
(2002) 08 MP CK 0024
In the Madhya Pradesh High Court
Case No : LPA No. 416 of 2002 (J)

(Smt.) Neetu Kathoria	Vs	APPELLANT
State of M.P. and Others		RESPONDENT

Date of Decision : 23-08-2002

Acts Referred:

Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972 — Section 11B, 12, 3

Citation : (2003) 1 MPJR 305

Hon'ble Judges : Dipak Misra, J;Ajit Singh, J

Bench : Division Bench

Advocate : Sanjay K. Agrawal, for the Appellant; R.N. Singh with Mr. Arpan J. Pawar, for the Respondent

Final Decision : Allowed

Judgement

Dipak Misra, J.

In this appeal defensibility of the order dated 26.6.2002 passed in W.P. No. 5664/2001 by the learned Single Judge is called in question by invoking Clause 10 of the Letters Patent.

The facts as have been uncontained are that the respondents No. 5 and 6 herein invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India for issue of a writ of "quo warranto" on the bedrock that the present appellant, who was respondent No. 5 therein (hereinafter referred to as "the appellant") has usurped a public office, the post of Chairman, Krishi Upaj Mandi Samiti, Bina, District, Sagar. Edifice was built on the base that the appellant was not qualified to hold the post of the Chairman inasmuch as she was neither registered as a voter as on 1-1-1999 nor was she recorded as an agriculturist in the land records which are prerequisites for contesting in the election. The writ petitioners who claimed themselves to be the registered voters and participated in the election urged in the petition that they were persons interested and as the office of the Chairman is a public office and it has been

held by a person not qualified to hold such office they were entitled to the relief prayed for. It was put forth that under the M.P. Krishi Upaj Mandi Adhiniyam, 1972 (hereinafter referred to as "the Act") there is provision for establishing of market committee u/s 3 of the Act. Section 12 of the Act embodies the provision for election of Chairman. Section 11-B of the Act stipulates the qualifications of voters as well as the qualification of a person to be elected as a representative of the agriculturists.

According to the writ petitioners, the post of Chairman of Market Committee, Bina was reserved for Scheduled Caste (woman) and to that effect a requisite notification was issued. The election for the aforesaid post was held on 26.2.2000 and the appellant was declared elected. It was set forth in the petition that she could not have participated in the election as she was neither an agriculturist nor registered as a voter but by manipulating and manoeuvring and taking recourse to fraud with the active assistance of Patwari she got her name included in the voters list at Serial No. 611. In the provisional list her name was not there and the voters list contained 610 names. The provisional as well as the final voters list was provided by the Tahsildar, Bina, the respondent No. 4 therein with a forwarding memo. The writ petitioners could know this fact at a subsequent stage which shocked them. They came to know that Mohan, the husband of the appellant, along with his three brothers filed an application before the respondent No. 4 for passing of an order of mutation in respect of the land admesuring 2.20 hectares which had been left behind by their father, Hariram Kathoriya. The mutation was sought on the basis of a deed of settlement called "Fard Batwara" on 23-1-1999. The Tahsiladar registered a case No. 14-A/26/98-99 and after following due procedure passed an order of mutation in favor of the four brothers which included the husband of the appellant. 0.5 hectares of land situate on Khasra No. 399/1 was directed to be recorded in the name of Mohan. Thereafter the Patwari, Laxman Prasad, entered the said area in the name of the appellant along with four brothers in clear violation of the order passed by the Tahsildar. This factum came to the knowledge of the Sub-Divisional Magistrate, Bina, who after conducting an enquiry submitted a report against the Patwari who was placed under suspension on 6-11-2000. It was put forth in the writ petition that Khasra entries were unauthorisedly manipulated to confer the status of Bhumiswami on the appellant by the delinquent Patwari with the sole purpose to enable her to contest in the election. When the petitioners came to know about the said fraudulent action they approached this Court. It was pleaded that her name was not recorded in the voters' list as on 1.1.1999. It was also brought to the notice that the election was scheduled to be held in the month of March-April, 1999 but because of an order of stay passed by this Court the same could not be held within the time frame and eventually it was held on 27.2.2000. It was urged that she was not a voter on the relevant date i.e. 1.1.1999 as per requirement of law and being ineligible on the crucial date she was not entitled to contest in the election, hence she was undoubtedly an usurper to the office in question.

