limited to the said consideration.

(vii) Uttamrao Shivdas Jankar v. Ranjitsinh Vijaysinh Mohite-Patil CDJ 2009 SC 1105: LNIND 2009 SC 1318:

25. The Returning Officer is a statutory authority. While exercising his power u/s 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 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. In *N.T. Veluswami Thevar v. G. Raja Nainar and Others* (1959) supp 1 SCR 623, this Court held:

Under Section 32 of the Act, any person may be nominated as a candidate for election if he is duly qualified under the provisions of the Constitution and the Act. Section 36(2) authorises the Returning Officer to reject any nomination paper on the ground that he is either not qualified, that is, under Sections 3 to 7 of the Act, or his disqualified under the provisions referred to therein. If there are no grounds for rejecting a nomination paper u/s 36(2), then it has to be accepted, and the name of the candidate is to be included in a list vide Section 36(8). Then, we come to Section 100(1)(c) and Section 100(1)(d)(i), which provide a remedy to persons who are aggrieved by an order improperly rejecting or improperly accepting any nomination. In the context, it appears to us that the improper rejection or acceptance must have reference to Section 36(2) and that the rejection of a nomination paper of a candidate who is qualified to be chosen

for election and who does not suffer from any of the disqualifications mentioned in Section 36(2) would be improper within Section 100(1)(c), and that, likewise, acceptance of a nomination paper of a candidate who is not qualified or who is disqualified will equally be improper u/s 100(1)(d)(i).

(viii) Ramesh Rout Vs. Rabindra Nath Rout,

78. The election petitions, as noticed above, in Ground 5(E) set up the case that the objection of non-filing of original Forms A and B signed in ink by the authorised officer of the party was not raised by any of the contesting candidates or any person on their behalf present at the time and place of scrutiny. It was the Returning Officer who raised the issue of non-filing of original Forms A and B but he refused minimum opportunity to the election petitioner to rebut the same. In our view, the Returning Officer ought to have acted in terms of the proviso to Section 36(5) of the 1951 Act and afforded an opportunity to the election petitioner until next day to rebut the objection and show to the Returning Officer that the proposed candidate had filed Forms A and B duly signed in ink by the authorised person of BJD. P.W. 3, the authorised representative of the election petitioner did state in his evidence that he requested to the Returning Officer, when he raised the objection that original Forms A and B were not filed, to enquire into the matter about the missing Forms A and B. It was not necessary to state in the election petition the evidence of P.W. 3 in support of Ground 5(E).

79. The proviso that follows sub-section (5) of Section 36 of the 1951 Act provides 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.

80. In Rakesh Kumar v. Sunil Kumar, this Court held in para 21 as under:

27. ...The use of the expression "not later than the next day but one following the date fixed for scrutiny" under the proviso to sub-section (5) of Section 36 of the Act unmistakably shows that the Returning Officer has been vested with the discretion to fix time to enable a candidate to rebut an objection to the validity of his nomination paper and such a discretion has to be fairly and judicially exercised. The refusal to grant an opportunity to the respondent and rejecting his nomination paper was clearly an arbitrary exercise of the discretion vested in the Returning Officer. The Returning Officer has also not given any cogent reasons for his refusal to grant an opportunity as prayed for by the respondent. The Returning Officer appears to have been labouring under some misconception when he recorded that the political party "cannot be given further time to change such authorisation after scrutiny". Under the proviso to Section 36(5) of the Act, the scrutiny itself would have been postponed to the adjourned time and, therefore, it was not a case of meeting the objection after scrutiny of the

nomination papers. The failure to exercise his jurisdiction to postpone the decision as to the validity of the nomination paper of the respondent even after the respondent had sought time to meet the objection indeed rendered the rejection of the nomination paper of the respondent as both improper and illegal. The Returning Officer is not expected to reject a nomination paper without giving an opportunity to the candidate or his representative and no one present on behalf of the other candidates had opposed the claim made by the respondent. Having raised the objection suo motu, the request of the respondent who was present and sought time in writing to seek clarification from the BJP as to who was its official candidate, the Returning Officer in all fairness was obliged to grant time to the respondent as prayed for by him and postpone the scrutiny to the next day but he ought not to have rejected his nomination paper in hot haste. The Returning Officer, obviously, failed to exercise his jurisdiction u/s 36(5) of the Act properly and thereby fell in a grave error in rejecting the nomination paper of the respondent.

4. Conversely, Mr. T.S. Venkatesh, learned counsel for first respondent, would contend that it is not the case of the petitioner that the election of first respondent is to be set aside on charges of corruption and as far as the rejection of nomination of the petitioner, the first respondent is in no way connected and, therefore, it is not proper for the petitioner to array the first respondent as a party to the Election Petition.

5. Mr. M.R. Raghavan, learned counsel for tenth and eleventh respondents, would argue that the election petitioner was not present at the time of scrutiny; in the absence of the petitioner or his authorised agent and in view of the defects in the nomination papers, the Returning Officer had no other option but to reject the nomination of the petitioner and, therefore, the rejection of nomination of the election petitioner by the Returning Officer was proper and in accordance with law and, as such, it cannot be interfered with. Both Mr. T.S. Venkatesh and Mr. M.R. Raghavan would rely upon the following decisions:

(i) Mathura Prasad Vs. Ajeem Khan,

8. As already mentioned above, the learned single Judge himself did not accept the story as put forward by the petitioner Ajeem Khan, rather it was held that the entire story narrated by him was a fabrication and the same deserved to be rejected outright. The Returning Officer who was an independent witness and Jaiprakash who was a proposer of Ramprakash were believed and it was held that the entire circumstances under which the nomination paper of Ramprakash came up for scrutiny and was rejected were correct. Thus a perusal of the circumstances put forward by these witnesses at the time of scrutiny and rejection of the nomination paper of Ramprakash show that Ramprakash himself was not present and even his proposer Jaiprakash after having gone to fetch Ramprakash did not return back and ultimately the Returning Officer rejected the nomination Officer rejecting the nomination paper of Ramprakash clearly makes a mention that the candidate was not identified as per electoral roll. His

representative had accepted the mistake also and was advised for correction, but did not correct the same. The candidate did not correct after advising to correct the mistake. It further makes a mention that the candidate even did not appear at the time of scrutiny to correct the mistake. In the circumstances mentioned above, we have no hesitation at all in holding that the Returning Officer was perfectly justified in rejecting the nomination paper of Ramprakash. 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. It is correct that 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 is 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.

12. The High Court considered the question as to whether the nomination paper of Dog Ram was improperly rejected. On the evidence led by the parties, the single Judge found that the candidate Dog Ram and his proposer were registered as voters in the constituency and were qualified to contest the election and propose the candidate respectively. It was further found that errors in regard to electoral roll numbers of the candidates and the proposer in the electoral roll and the nomination paper do not constitute defects of a substantial character as mentioned in the proviso to Section 33(4) of the Act. Learned single Judge accepted the evidence of the proposer (P.W. 2) to the effect that when he and the candidate presented the nomination paper, the Returning Officer told them that it was in order and that Returning Officer had tripped them into an error and if the Returning Officer had told them that there were some discrepancies in the nomination paper they would have either made corrections then and there and could have gone more fully prepared to make objections at the time of the scrutiny. The High Court in these circumstances allowed the election petition on the ground that the nomination paper of Dog Ram was improperly rejected.

