
(1983) 11 SC CK 0005

In the Supreme Court Of India

Case No : Civil Appeal No's. 1775, 1975 (E) and 2736 (E) of 1981

Pashupati Nath Sukul and Others

APPELLANT

Vs

Nem Chandra Jain and Others

RESPONDENT

Date of Decision : 25-11-1983

Acts Referred:

Conduct of Elections Rules, 1961 — Rule 2(1), 69, 85
Constitution of India, 1950 — Article 102(1), 12, 146, 148(5), 174
General Clauses Act, 1897 — Section 3(23), 3(60), 3(8)
Representation of the People Act,

Citation : AIR 1984 SC 399 : (1983) 2 SCALE 800 : (1984) 2 SCC 404 : (1984) 1 SCR 939 : (1984) 16 UJ 179

Hon'ble Judges : S. Murtaza Fazal Ali, J;O. Chinnappa Reddy, J;E. S. Venkataramiah, J

Bench : Full Bench

Advocate : M.C. Bhandare, Y.S. Chitale, S. Dixit, S. Bhandare and A. Subhashini, for the Appellant; Hari Shankar Jain and K.K. Gupta, for the Respondent

Final Decision : Allowed

Judgement

E.S. Venkataramiah, J.—At the conclusion of the hearing of the above appeals on November 16, 1983, we pronounced the following order :

Heard counsel for the parties. The appeals are allowed and the order of the High Court is set aside without any order as to costs.

We now give our reasons.

2. Two questions arise for consideration in these three appeals which are filed against the judgment and order dated July 10, 1981 of the High Court of Allahabad in Election Petition No. 7 of 1980. They are :

1. Whether the Secretary of a State Legislative Assembly is not qualified to be appointed as the Returning Officer at an election held to fill a seat in the Rajya

Sabha ?

2. Whether a person elected as a member of a Legislative Assembly but who has not made and subscribed the prescribed oath or affirmation as required by Article 188 of the Constitution can validly propose a person as a candidate at an election held for filling a seat in the Rajya Sabha ?

3. In February, 1980 the Legislative Assembly of the State of Uttar Pradesh was dissolved by the President by issuing a notification under Article 356 of the Constitution. A notification was issued by the Governor of Uttar Pradesh u/s 15(2) of the Representation of the People Act, 1951 (hereinafter referred to as 'the Act') in April, 1980 calling upon all the Assembly constituencies in Uttar Pradesh to elect members to the Legislative Assembly. After the results of the elections in all the constituencies held pursuant to the said notification were declared, the Election Commission of India issued a notification containing the names of the members elected for the said constituencies as required by Section 73 of the Act on June 9, 1980. The elected members were notified that they could take the oath as required by Article 188 of the Constitution at the session of the Legislative Assembly which had been summoned to meet on June 27, 1980 and on subsequent days. In the meanwhile on June 17, 1980, the Election Commission issued a notification calling upon the elected members of the Uttar Pradesh Legislative Assembly to elect a person for the purpose of filling a vacancy in the Rajya Sabha. By that notification, the Election Commission fixed the following programme for the purpose of the said election :

- (a) 24.6.1980 - as the last date for making nomination.
- (b) 25.6.1980 - as the date for scrutiny of the nomination papers.
- (c) 27.6.1980 - as the last date for withdrawal of candidature.
- (d) 4.7.1980 - as the date on which a poll, if necessary, would be taken.
- (e) 7.7.1980 - as the date before which the election had to be completed.

4. Shri S. P. Singh, Secretary of the Uttar Pradesh Legislative Assembly was appointed as the Returning Officer and Shri Uma Shankar, Joint Secretary as the Assistant Returning Officer for conducting the aforesaid election.