A counter affidavit was filed by the appellant in the writ petition contending, inter alia, that proper remedy for the petitioner was to file an election petition but they have chosen not to do so. It was also put forth that the writ petition having been instituted in the month of October, 2001 after expiry of more than one and half years, the same deserved to be dismissed on the ground of delay and laches. It was also set forth in the return that she was an agriculturist and Bhumiswami but as her name was left out from the list she applied for inclusion and the same was included before the finalisation of the electoral roll. Allegations in regard to manipulation and commission of fraud were categorically controverted. The election rules which were framed in the year 1997 were amended on 6.3.1999 and, therefore, the cut off date provided to be 1.1.1999 has lost its significance solemnity and the term "schedule" would include rescheduling. An effort was made to distinguish between a voter and the contestant by scanning the rules. It was put forth by the appellant that she had purchased 0.04 hectares of land situated at Khasra No. 257/3 in village Muhasa from the recorded Bhumiswami for valid consideration of Rs. 8000/- on 16.3.1999 by a registered sale deed and her name was entered in the revenue record and she was given the Bhu Adhikar and the Rin Pustika as Bhumiswami of land. Certain allegations of malafide were made against the writ petitioner No. 1.

The learned Single Judge directed the respondent Nos. 1 to 4 to produce the records which were produced before him. No return was filed on their behalf. It was contended by the learned counsel for the petitioners before the learned Single Judge that a fraud was played by the Patwari and on that fraudulent foundation the votes list was prepared and the name of the appellant was included in the voters' list on 27.3.1999. It was also contended that remedy of election petition was not available as the procedure has not been prescribed for filing of the election petition and rules have not been framed under the amended provision. It was also propounded that in any case, fraud was the governing character and, therefore, she was not entitled to hold the office. Further proponent was that on the crucial date i.e. 1.1.1999 the name of the appellant was not recorded in the voters' list but was subsequently entered on 27.3.1999, thence, she had definitely usurped the public office.

On behalf of the appellant it was contended before the learned Single Judge that remedy of election petition should have been taken resort to by the petitioners if they really felt the necessity to challenge the election. It was also argued that as the election was held in the year 2000 the eligibility criteria should be seen with reference to the date of election. Reliance was placed on the "Fard" Batwara dated 12.8.1998 to show that the eligibility could be traced prior to 1-1-1999. It was also contended that Rule 12 was amended on 6.3.1999 which could not be given retrospective effect.

The learned Single Judge adverted to the issue whether remedy of election petition was available to the petitioners u/s 66-A of the Act. After taking note of the said provision as well as Section 12 which was substituted by the amended