13. On appeal to this Court by the elected candidate, it was held that the Returning Officer could not be said to have improperly rejected the nomination paper of Dog Ram. This Court did not believe the evidence of proposer (P.W. 2) which was not corroborated by the evidence of any other witness. In the facts and circumstances of the case, it was held that the single Judge was not justified in accepting the evidence of P.W. 2 and in holding that the Returning Officer was guilty of tripping the candidate and the proposer by any assertion on his part into anyone believing that there was nothing wrong in the nomination paper.

(ii) 1997 (1) JLI 340 (SC)

8. ...These inaccuracies in the nomination paper were, contended the appellant,

technical in nature and should have been rectified by the Returning Officer at the time of scrutiny. This Court held that the responsibility of producing documentary evidence of registration as elector in a different constituency rests entirely on the candidate. It further held that it was not possible to generalise and hold that all errors in regard to electoral roll numbers of the candidate and the proposer in the nomination paper do not constitute defects of a substantial character. They would not be defects of substantial character only if at the time of scrutiny, the Returning Officer either by himself or with the assistance of the candidate or his proposer or any other person is able to find out the correct serial numbers of the candidate and the proposer by reference to the correct part number of the electoral roll. If that is not the case, he would be committing a great error by accepting the nomination paper without verifying whether a candidate was a voter in that constituency. It was, therefore, said that the question whether the defect is of a substantial character or not, would depend on the facts of each case. Unless the defect is one which can be per se noticed and corrected at the stage of Section 33(4) or later at the stage of Section 36(4) without the need to refer to various other documents, the same cannot be said to be of a non-substantial character. In the instant case also, the defect as to the number could have been said to be not of a substantial character if the appellant had shown that the name of the proposer appeared on the very same sheet at Serial Number 138 instead of 136, i.e. only two steps away. In that case, one can say that the Returning Officer could have verified the same if he had exercised due diligence. In such a situation, even if the appellant and his proposer were absent the Court could have taken the view that the defect was not of a substantial nature.

(iii) Hari Shankar Jain Vs. Sonia Gandhi,

23. Section 83(1)(a) of RPA, 1951 mandates that an election petition shall contain a concise statement of the material facts on which the petitioner relies. By a series of decisions of this Court, it is well settled that the material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words, they must be such facts as would afford a basis for the allegations made in the petition and would constitute the cause of action as understood in the Code of Civil Procedure, 1908. The expression "cause of action" has been compendiously defined to mean every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of Court. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of the party is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. (See *Samant N. Balkishna v. George Fernandez*, *Jitendra Bahadur Singh v. Krishna Behari*.) Merely quoting the words of the Section like chanting of a mantra does not amount to stating material facts. Material facts would include positive statement of facts as also positive averment of a negative fact, if necessary. In *V.S. Achuthanandan v. P.J. Francis* this Court

has held, on a conspectus of a series of decisions of this Court, that material facts are such preliminary facts which must be proved at the trial by a party to establish existence of a cause of action. Failure to plead "material facts" is fatal to the election petition and no amendment of the pleadings is permissible to introduce such material facts after the time-limit prescribed for filing the election petition.

24. It is the duty of the Court to examine the petition irrespective of any written statement or denial and reject the petition if it does not disclose a cause of action. To enable a Court to reject a plaint on the ground that it does not disclose a cause of action, it should look at the plaint and nothing else. Courts have always frowned upon vague pleadings which leave a wide scope to adduce any evidence. No amount of evidence can cure basic defect in the pleadings.

(iv) Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi,

4. The election under challenge relates to 1981, its term expired in 1984 on the dissolution of the Lok Sabha; thereafter another general election was held in December 1984 and the respondent was again elected from 25th Amethi Constituency to the Lok Sabha. The validity of the election held in 1984 was questioned by means of two separate election petitions and both the petitions have been dismissed. The validity of respondent's election has been upheld in Azhar Hussain v. Rajiv Gandhi and Bhagwati Prasad v. Rajeev Gandhi. Since the impugned election relates to the Lok Sabha which was dissolved in 1984 the respondent's election cannot be set aside in the present proceedings even if the election petition is ultimately allowed on trial as the respondent is a continuing member of the Lok Sabha not on the basis of the impugned election held in 1981 but on the basis of his subsequent election in 1984. Even if we allow the appeal and remit the case to the High Court the respondent's election cannot be set aside after trial of the election petition as the relief for setting aside the election has been rendered infructuous by lapse of time. In this view grounds raised in the petition for setting aside the election of the respondent have been rendered academic. Court should not undertake to decide an issue unless it is a living issue between the parties. If an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties, it would be waste of public time to engage itself in deciding it. LORD VISCOUNT SIMON in his speech in the House of Lords in Sun Life Assurance Co. of Canada v. Jervis observed:

I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. It is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties to a matter in actual controversy which the House undertakes to decide as a living issue.

These observations are relevant in exercising the appellate jurisdiction of this

Court.

5. The main controversy raised in the present appeal regarding setting aside of the respondent's election has become stale and academic, but precious time of the Apex Court was consumed in hearing the appeal at length on account of the present state of law. Section 98 read with Section 99 indicates that once the machinery of the Act is moved by means of an election petition, charges of corrupt practice, if any, raised against the returned candidate must be investigated. On conclusion of the trial if the Court finds that a returned candidate or any of his election agents is guilty of commission of corrupt practice he or his election agent, as the case may be, would be guilty of electoral offence incurring disqualification from contesting any subsequent election for a period of six years. In this state of legal position we had to devote considerable time to the present proceedings as the appellant insisted that even though six years period has elapsed and subsequent election has been held nonetheless if the allegations made by him make out a case of corrupt practice the proceedings should be remanded to the High Court for trial and it after the trial the Court finds him guilty of corrupt practice the respondent should be disqualified. If we were to remand the proceedings to the High Court for trial for holding inquiry into the allegations of corrupt practice, the trial itself may take couple of years, (sic but) we doubt if any genuine and bona fide evidence could be produced by the parties before the Court. In fact, during the course of hearing the appellant himself stated before us more than once, that it would now be very difficult for him to produce evidence to substantiate the allegations of corrupt practice but nonetheless he insisted for the appeal being heard on merit. Though the matter is stale and academic yet having regard to the present state of law, we had to hear the appeal at length.

8. The first question which falls for our determination is whether the High Court had jurisdiction to strike out pleadings under Order 6 Rule 16 of the CPC and to reject the election petition under Order 7 Rule 11 of the Code at the preliminary stage even though no written statement had been filed by the respondent. Section 80 provides that no election is to be called in question except by an election petition presented in accordance with the provisions of Part VI of the Act before the High Court. Section 81 provides that an election petition may be presented on one or more of the grounds specified in Section 100 by an elector or by a candidate questioning the election of a returned candidate. Section 83 provides that an election petition shall contain a concise statement of material facts on which the petitioner relies and he shall set forth full particulars of any corrupt practice that he may allege including full statement of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice. Section 86 confers power on the High Court to dismiss an election petition which does not comply with the provisions of Sections 81 and 82 or Section 117. Section 87 deals with the procedure to be followed in the trial of the election petition and it lays down that subject to the provisions of the Act and of any rules made thereunder, every election petition