5. Pashupati Nath Sukul, the appellant in Civil Appeal No. 1775 of 1981 (hereinafter referred to as 'the appellant') and Nem Chandra . Jain, respondent No. 1 were nominated as the candidates at that election. At the time of scrutiny, respondent No. 1 filed objections to the nomination of the appellant raising two grounds-(1) that the appellant was disqualified as he was a Government servant and (2) that the proposer of the candidature of the appellant was not qualified to propose his candidature as he had not yet taken the oath as required by Article 188 of the Constitution. The appellant pleaded that as he had retired voluntarily from the Government service he was not disqualified for being chosen as a member of the Rajya Sabha and that the proposer of his candidature was an

elected member of the Legislative Assembly who was competent to make the proposal even though he had not taken the oath as provided in Article 188 of the Constitution. The Objections of respondent No. 1 were overruled and the nomination papers of both the appellant and respondent No. 1 were accepted by the Returning Officer. At the poll which took place on July 4, 1980 the appellant secured 325 votes and respondent No. 1 got 41 votes. Accordingly the appellant was declared to be elected as a member of the Rajya Sabha. Aggrieved by the result of the election, respondent No. 1 filed an election petition before the High Court calling in question the result of the election on various grounds and of them we are now concerned with two grounds only and they are (1) that as the Secretary of the Legislative Assembly was neither an officer of the Government nor of a local authority, he could not be appointed as the Returning Officer u/s 21 of the Act and 2) that as the proposer of the nomination paper of the appellant had not made or subscribed the oath or affirmation as required by Article 188 of the Constitution on the date of the nomination, there was improper acceptance of the nomination of the appellant. The appellant, the Election Commission of India, the State of Uttar Pradesh and Shri S. P. Singh, the Returning Officer were impleaded as respondents to the election petition. The name of the Governor of Uttar Pradesh who had also been impleaded as a respondent was deleted by the order of the High Court. The petition was contested by the appellant and others who had been impleaded as respondents in the election petition. At the conclusion of the trial, the High Court set aside the election of the appellant on the following grounds viz. that Shri S. P. Singh, Secretary, Legislative Assembly was not qualified to be appointed as the Returning Officer; that the proposal of the candidature of the appellant by a member of the Legislative Assembly who had not made and subscribed the oath or affirmation as required by Article 188 of the Constitution on the date of nomination was illegal and hence there was improper acceptance of the nomination of the appellant and that there was no valid electoral roll in force on the date of nomination. Aggrieved by the judgment of the High Court, the appellant has preferred Civil Appeal No. 1775 of 1981, the Election Commission of India has filed Civil Appeal No. 1975 (E) of 1981 and the State of Uttar Pradesh has preferred Civil Appeal No. 2736 (E) of 1981. All these three appeals are disposed of by this common judgment.

6. We shall first deal with the question whether the Secretary of the Legislative Assembly was not qualified to be appointed as the Returning Officer for the election. Section 21 of the Act which deals with the appointment of Returning Officers reads thus:

21. Returning Officers-For, every constituency, for every election to fill a seat or seats in the Council of States and for every election by the members of the Legislative Assembly of a State to fill a seat or seats in the Legislative Council of the State, the Election Commission shall, in consultation with the Government of the State designate or nominate a returning officer who shall be an officer of Government or of a local authority:

Provided that nothing in this section shall prevent the Election Commission from designating or nominating the same person to be the returning officer for more than one constituency.

(Emphasis added)

7. The contention of respondent No. 1 which has been accepted by the High Court is that the Secretary of the Legislative Assembly being not an officer of Government or of a local authority he was not qualified to be appointed as the Returning Officer. The argument is that 'Government' in the expression 'an officer of Government' used in Section 21 of the Act means the Executive only and an officer of the Legislature is not therefore, an officer of Government.

8. This case is an illustration of some legal problems solutions for which appear to be quite obvious but when an attempt is made to give reasons for such solutions one would be confronted with many difficulties though not insurmountable. The expressions 'Government' and 'an officer of Government' are not defined in the Constitution or in the Act. Article 367 of the Constitution provides that unless the context otherwise requires, the General Clauses Act, 1897 shall, subject to any adaptations and modifications that may be made therein under Article 372 of the Constitution, apply for the interpretation of the Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India. Section 3(23) of the General Clauses Act, 1897 defines 'Government' as follows :

3(23) 'Government' or 'the Government' shall include both the Central Government and any State Government.

9. The above definition is an inclusive definition and it suggests that there may be other organs of State which may be included within the meaning of the expression 'Government'. The expressions 'Central Government' and 'State Government' are defined in Section 3(8) and Section 3(60) of the General Clauses Act, 1897 respectively. These definitions are to be adopted unless there is anything in the context to the contrary. A general review of the constitutional provisions shows various expressions used in it to describe the several organs of the State. In Part I of the Constitution the expressions 'the Union', 'the States' and 'the Union Territories' are used. In Article 12 of the Constitution, we find the expressions 'Government and Parliament of India' and 'Government and the Legislature of each of the States' suggesting that Government is different from the Union Legislature or the Legislatures of the States. This is for purposes of Part III of the Constitution. In Article 102(1)(a) and Article 191(1)(a) of the Constitution, the expressions 'the Government of India' and 'the Government of any State' are used and they provide that a person holding an office of profit under the Government of India or a State Government is disqualified for being chosen as a member of Parliament or of a State Legislature respectively. Article 98 and Article 187 of the Constitution provide for the appointment of separate secretariat staff of each House of Parliament and of the State Legislatures

respectively. Article 146 and Article 229 of the Constitution respectively deal with the appointment of officers and servants of the Supreme Court and of the High Courts. Article 148(5) and Article 318 of the Constitution respectively deal with the conditions of service etc. of the employees working in the office of the Comptroller and Auditor-General of India and the Public Service Commissions. Part XIV of the Constitution contains provisions relating to the services under the Union Government and the State Governments. It contains Article 311 which guarantees certain rights which cannot be denied to the employees in the Legislature and in the Judiciary. Dealing with the nature of the office held by the officers working in the High Court, who are governed by Article 229 of the Constitution this Court has observed in *Pradyat Kumar Bose Vs. The Hon'ble The Chief Justice of Calcutta High Court*, thus :

A close scrutiny of the terminology so used shows a marked departure in the language of Article 320(3)(c) from that in Articles 310 and 311. Officers and members of the staff attached to a High Court clearly fall within the scope of the phrase "persons appointed to public services and posts in connection with the affairs of the State" and also of the phrase "a person who is a member of a civil service of a State" as used in Articles 310 and 311. The salaries of these persons are paid out of the State funds as appears from Article 229(3) which provides that the administrative expenses of a High Court including all salaries, allowances and pensions payable to or in respect of officers and servants of the High Court are chargeable upon the Consolidated Fund of a State. The item relating to such administrative expenses has to form part of the annual financial statement to be presented to the State Legislative Assembly under Article 202 and estimates thereof can form the subject matter of the discussion in the Legislature under Article 203(1). They must, therefore, be taken "to hold posts in connection with the affairs of the State and to be members of the civil service of the State."

10. Entry 5 of List II of the Seventh Schedule to the Constitution relates to 'Local Government' that is to say, the Constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration. In each of these cases it becomes necessary to examine the relevant provisions of law applicable to it in order to determine whether the officers and staff of the various organs are officers of Government or not. Before taking up such examination the meaning of the expression 'Government' has to be ascertained.

11. A student of International Law understands by the expression 'State' as a fully sovereign independent community residing in a specified territory with a legal capacity to enter into international relations and having the power to fulfil the obligations which the international law imposes on the family of nations. It should also have been admitted or recognised as a State on a footing of equality with other States. A State implies the existence of a community or group of people occupying a geographical area or territory in which they permanently

reside possessing internal sovereignty and independence of foreign control and a political organisation or agency through which the collective will of the people is expressed and enforced. The last of the elements of a State referred to above is generally called as a Government. A student of Political Theory and Comparative Politics may describe a Government as a monarchical, republican, democratic or dictatorial depending upon its peculiar features. It may be federal or unitary. A political philosopher may describe a Government as imperial, colonial, capitalist or socialist. The above list is not really exhaustive. But these are only different forms of Government and 'Government' here is used in a very broad sense. From the legal point of view, Government may be described as the exercise of certain powers and the performance of certain duties by public authorities or officers, together with certain private persons or corporations exercising public functions. The structure of the machinery of Government and the regulation of the powers and duties which belong to the different parts of this structure are defined by the law which also prescribes to some extent the mode in which these powers are to be exercised or these duties are to be performed (See Halsbury's Laws of England, Fourth Edition, Vol. 8, Para 804). Government generally connotes three estates, namely, the Legislature, the Executive and the Judiciary while it is true that in a narrow sense it is used to connote the Executive only. The meaning to be assigned to that expression, therefore, depends on the context in which it is used.