shall be tried by the High Court as nearly as may be in accordance with the procedure applicable to the trial of suits under the Code of Civil Procedure, 1908. Since provisions of CPC apply to the trial of an election petition, Order 6 Rule 16 and Order 6 Rule 17 are applicable to the proceedings relating to the trial of an election petition subject to the provisions of the Act. On a combined reading of Sections 81, 83, 86 and 87 of the Act, it is apparent that those paragraphs of a petition which do not disclose any cause of action, are liable to be struck off under Order 6 Rule 16, as the Court is empowered at any stage of the proceedings to strike out or delete pleading which is unnecessary, scandalous, frivolous or vexatious or which may tend to prejudice, embarrass or delay the fair trial of the petition or suit. It is the duty of the Court to examine the plaint and it need not wait till the defendant files written statement and points out the defects. If the Court on examination of the plaint or the election petition finds that it does not disclose any cause of action it would be justified in striking out the pleadings. Order 6 Rule 16 itself empowers the Court to strike out pleadings at any stage of the proceedings which may even be before the filing of the written statement by the respondent or commencement of the trial. If the Court is satisfied that the election petition does not make out any cause of action and that the trial would prejudice, embarrass and delay the proceedings, the Court need not wait for the filing of the written statement, instead it can proceed to hear the preliminary objections and strike out the pleadings. If after striking out the pleadings the Court finds that no triable issues remain to be considered, it has power to reject the election petition under Order 7 Rule 11.

14. Before we consider various paragraphs of the election petition to determine the correctness of the High Court order we think it necessary to bear in mind the nature of the right to elect, the right to be elected and the right to dispute election and the trial of the election petition. Right to contest election or to question the election by means of an election petition is neither common law nor fundamental right, instead it is a statutory right regulated by the statutory provisions of the Representation of People Act, 1951. There is no fundamental or common law right in these matters. This is well settled by a catena of decisions of this Court in *N.P. Ponnuswami v. Returning Officer, Jagan Nath v. Jaswant Singh*, *Jyoti Basu v. Debi Ghosal*. These decisions have settled the legal position that outside the statutory provisions there is no right to dispute an election. The Representation of People Act is a complete and self-contained Code within which any rights claimed in relation to an election or an election dispute must be found. The provisions of the CPC are applicable to the extent as permissible by Section 87 of the Act. The scheme of the Act as noticed earlier would show that an election can be questioned under the statute as provided by Section 80 on the grounds as contained in Section 100 of the Act. Section 83 lays down a mandatory provision in providing that an election petition shall contain a concise statement of material facts and set forth full particulars of corrupt practice. The pleadings are regulated by Section 83 and it makes it obligatory on the election petitioner to give the requisite facts, details and particulars of each corrupt

practice with exactitude. If the election petition fails to make out a ground u/s 100 of the Act it must fail at the threshold. Allegations of corrupt practice are in the nature of criminal charges, it is necessary that there should be no vagueness in the allegations so that the returned candidate may know the case he has to meet. If the allegations are vague and general and the particulars of corrupt practice are not stated in the pleadings, the trial of the election petition cannot proceed for want of cause of action. The emphasis of law is to avoid a fishing and roving inquiry. It is therefore necessary for the Court to scrutinise the pleadings relating to corrupt practice in a strict manner.

(v) Michael B. Fernandes Vs. C.K. Jaffer Sharief and Others,

4. In order to examine the correctness of the rival submissions, it would be necessary for us to have a bird's-eye view of the relevant provisions of the Act and the different case-laws on the point. But one thing must be borne in mind that in the case in hand, the allegations made were in relation to the use of voting electoral machines, u/s 61A of the Act. The gravamen of the allegations in the election petition is that the Returning Officer as well as the Chief Electoral Officer had not complied with several provisions of the Conduct of Elections Rules and Respondents 7 and 8 had not acted in accordance with the guidelines issued by the Election Commission of India. The relevant paragraphs of the election petition pertaining to the infraction of Rules committed by Respondents 7 and 8 are paragraphs 20-a, 20-d, 20-f, 25 and 28. The Representation of the People Act, 1951 (hereinafter referred to as "the Act") is an Act, providing for the conduct of elections to the House of Parliament and to the House of Legislature of each State and it provides the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences in connection with such elections and the decisions of doubts and disputes arising out of or in connection with such elections. The general procedure at elections has been enumerated in Chapter III. Section 61 of the Act provides the procedure for preventing personation of electors and Section 61A which was inserted by Act 1 of 1989 w.e.f. 15-3-1989, deals with voting machines at elections. Section 66 provides for declaration of result and Section 67 provides for submission of a report of the result to the appropriate authority and the Election Commission and in case of an election to a House of Parliament, to the Secretary of that House by the Returning Officer, soon after the declaration of the result. It also provides for publication of the name of the elected candidate in the Official Gazette. Part VI starting with Section 79 deals with disputes regarding elections. u/s 80 of the Act, no election shall be called in question except by an election petition presented in accordance with the provisions of this part. Presentation of petition is dealt with in Section 81 and such petition could be presented on one or more of the grounds specified in sub-section (1) of Section 100 and Section 101. Section 82 stipulates as to who shall join as respondents to an election petition. Section 82 may be quoted hereinbelow in extenso:

82. Parties of the petition - A petitioner shall join as respondents to his petition-

(a) where the petitioner, in addition to claiming declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and

(b) any other candidate against whom allegations of any corrupt practice are made in the petition.

Section 83 provides as to what should be contained in an election petition and Section 86 in Chapter III deals with trial of election petitions. Section 87 is the procedure for such trial and it provides that every election petition shall be tried as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits. As stated earlier, Section 100 indicates the grounds on which an election can be declared to be void and Section 101 indicates the grounds on which a candidate other than the returned candidate may be declared to have been elected. We are not concerned with the other provisions of the Act in the case in hand. An appeal to the Supreme Court has been provided u/s 116A. On a plain reading of Section 82, which indicates as to the person who can be joined as a respondent to an election petition, the conclusion is irresistible that the returned candidate, the candidate against whom allegations of any corrupt practice have been made is to be joined as party-respondent when declaration is sought for holding the election of the returned candidate to be void and when a prayer is made as to any other candidate to be declared to be duly elected, then all the contesting candidates are required to be made party-respondents. On a literal interpretation of the aforesaid provisions of Section 82, therefore, it can be said that an election petition which does not make the persons enumerated in Section 82 of the Act, as party-respondents, is liable to be dismissed. The two decisions of this Court directly on the question are the cases of *Jyoti Basu v. Debi Ghosal* and *B. Sundara Rami Reddy v. Election Commission of India*. In the former case, CHINNAPPA REDDY, J., speaking for the Court, held that right to elect or to be elected or dispute regarding election are neither fundamental rights nor common law rights but are confined to the provisions of the Act and the Rules made thereunder and consequently, rights and remedies are all limited to those provided by the statutory provisions. On the question of joinder of parties, referring to Sections 82 and 86(4) of the Representation of the People Act, it was held that the contest of the election petition is designed to be confined to the candidates at the election and all others are excluded and, therefore, only those may be joined as respondents to an election petition, who are mentioned in Sections 82 and 86(4) and no others. An argument had been advanced in that case that even if somebody may not be a necessary party u/s 82 of the Act, but yet he could be added as a proper party as provided in Order 1 Rule 10 of the Code of Civil Procedure. But the Court rejected that contention on a finding that the provisions of the CPC apply to election disputes only as far as may be and subject to the provisions of the Act and any rules made thereunder and the provisions of the Code cannot be invoked