12. In our Constitution, which has a federal structure, there are both at the level of the Union and at the level of the States detailed provisions, pertaining to the Legislature, the Executive and the Judiciary. All the "three organs are concerned with the governance of the country one organ makes the laws, the second enforces them and the third interprets them though sometimes their functions may be overlapping. In this sense all the three organs together constitute the Government at their respective level. It is significant that the President is a part of parliament under Article 79 of the Constitution, the executive power of the Union is vested in him under Article 53(1) of the Constitution and he appoints Judges of the Supreme Court under Article 124(2) and he can issue an order removing a Judge of the Supreme Court under Article 124(4) of the Constitution, of course, subject to the limitations contained therein. At the level of the State too the position is analogous to the position at the level of the Union. The Governor is a part of the Legislature of the State under Article 168(1) of the Constitution. The executive power of the State is vested in him under Article 154(1) and he is consulted in the appointment of judges of the High Court. While under Article 235 of the Constitution, the High Court is vested with the control over the Subordinate Judiciary of the State, in the case of dismissal or removal of a judicial officer in the Subordinate Judiciary, the Governor has to issue the order though on the recommendation made by the High Court. A study of these provisions shows that there is no water tight compartment between the three major organs of the State. The Comptroller and Auditor-General of India though he is assigned an independent status is an officer under the Union Government.

(See Gurugobinda Basu Vs. Sankari Prasad Ghosal and Others, . The Judges of the Supreme Court and of a High Court are not servants of Government but hold a constitutional office (vide Union of India (UOI) Vs. Sankalchand Himatlal Sheth and Another, and Hargovind Pant Vs. Dr. Raghukul Tilak and Others, . But the Comptroller and Auditor-General of India and the Judges of the Supreme Court and of a High Court are not eligible to contest elections to Parliament and the State Legislatures in view of Article 102(l)(a) and Article 191(l)(a) of the Constitution, as the case may be, because they are serving in connection with the affairs of the Union (See Article 360(4)(b) of the Constitution) and are therefore, holding offices of profit under the Central Government. The position of a person who works as an officer of the Legislature of a State is also the same. Even though he belongs under Article 187 of the Constitution to the staff of the State Legislature, he is still an officer of Government in the broad sense in which the expression 'Government' is used in Article 102(l)(a) and Article 191(l)(a) of the Constitution. If the expression 'Government' used here is construed as meaning the Executive Government only, then it would defeat the very purpose of these provisions of the Constitution. Similarly he has to be treated as an officer of Government for purposes of Section 21 of the Act also qualified for being appointed as the Returning Officer for an election held under the Act. It is not disputed that after the commencement of the Constitution, the Secretaries of the State Legislatures almost as a matter of rule are being appointed as Returning Officers for election to the Rajya Sabha and for election to the Legislative Councils of States and Parliament has not thought it fit to amend suitably, Section 21 of the Act expressly including the officers of the State Legislatures amongst the persons qualified to be appointed as Returning Officers even though it has amended that section once by specifically including officers of local authorities. Parliament all-along has treated the Secretaries of the State Legislatures as officers of Government for purposes Section 21 and has found it convenient to do so having regard to the nature of the work to be . carried out by them. It may be noted that even though Article 98 and Article 187 of the Constitution contemplate the establishment of a separate secretariat staff for each House of Parliament and of the State Legislature respectively, the salaries and allowances of the members of that staff are paid out of the Consolidated Fund of India or of the State, as the case may be after they are voted by the House or Houses concerned. Their appointment and other conditions of service are regulated by Rules made by the President or the Governor, as the case may be, until appropriate law is made by Parliament or the State Legislature, as the case may be. We are of the view that the word 'Government' Article 102(1)(a) and in Article 191(1)(a) of the Constitution and the word 'Government' in the expression 'an officer of Government' in Section 21 of the Act should be interpreted liberally so as to include within its scope the Legislature, the Executive and the Judiciary. The High Court erred in equating the word 'Government' occurring in Section 21 of the Act to the Executive Government only and in further holding that the officers of the State Legislature could not be treated as officers of Government for purposes of that section. The finding of the