to permit that which is not permissible under the Act. It was in that context the Court further observed that the concept of "proper parties" is and remains alien to an election dispute under the Act. This decision was followed in B. Sundara Rami Reddy case referred to supra and it was reiterated that the concept of "proper party" is and must remain alien to an election dispute under the Act and only those may be joined as respondents to an election petition, who are mentioned in Sections 82 and 86(4) of the Act and no others. The Court in this case added that however desirable and expedient it may appear to be, none else shall be joined as the respondents. Mr. Venkataramani, the learned senior counsel appearing for the appellant, contended that the law enunciated in the two decisions and the observations made are too wide and while Section 82 casts an obligation on an election petitioner to join those mentioned in Clauses (a) and (b) as party-respondent, it does not put an embargo for addition of any other person in an appropriate case, depending upon the nature of allegation made and consequently, the expression "any other" in the two decisions referred to above, must be held not to have been correctly used. Mr. Venkataramani relied upon the observations made by this Court in M.S. Gill case wherein the Court had observed that the Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances and submitted that the basis of electoral democracy being a free and fair election and fairness imports an obligation to see that no wrongdoer candidate benefits from his own wrong. In case where allegations are made against the Returning Officer or the Chief Electoral Officer with regard to the conduct of the election, there should be no bar to array them as parties and according to Mr. Venkataramani in Gill case the Chief Election Commissioner was a party and, therefore, this Court in Jyoti Basu as well as the subsequent case, having not noticed the aforesaid judgment of the larger Bench, the latter decision will be of no assistance. We are not in a position to accept the submission of Mr. Venkataramani inasmuch as in Gill case an order of the Election Commissioner was under challenge by filing a writ petition and it was not an election petition under the provisions of the Representation of the People Act. There is no dispute with the proposition that a free and fair electoral process is the foundation of our democracy, but the question for consideration is, whether by indicating in the Act as to who shall be arrayed as party, the Court would be justified in allowing some others as parties to an election petition. For the aforesaid proposition, Gill case is no authority. Mr. Venkataramani then relied upon the decision of the Calcutta High Court in Dwijendra Lal Sen Gupta v. Harekrishna Konar where the question came up for consideration directly and the Calcutta High Court did observe that the Returning Officer may nevertheless in an appropriate case be a "proper party" who may be added as party to the election petition and undoubtedly, the aforesaid observation supports the contention of Mr. Venkataramani. Following the aforesaid decision, a learned single Judge of the Bombay High Court in the case of H.R. Gokhale v. Bharucha Noshir C. had also observed that the

observations of SHAH, J. in Ram Sewak Yadav case in paragraph 6 are not intended to lay down that the Returning Officer can in no event be a proper party to an election petition. But both these aforesaid decisions of Calcutta High Court and Bombay High Court had been considered by this Court in Jyoti Basu case and the Court took the view that the public policy and legislative wisdom both seem to point to an interpretation of the provisions of the Representation of the People Act which does not permit the joining, as parties, of persons other than those mentioned in Sections 82 and 86(4). The Court also in paragraph 12 considered the consequences if persons other than those mentioned in Section 82 are permitted to be added as parties and held that the necessary consequences would be an unending, disorderly election dispute with no hope of achieving the goal contemplated by Section 86(6) of the Act. In the aforesaid premises, we reiterate the views taken by this Court in Jyoti Basu case and reaffirmed in the later case in B. Sundara Rami Reddy and we see no infirmity with the impugned judgment, requiring our interference under Article 136 of the Constitution. This appeal accordingly fails and is dismissed.

6. I have heard the learned counsel for the parties at length and also gone through the voluminous materials available on record, coupled with the authorities cited.

7. To start with, on 19.9.2011, this Court framed the following issues, for trial:

(1) Whether the Returning Officer has failed in his mandatory duty u/s 33(4) of The Representation of the People Act, 1951, at the time of submission of nomination paper by the petitioner, to make a preliminary verification of the nomination paper?

(2) Whether the Returning Officer of 197-Ilayangudi Assembly Constituency has violated Section 36(4) of the Act?

(3) Whether the rejection of nomination of the petitioner without an order is valid and sustainable?

(4) Whether the Returning Officer is bound to issue a rejection order, stating reasons for rejection of the nomination paper?

(5) Whether the Election Petition has become infructuous, in view of the constitution of 14th Legislative Assembly?

(6) Whether in the absence of the election petitioner and his proposer during the scrutiny, the election petitioner can put the burden on the Returning Officer to suo motu scrutinize the names and roll numbers of the petitioner and his proposer as entered in the nomination paper with the electoral rolls?

8. To decide the above issues, it is imperative to go through the relevant provisions viz., Section 33(4) and 36(4) of the Act; Chapter V Clause 16 and Chapter VI Clauses 3, 2, 6, 9, 1, 9, 2, 9, 3, 9, 4, 9, 6, 10, 1 and 10.2 of the Handbook for Returning Officers, which are as under:

Section 33:

33. Presentation of nomination paper and requirements for a valid nomination.--

(1) - (3) xxx

(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.

(5)-(7) xxxxx

Section 36:

36. Scrutiny of nominations.--

(1) - (3) xxxxxx

(4) The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.

(5) - (8) xxxxxxxx

Chapter V: Nominations:

Clause 16 : Discrepancies and errors in electoral rolls:

16. 1. No misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposers 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 is commonly understood. You 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 papers shall be overlooked. You have no power in law to allow any other error to be corrected.

16.2. xxxxx

16.3. Points, which you are thus required to dispose of u/s 33 (4), should invariably be disposed of at this stage. It will be undesirable for you at the time of scrutiny to reject a nomination paper for defects, which could have been thus cured at the earlier stage of the presentation of the nomination paper. Say, for example, omission to mention his age in nomination paper is a defect of substantial nature and need not be pointed out at preliminary scrutiny."

Chapter VI: Scrutiny: Clause 3.2.

Persons to be admitted:

3.1. xxxx

3.2. It is not necessary that a candidate or his representative should be present at the time of scrutiny of nominations and no nomination can be rejected solely on the ground of absence of the candidate or his representative during scrutiny proceedings. But, if any objection is raised with regard to the nomination of the candidate and there is no one to rebut it on his behalf, the Returning Officer may be justified in rejecting the nomination paper if he finds substance in the objection which was raised but remains un-rebutted.

6. Objections and summary inquiry - Reasons to be recorded in every case of objection or rejection:

Even if no objection has been raised to a nomination paper, you have to satisfy yourself that the nomination paper is valid in law. If any objection is raised to any nomination paper, you will have to hold a summary inquiry to decide the same and to treat the nomination paper to be either valid or invalid. Record your decision in each case giving brief reasons particularly where an objection has been raised or where you reject the nomination paper. The objector may be supplied with a certified copy of your decision accepting the nomination paper of a candidate after overruling the objections raised by him, if he applies for it. Your decision may be challenged later in an election petition and so your brief statement of reasons should be recorded at this time.

8.0 Grounds, which are insufficient for rejection of nomination papers:

8.1. Do not reject any nomination paper on the ground of any defect, which is not of a substantial character (Section 36(4)). Any mistake or error of a technical or clerical nature should, therefore, be ignored by you.

8.2. You may also note that rule 4 of the Conduct of Elections Rules, 1961, lays down that the failure to complete, or defect in completing a declaration regarding symbols in the nomination paper is not a defect of a substantial character.

8.3. Also, a nomination paper should not be rejected for the reason only that none of the persons referred to in Section 36 (1) was present at the time of scrutiny of nomination; it should be accepted or rejected on merits, taking all the available material into account.

8.4. In the past, there were instances where nomination papers were rejected on flimsily grounds, e.g. for mistakes made in the nomination paper regarding; (a) the year of election, or (b) the exact name of the House of the Legislature or the constituency, (c) the description of an electoral roll number or (d) the choice of symbols, or (e) some discrepancy between the age, name, or other particulars of the candidate or his proposer as given in the nomination paper and in the electoral roll and so on. Such unjustifiable and improper orders of rejection on technical grounds has led to a large number of election petitions and the eventual setting aside of several elections with consequent avoidable waste of time, money and labour for all concerned. Similar instances of improper rejections should not occur again and it is up to you to interpret the provisions of the law intelligently and with common-sense. Do not, therefore, reject any nomination paper for such technical or clerical errors or discrepancies. Most of them can and should be directed by you to be set right at the time of the presentation of the nomination paper (Section 33 (4)) proviso. It would, therefore, be undesirable if you fail at the proper stage to help a candidate by exercising your powers and discretion under the proviso to Section 33 (4) and later at the time of scrutiny you reject his nomination paper on the ground of those very defects which could have been set right under that Section.

8.5. xxxxx

8.6. What may be treated as defects of substantial nature

Though it depends on various factors but some of the defects of substantial nature and which cannot be allowed to be corrected at the stage of preliminary scrutiny by the RO are (a) failure to declare age in the nomination paper; (b) failure to sign the nomination paper by the candidate or any of his proposers in the manner prescribed; (c) failure to comply with requirement to produce evidence of being a registered elector where a candidate is contesting election from a different constituency; (d) failure to submit written authorization form from the political party, within prescribed time and in prescribed, where a candidate claims to have been set up by a national or state party. Other cases are (a) failure to mention name of constituency, particularly in a General election; (b) failure to give full address in nomination paper; (c) failure to file affidavit in Form 26 and/or affidavit provided by ECI for disclosing criminal antecedent, assets, liabilities and educational qualification. These are just illustrative examples. You should thoroughly check facts of each case with your understanding of legal provisions and judicial decisions on the matter and decide accordingly.

10. Grounds for rejection of nomination papers:

10.1. You must reject a nomination paper, if-

(i) The candidate is clearly not qualified in law to be a member of the Legislature concerned, or

(ii) The candidate is clearly disqualified in law to be such member, or

(N.B. The Commission will supply to you through the Chief Electoral Officer consolidated list of persons, who have incurred disqualification u/s 8A and 11A(b) (for corrupt practices) and 10A (for failure to lodge account of election expenses) of the Representation of People Act, 1951. In other cases, you may, if necessary, consult the Chief Electoral Officer.)

(iii) The nomination paper has been delivered before 11 a.m. or after 3 p.m., on any of the days notified for making nominations, or

(iv) The nomination paper has been delivered to you or to your Specified Assistant Returning Officer by a person other than the candidate himself or any of his proposers, or

(v) The nomination paper has been delivered at a place other than that specified in the public notice, or

(vi) The nomination paper has been delivered to a person other than yourself or your Assistant Returning Officer, specified by you in this behalf, or

(vii) The nomination paper is not substantially in the prescribed form, or

(viii) The prescribed affidavits have not been filed at all by the candidate, or (N.B. If the prescribed affidavits have been filed, but are found or considered to be defective or containing false information, the nomination should NOT be rejected on this ground.)

(ix) The nomination paper has not been signed by the candidate and/or by the required number of his proposer(s), or

(x) Any of the proposers was not an elector of the constituency or was not eligible to be a proposer at the time of presentation of the nomination paper (whereby the nomination paper is not subscribed by the required members of proposers), or

(xi) The proper deposit has not been made in accordance with Section 34, or

(xii) The oath or affirmation is not made by the candidate as required under the Constitution of India, Government of Union Territories Act, 1963, or the Government of National Capital Territory of Delhi Act, 1991, as the case may be, or

(xiii) The candidate does not belong to the Scheduled Caste or the Scheduled Tribe and he has filed nomination paper to contest a seat reserved for the Scheduled Castes or, as the case may be, the Scheduled Tribes, or

(xiv) The candidate has omitted to specify his age in the nomination paper or

(xv) Where the candidate is not an elector of the constituency for which he has filed nomination paper, he has neither filed a copy of the electoral roll of the constituency in which he is registered as an elector or of the relevant part thereof or a certified copy of the relevant entries relating to his name in such electoral roll along with the nomination paper nor produced the same at the time of scrutiny as required u/s 33(5). In such event, the nomination paper must be rejected even if you are in possession of the electoral roll of that different constituency.

10.2. You should invariably record the reasons for rejecting a nomination paper on the spot, and supply certified copies of the order immediately in cases where all the nomination papers filed by a candidate have been rejected by you. This may be done even in the absence of an application from him and without payment. Where one of the nomination papers of a candidate is accepted by you, in that case, you shall occupy a certified copy of your order rejecting the other nomination paper (s) to the candidate, if he applies for it.

9. Section 33 deals with Presentation of nomination paper and requirements for a valid nomination. As per sub-section (4) thereof, 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. Further, the proviso clause thereto says 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 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 said proviso also allows the Returning Officer 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 roll or in the nomination paper shall be overlooked.

10. Section 36 deals with Scrutiny of nominations. Sub-section (4) thereof states that the Returning Officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.

11. Chapter V of the Handbook for Returning Officers deals with Nominations and Clause 16 with discrepancies and errors in electoral rolls. As per Clause 16.1, no misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposers 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 is commonly understood. It also says that the Returning Officer shall permit any such misnomer or inaccurate description or clerical, technical or printing error to be corrected and technical or printing error in the electoral roll or in the nomination papers to be overlooked. Clause 16.3 says that the points, which the RO is required to dispose of u/s 33 (4) should invariably be disposed of at the stage of presentation of nomination paper and it will be undesirable for the RO at the time of scrutiny to reject a nomination paper for defects, which could have been cured at the earlier stage of the presentation of the nomination paper.

12. Chapter VI deals with Scrutiny. Clause 3.2 speaks to the effect that it is not necessary that a candidate or his representative should be present at the time of scrutiny of nominations and no nomination can be rejected solely on the ground of absence of the candidate or his representative during scrutiny proceedings. But, if any objection is raised with regard to the nomination of the candidate and there is no one to rebut it on his behalf, the Returning Officer may be justified in rejecting the nomination paper the finds substance in the objection which raised but remain un-rebutted.

13. Clause 6 deals with objections and summary inquiry - Reasons to be recorded in every case of objection or rejection. As per the said clause, even if no objection has been raised to a nomination paper, the Returning Officer has to satisfy himself that the nomination paper is valid in law. If any objection is raised to any nomination paper, he has to hold a summary inquiry to decide the same and to treat the nomination paper to be either valid or invalid. It also says points to recording the decision of the Returning Officer in each case giving brief reasons particularly where an objection has been raised or where he rejects the nomination paper.