High Court that the Secretary of the Uttar Pradesh State Legislature could not be appointed as the Returning Officer for the election to the Rajya Shaba is, therefore, unsustainable.

13. The second question to be considered is whether the nomination of the appellant was liable to be rejected on the ground that the proposer was not eligible to nominate a candidate as he had not made and subscribed the oath or affirmation as prescribed by Article 188 of the Constitution.

14. Section 33 of the Act prescribes the requirements for a valid nomination. It provides that the nomination paper should be completed in the prescribed form and signed by the the candidate and by an elector of the constituency as proposer. Clauses (d) and (e) of Section 2(1) of the Act define the words 'election' and 'elector' respectively. 'Election' means an election to fill a seat or seats in either House of Parliament or in the House or either House of the Legislature of a State other than the State of Jammu and Kashmir. 'Elector' in relation to a constituency means a person whose name is entered in the electoral roll of that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in Section 16 of the Representation, of the People Act, 1950 (43 of 1950). Sub-clause (b) of Clause (1) of Article 80 of the Constitution states that the Council of States (the Rajya Sabha) shall in addition to twelve members nominated by the President under Sub-clause (a) thereof consist of not more than two hundred and thirtyeight representatives of the States and of the Union territories. Clause (2) of Article 80 of the Constitution provides that the allocation of seats in the Council of States to be filled by representatives of the States and of the Union territories shall be in accordance with the provisions in that behalf contained in the Fourth Schedule to the Constitution. Clause (4) of Article 80 provides that the representatives of each State in Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote. Section 152 of the Act provides that the Returning Officer for on election by the elected members of the Legislative Assembly of a State to fill a seat or seats in the Council of States shall for the purposes of such election maintain in his office in the prescribed manner and from a list of elected members of that Legislative Assembly. Clause (c) of Sub-rule (1) of Rule 2 of the Conduct of Elections Rules, 1961 defines "election by assembly members" as an election to the Council of States by the elected members of the Legislative Assembly of a State or by the members of the electoral college of a Union territory or an election to the Legislative Council of a State by the members of the Legislative Assembly of a State. 'Elector' is defined by Clause (d) of Sub-rule (1) of Rule 2 of the said Rules, in relation to an election by Assembly members as any person entitled to vote at that election.

15. In the present case, the notification containing the names of elected members of the Uttar Pradesh Legislative Assembly who participated at the election in question had been published u/s 73 of the Act on June 9, 1980 and

that the previous Legislative Assembly had been dissolved earlier in February, 1980. This is not a case where general elections to the Legislative Assembly had been held before the normal tenure of the existing Legislative Assembly was over. Section 73 of the Act which prescribes the publication of results of general elections reads thus :

73, Publication of results of general elections to the House of the People and the State Legislative Assemblies, Where a general election is held for the purpose of constituting a new House of the People or a new State Legislative Assembly, there shall be notified by the Election Commission in the Official Gazette as soon as may be after the results of the elections in all the constituencies (other than those in which the poll could not be taken for any reason on the date originally fixed under Clause (d) of Section 30 or for which the time for completion of the election has been extended under the provisions of Section 153), have been declared by the returning officer under the provisions of Section 53 or, as the case may be, Section 66, the names of the members elected for those constituencies and upon the issue of such notification that House or Assembly shall be deemed to be duly constituted:

Provided that the issue of such notification shall not be deemed-

(a) to preclude-

(i) The taking of the poll and the completion of the election in any Parliamentary or Assembly constituency or constituencies in which the poll could not be taken for any reason on the date originally fixed under Clause (d) of Section 30, or

(ii) the completion of the election in any Parliamentary or Assembly constituency or constituencies for which time has been extended under the provisions of Section 53; or

(b) to affect the duration of the House of the People or the State Legislative Assembly, if any, functioning immediately before the issue of the said notification.