14. Clause 9 states the grounds, which are insufficient for rejection of nomination papers. Clause 9.1 stipulates not to reject any nomination paper on the ground of any defect, which is not of a substantial character, as in the case of Section 36(4). It also says that any mistake or error of a technical or clerical nature should be ignored by the Returning Officer. Clause 9.3 describes that a nomination paper should not be rejected for the reason only that none of the persons referred to in Section 36(1) was present at the time of scrutiny of nomination and it should be accepted or rejected on merits, taking all the available material into account.

15. Clause 9.4 indicates that in the past, there were instances where nomination papers were rejected on flimsy grounds, e.g. for mistakes made in the nomination paper regarding: (a) the year of election, (b) the exact name of the House of the Legislature or the constituency, (c) the description of an electoral

roll number, (d) the choice of symbols, or (e) some discrepancy between the age, name, or other particulars of the candidate or his proposer as given in the nomination paper and in the electoral roll and so on. Such unjustifiable and improper orders of rejection on technical grounds has led to a large number of election petitions and the eventual setting aside of several elections with consequent avoidable waste of time, money and labour for all concerned. Similar instances of improper rejections should not occur again and it is up to the Returning Officer to interpret the provisions of the law intelligently and with common-sense. It, therefore, directs the Returning Officer not to reject any nomination paper for such technical or clerical errors or discrepancies. Most of them can and should be directed by the Returning Officer to be set right at the time of the presentation of the nomination paper, as per Section 33(4) proviso. It would, therefore, be undesirable if the Returning Officer fails at the proper stage to help a candidate by exercising his powers and discretion under the proviso to Section 33(4) and later at the time of scrutiny rejects his nomination paper on the ground of those very defects which could have been set right under that Section.

16. Clause 9.6 defines as to what may be treated as defects of substantial nature. They are: (a) failure to declare age in the nomination paper; (b) failure to sign the nomination paper by the candidate or any of his proposers in the manner prescribed; (c) failure to comply with requirement to produce evidence of being a registered elector where a candidate is contesting election from a different constituency; (d) failure to submit written authorization form from the political party, within prescribed time, where a candidate claims to have been set up by a national or state party; (a) failure to mention name of constituency, particularly in a General election; (b) failure to give full address in nomination paper; (c) failure to file affidavit in Form 26 and/or affidavit provided by ECI for disclosing criminal antecedent, assets, liabilities and educational qualification.

17. In the case on hand, there are no failures of above characters on the part of the election petitioner to be treated as defects of substantial nature.

18. Clause 10. states the grounds for rejection of nomination papers. They are:

(i) The candidate is clearly not qualified in law to be a member of the Legislature concerned.

(ii) The candidate is clearly disqualified in law to be such member.

(iii) The nomination paper has been delivered before 11 a.m. or after 3 p.m., on any of the days notified for making nominations.

(iv) The nomination paper has been delivered to the Returning Officer or to his Specified Assistant Returning Officer by a person other than the candidate himself or any of his proposers.

(v) The nomination paper has been delivered at a place other than that specified in the public notice.

(vi) The nomination paper has been delivered to a person other than the Returning Officer or his Assistant Returning Officer, specified by him in that behalf.

(vii) The nomination paper is not substantially in the prescribed form.

(viii) The prescribed affidavits have not been filed at all by the candidate.

(ix) The nomination paper has not been signed by the candidate and/or by the required number of his proposer(s).

(x) Any of the proposers was not an elector of the constituency or was not eligible to be a proposer at the time of presentation of the nomination paper (whereby the nomination paper is not subscribed by the required members of proposers).

(xi) The proper deposit has not been made in accordance with Section 34.

(xii) The oath or affirmation is not made by the candidate as required under the Constitution of India, Government of Union Territories Act, 1963, or the Government of National Capital Territory of Delhi Act, 1991, as the case may be.

(xiii) The candidate does not belong to the Scheduled Caste or the Scheduled Tribe and he has filed nomination paper to contest a seat reserved for the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(xiv) The candidate has omitted to specify his age in the nomination paper.

(xv) Where the candidate is not an elector of the constituency for which he has filed nomination paper, he has neither filed a copy of the electoral roll of the constituency in which he is registered as an elector or of the relevant part thereof or a certified copy of the relevant entries relating to his name in such electoral roll along with the nomination paper nor produced the same at the time of scrutiny as required u/s 33 (5).

19. In the present case, none of the grounds mentioned above exists for rejection of nomination paper of the election petitioner.

20. Clause 10.2 says that the Returning Officer should invariably record the reasons for rejecting a nomination paper on the spot and supply certified copies of the order immediately in cases where all the nomination papers filed by a candidate have been rejected. This shall be done even in the absence of an application from him and without payment.

21. In this case, the petitioner, by a representation dated 30.7.2009, Exhibit P-8, requested the Returning Officer to provide him with a copy of the rejection order, if any, passed at the time of scrutiny of nomination, but he has not received any response. Though the RO had orally informed the petitioner that his nomination was rejected on account of discrepancy in the serial numbers of the proposers, no order specifying any such reason has been issued to the petitioner till date, despite repeated requests. This is also evident from the own statement of the

Returning Officer as C.W. 1 during his examination before the Court that even after the receipt of representation from the election petitioner, seeking for a certified copy of the rejection order, he has not issued the same to the petitioner. Therefore, it is clear that the RO had acted in an illegal manner and in contravention of the instructions issued by ECI. By the illegal act of the RO, the petitioner was deprived of his chances of contesting the election held on 18.8.2009. The so called defect of minor discrepancies in the serial numbers of the proposers was a curable defect which could have been cured at the stage of presentation of the nomination itself. It all shows that the RO had not only not exercised the mandatory requirement of the provisions, particularly the one u/s 33(4), but also acted contrary to the provisions, whereby failing to see that the names of the proposers are in the electoral roll of the constituency and that he is satisfied with the same. Had he pointed out the matter to the election petitioner on the very day of presentation of nomination, certainly, the petitioner would have been in a position to clarify the same then and there, as is now done before this Court.

22. More so, sub-clause (4) of Section 36 says the RO cannot reject any nomination paper on the ground of any defect which is not of a substantial character. As already stated above, in the case on hand, the ground on which the nomination paper of the election petitioner has been rejected does not constitute a substantial character. Therefore, the action of the RO in rejecting the nomination of the petitioner is contrary to law and tainted with mala fides.

23. On 1.8.2009, the party of the petitioner had submitted a representation in person to the Chief Electoral Officer to reconsider the decision of the RO to reject the nomination of the petitioner. A similar representation was also submitted to ECI by fax on the same date. In this regard, it is relevant to mention that when a representation was made in respect of other constituencies viz., Bargur and Srivaikundam, the Chief Electoral Officer had immediately called for a report from the Returning Officers and sent the same to ECI for its orders, whereas, in the case in question, he had not called for a report immediately but, instead, put up a note as if he received the representation too late, even though it was received on 1.8.2009 itself. That act of the CEO was apparently discriminative.

24. Surprisingly, the Returning Officers of Bargur and Srivaikundam Constituencies had conducted re-scrutiny on 1.8.2009 in their respective constituencies on the advice of ECI and Chief Electoral Officer and accepted the nomination papers of the rejected candidates for the reason of wrongly stating the serial numbers of the proposers in their nomination papers. This is evident from Exhibit P-18, newspaper report, dated 2.8.2009. It is not known to this Court as to why ECI and CEO had not ordered re-scrutiny in the present case which was facing similar situation as that of Bargur and Srivaikundam Constituencies. It is only because of the RO's ignorance and non-compliance of the statutory provisions and the ECI Instructions, the rejection of nomination of the petitioner had taken place and it only shows that either the ECI is not

appointing the ROs with the knowledge of electoral laws or the ECI has not given proper training to the persons appointed as ROs. This type of approach shall undermine the ethos of democracy.