(emphasis added)

16. On the publication of the notification on June 9, 1980 u/s 73 of the Act in the instant case, the Assembly was deemed to be duly constituted. Article 188 of the Constitution prescribes the oath to be taken or the affirmation to be made by every member of a Legislative Assembly or a Legislative Council. It reads :

188. Every member of the Legislative Assembly or the Legislative Council of a State shall, before taking his seat, make and subscribe before the Governor, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

17. Article 191 of the Constitution prescribes the disqualifications for membership of the Legislative Assembly or Legislative Council of a State. On the incurring of any such disqualification a member of a Legislative Assembly or a Legislative Council ceases to be a member thereof. Article 193 of the Constitution

provides for the penalty for sitting and voting before making oath or affirmation under Article 188 of the Constitution or when not qualified or when disqualified the penalty being in respect of each day five hundred rupees to be recovered as a debt due to the State. It does not say that if an elected member of a Legislative Assembly sits and votes before taking oath as prescribed by Article 188 of the Constitution he shall automatically cease to be a member of the House, even though it is possible that his seat maybe declared as vacant under Article 190(4) of the Constitution if for sixty days he is absent from all meetings of the House without its permission. Now the question is whether the making of oath or affirmation is a condition precedent for being eligible to act as a proposer of a valid nomination for election to the Rajya Sabha. The rule contained in Article 193 of the Constitution, as stated earlier, is that a member elected to a Legislative Assembly cannot sit and vote in the House before making oath or affirmation. the words 'sitting and voting' in Article 193 of the Constitution imply the summoning of the House under Article 174 of the Constitution by the Governor to meet at such time and place as he thinks fit and the holding of the meeting of the House pursuant to the said summons or an adjourned meeting. An elected member incurs the penalty for contravening Article 193 of the Constitution only when he sits and votes at such a meeting of the House. Invariably there is an interval of time between the Constitution of a House after a general election as provided by Section 73 of the Act and the summoning of the first meeting of the House. During that interval an elected member of the Assembly whose name appears in the notification issued u/s 73 of the Act is entitled to all the privileges, salaries and allowances of a member of the Legislative Assembly, one of them being the right to function as an elector at an election held for filling a seat in the Rajya Sahha. That is the effect of Section 73 of the Act which says that on the publication of the notification under it the House shall be deemed to have been constituted. The election in question does not form a part of the Legislative proceedings of the House carried on at its meeting. Nor the votes cast at such an election is a vote given in the House on any issue arising before the House. The Speaker has no control over the election. The election is held by the Returning Officer appointed for the purpose. As mentioned earlier, u/s 33 of the Act the nomination paper has to be presented to the Returning Officer between the hours of eleven o'clock in the forenoon and three o'clock in the afternoon before the last day notified for making nominations u/s 30 of the Act. Then all further steps such as scrutiny of nominations and withdrawal of nominations take place before the Returning Officer. Rule 69 of the Conduct of Elections Rules 1961 provides that at an election by Assembly members where a poll becomes necessary, the Returning Officer for such election shall, as soon as may be after the last date for the withdrawal of candidatures, send to each elector a notice informing him of the date, time and place fixed for polling. Part VI of the Conduct of Elections Rules, 1961 which contains Rule 69 and Part VII thereof deal with the procedure to be followed at an election. by assembly members. Rule 85 of the Conduct of Elections Rules, 1961 provides that as soon as may be after a candidate has been declared to be elected, the

returning officer shall grant to such candidate a certificate of election in Form 24 and obtain from the candidate an acknowledgement of its receipt duly signed by him and immediately send the acknowledgement by registered post to the Secretary of the Council of States or as the case may be, the Secretary of the Legislative Council. All the steps taken in the course of the election thus fall outside the proceedings that take place at a meeting of the House.

18. We may here refer to the decision of the Calcutta High Court in *Bhupendra Nath Basu v. Ranjit Singh* ILR 41 Cal. 384. The facts of that case were these. An election was held on February 14, 1913 to the Legislative Council of the Governor-General from the constituency consisting of the non-official additional members of the Bengal Legislative Council each having two votes to fill two seats in the Legislative Council of the Governor-General. There were at that time thirty four non-official additional members but two of them had not taken the oath of allegiance at the time of the election as prescribed by the Bengal Council Regulation VII. At the election there were four candidates- the plaintiff Bhupendra Nath Basu, the 1st defendant Maharaja Ranjit Singh, the 2nd defendant Surendra Nath Banerjee and Nawab Badruddin Haidar. As a result of the poll the second defendant got 22 votes, the first defendant got 18 votes, the plaintiff 17 and Nawab Badruddin Haidar 11 votes. Accordingly defendants 1 and 2 were declared elected to fill the two seats. The plaintiff after being unsuccessful in his petition to the Governor-General filed a suit . before the High Court questioning the validity of the election. He prayed that the votes should be recounted after excluding the votes cast by the two members who had not taken the oath of allegiance. . Regulation VII referred to above provided that every person elected nominated under the regulations should before taking his seat at a meeting of the Council make an oath or affirmation of his allegiance to the Crown and Regulation VIII provided that if such a person "fails to make the oath or affirmation prescribed by Regulation VII within such time as the Governor-in-Council may consider reasonable, the Governor, shall by notification in the local Official Gazette declare the election or nomination to be void or his seat to be Vacate". Such a declaration had not been made on the date of the election. The contention of the plaintiff was rejected by the High Court in the following terms :

Moreover, I am not satisfied that the view of the Government as to the taking of the oath of allegiance is not a correct one. Doubtless the English cases that were referred to, the case of the Mayor of Penryn (1 Strange 582) and *The King v. Swyer* (1830) 10 B. and C. 486) have decided that a person is admitted to a public office, which requires the oath of allegiance, only when the oath of allegiance is taken. That does not get rid of the difficulty that arises from these Regulations. These Regulations constitute an electoral College of elected members of the Local Council to elect two persons to be members of the Council of His Excellency the Governor-General. I am not satisfied on the Regulations that the learned Advocate-General has called my attention to, that when the electors have the right of giving their votes by mean's of registered letter, for the purpose of being members of electoral college and for that purpose only, that the

mere fact of election to the local Council was not sufficient to constitute a person so elected a member of the electoral college. It is only for the purpose of exercising the legislative functions conferred by the Regulations and by the Act that the oath of allegiance is required. Moreover, as the Advocate-General has pointed out, the mere fact of omission to take an oath of allegiance does not ipso facto cause a member to vacate his seat; under Regulation VIII of the Bengal Council Regulations, the discretion is given to the Governor as to his declaring a seat to be vacant if the person elected fails to take an oath of allegiance. In my opinion, in this case the Rule fails and must be discharged, and discharged with costs.

19. We are of the view that an elected member who has not taken oath but whose name appears in the notification published u/s 73 of the Act can take part in all non-legislative activities of an elected member. The right of voting at an election to the Rajya Sabha can also be exercised by him. In this case since it is not disputed that the name of the proposer had been included before the date on which he proposed the name of the appellant as a candidate in the notification published u/s 73 of the Act and in the electoral roll maintained u/s 152 of the Act, it should be held that there was no infirmity in the nomination. For the same reason even the electoral roll which contained the names of elected members appearing in the notification issued u/s 73 of the Act cannot be held to be illegal. That is how even respondent No.1 appears to have understood the true legal position as he was also proposed as a candidate by an elector who had not yet made the oath or affirmation. The second contention also fails. No other contention was pressed before us. We are therefore, of the view that the findings recorded by the High Court on the basis of which the election of the appellant to the Rajya Sabha was set aside are erroneous.

20. In the result we allow the above appeals, set aside the judgment of the High Court and dismiss the election petition filled by respondent No 1. Having regard to the novelty of the question raised in this case the parties are directed to bear their own costs throughout.