25. The Handbook of Instructions given to the ROs by ECI is pursuant to the exercise of power conferred under the Constitution of India. Hence, the Handbook Instructions are the instructions issued, exercising constitutional power of ECI, and the ROs are bound to follow each and every instruction meticulously, as the said instructions are mandatory in nature.

26. The RO has rejected the nomination of the petitioner stating that "The list of proposers mentioned in Sl. Nos. 1, 2 and 3 are not mentioned in Sl. Nos. of the Electoral Roll of the Assembly Constituency. Hence, for want of adequate proposers, the nomination is rejected."

27. In this context, it is to be stated that the discrepancies with regard to three proposers are : (1) K. Manimaran : Part No. 134 Sl. No. 71; (2) P. Chockalingam: Part No. 134 Sl. No. 129 and (3) S. Kalaichandran: Part No. 134 Sl. No. 133. The said Serial Numbers viz., 71, 129 and 133 were mentioned in the nomination paper of the petitioner. In fact, the correct Serial Numbers of the said proposers in the electoral roll are 72 in case of Manimaran, 130 in case of Chockalingam and 134 in case of Kalaichandran of the same Part No. 134. It only shows that the discrepancy of the said serial numbers in the nomination paper vis-a-vis the electoral roll is just one level below.

28. Curiously, the Returning Officer, as C.W. 1, in his evidence, has admitted that the said three proposers' names are found in the electoral roll of Ilayangudi Assembly Constituency. Further, it is admitted therein that he did not check up the serial numbers of the proposers and the quality of details of proposers but only checked the total number of proposers during the preliminary examination of nomination papers when nomination papers were presented on 27.7.2009. Also, he has admitted in his evidence that after the scrutiny was over, the election petitioner came to his office and pleaded that the serial numbers of the proposers 1, 2 and 3 were wrongly mentioned in the nomination papers. He even went to the extent of admitting that when the scrutiny got over and when the election petitioner and his representative Mr. Arulmozhi came to meet him at 12.30 p.m., he asked them to meet him after lunch. This evidence of him is quite contrary to the pleading that no one was present at the time of scrutiny on behalf of the election petitioner. It is conspicuous from this evidence that the election petitioner and his representative were very much available on the date of scrutiny, though with some delay. In that situation, as a rebuttal was made by the election petitioner with regard to the objection raised by the Returning Officer as to the discrepancy, the RO ought to have adjourned the matter to the next day, as per the proviso u/s 36(5), by which time, the election petitioner would have satisfied the requirement. This was admittedly not done. The said failure on the part of the RO, in my standpoint, has caused much prejudice to the election petitioner. That apart, it is his statement that for discrepancies of serial

numbers of the proposers in the nomination papers, none of the nominations was rejected, which is, in fact, not so.

29. When it was the stand of the RO that the names of the proposers mentioned in Sl. Nos. 1, 2 and 3 are not mentioned in Sl. Nos. of the Electoral Roll of the Assembly Constituency and that was the reason for rejection of nomination paper of the election petitioner, it is not known why he admitted in his evidence that all the said three proposers names are found in the electoral roll of Ilayangudi Assembly Constituency, Exhibit P-5. Even on verification of Exhibit P-5 by this Court, it is clear that the names of three proposers are mentioned at Serial Nos. 72, 130 and 134. Indeed, it was incumbent on the part of the Returning Officer to look into the immediate next names by way of verification and call for an explanation from the petitioner, if needed, in that regard. Therefore, there cannot be any hesitation that the names of the proposers are very well mentioned in the electoral roll of Ilayangudi Assembly Constituency.

30. In view of the above, the Issues Nos. 1, 2, 4, 5 and 6 are answered in the affirmative and Issue No. 3 is decided in the negative.

31. A similar question as to whether the Returning Officer was right in rejecting the nomination of the respondent arose before the Supreme Court in the case of Hira Singh Pal cited *supra*, wherein it was held that 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 and as such it was improper on his part to have rejected the nomination paper. In that case, in the nomination paper, it had been mentioned that the candidate's name was found at Serial No. 504 of Part 2 of 9-Arki Assembly Constituency though in fact it was found at Serial No. 504 in Part 12 of that constituency. Under the said circumstances, it was held that the rejection of nomination papers was improper and such a rejection was impermissible u/s 36 and the same was a ground for setting aside the election u/s 100 of the Representation of the People Act.

32. In *Rakesh Kumar v. Sunil Kumar* (*supra*), the Supreme Court held that the Election Commission of India has issued instructions in exercise of its statutory functions. Those instructions are contained in the Hand Book for Returning Officers. Chapter VI of the Handbook deals with scrutiny of nomination papers by the returning officer. The learned single Judge of the High Court has referred to various provisions of the instructions and has rightly come to the conclusion that the Returning Officer did not follow those instructions while scrutinising the nomination papers, thereby adopting a wrong procedure. It was also held therein that through the proviso clause to Section 36(5), 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 accordance with the principles of natural justice also.

33. In the present case, when the election petitioner had sought an opportunity to meet the objection, even assuming 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, which is, admittedly, not done.

34. In *Election Commission of India v. Ashok Kumar and Others* (supra), the Apex Court has held that election disputes are not just private civil disputes between two parties. Though there is an individual or a few individuals arrayed as parties before the Court, the stakes of the constituency as a whole are on trial. Whichever way the lis terminates, it affects the fate of the constituency and the citizens generally. A conscientious approach with overriding consideration for welfare of the constituency and strengthening the democracy is called for. Neither turning a blind eye to the controversies which have arisen nor assuming a role of over enthusiastic activist would do. The two extremes have to be avoided in dealing with election disputes.

35. In *Ram Bhual v. Ambika Singh* (supra) case, the Supreme Court has held that it is clear from Section 36(4) of the Act that the Returning Officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character. Section 33(4) of the Act provides that on the presentation of a nomination paper, the Returning Officer has to satisfy himself that the names and the 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. The proviso thereto clearly provides 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 with respect to such person or place and in a case where there was an error in the nomination paper in regard to the description, he shall direct that the same be corrected and he could even overlook such errors.

36. In *Anil Baluni v. Surendra Singh Negi* (supra) case, cited above, the Supreme Court has held that the election petition has been filed on the ground that the appellant's nomination papers had been improperly rejected, which is a ground contemplated by Section 100(1)(c) of the Act. In such a case, the only issue before the Court is to examine the correctness and propriety of the order by which the nomination papers of a candidate are rejected and the scope of inquiry is limited to the said consideration.

37. In *Mathura Prasad v. Ajeem Khan* (supra) case, relied upon by the respondents, the candidate, did not correct after advising to correct the mistake. In the said circumstance, the Apex Court has held that the Returning Officer was perfectly justified in rejecting the nomination paper. 38. In the instant case, though Clause 16.3 of the Handbook for Returning Officers asserts that the points, which the RO is required to dispose of u/s 33(4) should invariably be disposed of at the stage of presentation of nomination paper and it will be undesirable for the RO at the time of scrutiny to reject a nomination paper for defects, which could have been cured at the earlier stage of the presentation of the nomination paper, the RO has virtually neglected to adhere to the said provision, thereby giving a room for filing of this Election Petition. In fact, the ground on which the nomination of the petitioner was rejected was so flimsy as mentioned in Clause 9.4 that technical or clerical error or discrepancy could be rectified at the early stage of filing of nomination. It is also specifically stated therein that unjustifiable and improper orders of rejection on technical grounds has led to a large number of election petitions and the eventual setting aside of several elections with consequent avoidable waste of time, money and labour for all concerned. In order that similar instances of improper rejections should not occur again and it is up to the Returning Officer to interpret the provisions of the law intelligently and with commonsense, the Returning Officers were directed not to reject any nomination paper for such technical or clerical errors or discrepancies. Most of them can and should be directed by the Returning Officer to be set right at the time of the presentation of the nomination paper, as per Section 33(4) proviso. It would, therefore, be undesirable if the Returning Officer fails at the proper stage to help a candidate by exercising his powers and discretion under the proviso to Section 33(4) and later at the time of scrutiny rejects his nomination paper on the ground of those very defects which could have been set right under that Section. Also, the said defect is not of a substantial character, as mentioned in Section 36(4). (emphasis supplied)

39. All the above happenings would reveal that the Returning Officer had not acted as per the provisions of the Act and the instructions. At the same time, it is to be seen that the aggrieved petitioner had immediately represented to the Election Commission of India on meeting the Chief Electoral Officer of the State of Tamil Nadu. In his representation, the petitioner had detailed every event and requested the CEO to look into the matter by calling for a report and sending the same to the ECI for immediate rectification. Along with the by-election to 197-Ilayangudi Assembly Constituency, there were also by-elections to Bargur and Srivaikundam Assembly Constituencies and when the complaints were filed in respect of rejection of nominations with regard to Bargur and Srivaikundam Assembly Constituencies, the CEO had immediately acted upon the said complaints, as a result of which the rejected nominations were recalled and accepted, which course was not adopted in the case of the petitioner.

40. Right to contest election or to question the election by means of an election petition is neither common law nor fundamental right, instead it is a statutory

right regulated by the statutory provisions of the Representation of the People Act, 1951. Outside the statutory provisions, there is no right to dispute an election. The Representation of the People Act is a complete and self-contained Code within which any rights claimed in relation to an election or an election dispute must be found. The provisions of the CPC are applicable to the extent as permissible by Section 87 of the Act. The scheme of the Act would show that an election can be questioned under the statute as provided by Section 80 on the grounds as contained in Section 100 of the Act.

41. In a democracy, there is every possibility for a candidate, whether he belongs to a political party or not, to be elected to the legislature. It is also immaterial whether the political party is big or small or registered or not. Any candidate of that party can contest the election and when he files a nomination to that effect, it is for the authorities concerned to follow the rules and procedures as contemplated and what are all the instructions given to them in discharge of their duties. When there were three representations from three of the constituencies and two of them were immediately acted upon by calling for reports of the Returning Officers and the same were forwarded to the ECI, it was not done in the case of the petitioner and, instead, the CEO put a different note as if he received the representation too late, even though it was received on 1.8.2009 itself. This Court intended to see the record of the CEO and, accordingly, it was produced before this Court. On a perusal of the same, the above content of the note is established. The said content reads thus: "Received at about 12.30 p.m. on 1.8."09. Now it is too late to get the RO's report, send to ECI and obtain ECI's instructions/orders on the subject." Therefore, it gives a clear impression to this Court that CEO had discriminately acted upon the petitioner's case. Had the CEO acted on the representation of the petitioner by calling for a report from the RO immediately and thereafter the report was sent to ECI, the circumstances would have definitely changed, whereby not leading to the filing of Election Petition itself, as in the case of two others. Further, in this case, on a delayed report of the RO dated 6.8.2009 only, the CEO had forwarded the report to ECI. During the course of examination, when a question was put to CEO regarding not calling for a report of the RO on the representation of the petitioner, he has stated "I did not prefer to collect the RO's report on the very same day of receiving the representation i.e., on 1.8.2009 and send it to the Election Commission of India, because, in the scheme of things, the CEO cannot direct the RO to re-consider his decision and it is for the petitioner to send his representation to the ECI." From this, it is vivid that the CEO had not done his duties and responsibilities as prescribed both in the rules and the instructions. As such, the said inaction is hit by Article 14 of the Constitution of India. Hence, the lackadaisical attitude of both the Returning Officer and the Chief Electoral Officer has to be highly deprecated.

42. A proviso as to the relief that may be claimed by the petitioner has been made in the Act u/s 84, as per which, the petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void,

claim a further declaration that he himself or any other candidate has been duly elected.

43. In the case on hand, the claim of the petitioner, as already stated above, is for a declaration that the rejection of nomination of the petitioner filed for 197-Ilayangudi Assembly Constituency, Tamil Nadu, by the Returning Officer, is improper, illegal, void and contrary to the provisions of the Representation of the People Act, 1951, and the Returning Officer's instructions, 2009, issued by the Election Commission of India, and to set aside the entire election process, including the election of first respondent as returned candidate.

44. The election in question was a by-election, which was for a limited period of about two years, due to the fact that the 13th Legislative Assembly was dissolved in the year 2011. Of course, it is not the case of the petitioner in the Election Petition that the relief of declaration sought for is on the basis of corruption charges against the first respondent/returned candidate, but, it is the case of the first respondent/returned candidate that he cannot be found fault with for the lapses, if any, with the election authorities. What may, it matters not, even if the nomination of a candidate has been rejected improperly u/s 100(1)(c) and nothing can be faulted with the first respondent, the consequence to be followed u/s 100 shall be the same i.e., declaration of election of the returned candidate to be void.

45. Under the circumstances, the rejection of nomination of the petitioner filed for 197-Ilayangudi Assembly Constituency, Tamil Nadu, by the Returning Officer, is declared as improper, illegal, void and contrary to the provisions of the Representation of the People Act, 1951, and the Returning Officer's instructions, 2009, issued by the Election Commission of India. As such, the entire election process, including the election of first respondent as returned candidate, is set aside. Though the matter has become infructuous as per Issue No. 5, in view of the serious lapses on the part of the Returning Officer and also the Chief Electoral Officer, the decision in the Election Petition should not only be academic, but realistic as well. Accordingly, the Returning Officer and the Chief Electoral Officer of the relevant period and the Election Commission of India are jointly and severally directed to pay costs of ` 25,000/- (Rupees Twenty Five Thousand only) to the election petitioner within a period of one month from the date of receipt or production of a copy of this order. It is open to the competent authority/State Government to recover the monetary benefits that are availed by the first respondent/returned candidate during his tenure, if they so desire.

46. While parting with, I would like to make a point as under:

Though the provisions of the Act and the Handbook for Returning Officers are very clear as to the duties and responsibilities of the Returning Officer and the other authorities concerned during the course of elections, as could be seen in the instant case, the said provisions are not adhered to by the authorities. Therefore, it is desirable that Election Commission of India shall ensure the

appointment of Returning Officers with the knowledge of electoral laws and by giving proper training to them so as to strictly adhere to the provisions of the Act and the Handbook for Returning Officers, whereby instances of this kind, such as improper rejection of nomination papers of the candidates for technical or clerical errors or discrepancies shall not recur, thereby paving way for fair and impartial elections. Election Petition is allowed accordingly.

Petition allowed.