Act No. 27 of 1997 and the Rules 43 and 54 of M.P. Krishi Upaj Mandi (Adhisuchana Prakashan Riti, Bharasdhak Samiti Tatha Mandi Samiti Gathan) Niyam, 1974 [in short "the rules"] and taking into consideration the fact that no change has been made u/s 79 (2) (ii) (c) of the Act and further taking note of Rule 90 of 1997 Rules which deals with repeal and savings the learned Single Judge came to hold that 1997 Rules nowhere prescribe method of filing of election petition and on that ratio came to hold that reference of dispute of the election of President cannot be made under Rule 84 (13) of 1997 Rules. The learned Single Judge has also expressed that the State should have framed the rules as per amended Section 66-A but no clear procedure having been prescribed an imbroglio had been created and hence, the writ petition could not be thrown away simply on the ground that the petitioners should have preferred an election petition in terms of Section 66-A of the Act when the respondent had not prescribed the procedure clearly nor had framed fresh rules in regard to dealing of an election petition. The learned Single Judge placed reliance on the decision rendered in the case of K. Venkatachalam Vs. A Swamickan and Another, and placing reliance on paras 20, 25, 27 and 28 of that decision came to hold that no person can be allowed to play fraud and a person who illegally usurps the office has to show under what legal authority he is entitled to hold the office. In this backdrop, learned Single Judge in para 44 of the judgment posed the question whether the appellant lacked the basic eligibility criteria to enter into the office of the Chairman. The learned Single Judge perused the original records which showed that the name of the appellant was recorded in the voters' list on 27.3.1999. The endorsement shows that name was entered as Panchayat had passed a resolution on 21.3.1999. The learned Single Judge in para 46 referred to the order of the Tahsildar and observed that Patwari had no right to make only entry in the record in absence of an order passed by the Tahsildar in accordance with the M.P. I and Revenue Code, 1959 (hereinafter referred to as "the Code"). In the said paragraph he further came to hold that Tahsildar had allowed mutation in respect of four persons on the basis of "Fard" Batwara on 12.3.1999 but at no point of time thereafter had directed mutation in the name of the appellant, the respondent No. 5 in the writ petition. In view of this analysis the learned Single Judge arrived at the conclusion that there was no entry in the eye of law in the revenue records and the appellant was not recorded as Bhumiswami of any agricultural land as on 27.3.1999 the date on which entry in her name was made in the voters' list by amending the voters list. He has taken note of the registered sale deed dated 16.3.1999. The learned Single Judge thereafter proceeded to analyse the facts and came to hold that the Tahsildar had not passed any order of mutation on the strength of the sale deed dated 16.3.1999 but the resolution of the Gram Panchayat was passed by the Gram Panchayat. He has also made reference to section 108 and 110 of the M.P. Land Revenue Code. On that base he came to hold that panchayat was not competent to pass an order of mutation and it had only passed the resolution and forwarded the resolution which could be a recommendation at the most and cannot be given the status of mutation. The learned Single Judge came to hold that as the Gram

Panchayat had no jurisdiction to direct for mutation the said direction dated 21.3.1999 was non est, illegal and void. After recording such a finding the learned single Judge referred to the Section 11-B of the Act and came to hold that a person unless recorded as Bhumiswami in the village land records and in the voters' list prepared under the provisions of the Act and the rules made hereunder is not qualified to be a representative of the agriculturists. Some comments have been given with regard to the action of the Patwari. Quite apart from the above, the learned Single Judge expressed the opinion that eligibility has to be assessed as on 1.1.1999 and even if the facts are accepted the appellant was not a Bhumiswami as on the cut off date and hence, she could not have been regarded as a Bhumiswami. On these premises the learned Single Judge declared the appellant as an usurper of the office of Chair Person, Krishi Upaj Mandi Samiti, Bina and held that she has no right to continue in the office and accordingly directed a fresh election to be held.

Assailing the aforesaid order it is submitted by Mr. Sanjay K. Agrawal, learned counsel for the appellant that the learned Single Judge has erred in law by coming to hold that an election dispute could not have been raised assailing the election of the appellant. It is canvassed by him that the appellant had purchased the land on 16.3.1999 and the Gram Panchayat passed the resolution as per notification dated 21.10.1994 by which the Gram Panchayat had been conferred the power of Tahsildar u/s 110 of the M.P. Land Revenue Code and therefore, the finding of the learned Single Judge that the Gram Panchayat did not have the jurisdiction to pass such order does not stand scrutiny. It is contended by him the gram Panchayat could pass a resolution for mutation as there was no dispute and once jurisdiction is vested it can be exercised and that having been exercised that finding of the learned Single Judge in that regard cannot be allowed to hold the field. It is propounded by Mr. Agrawal that the appellant filed an application before the electoral registration officer for recording her name in the voters' list and the said application was duly considered and no one including the writ petitioners raised any objection and no appeal was preferred and hence, the finality got attached to it and that being the resultant factor it could not have been gone into in the writ petition. It is also put forth" by him that an entry made in the electoral roll is final and conclusive and it is not open to be gone into in a proceeding of this nature and as the learned Single Judge has expressed his opinion by making a roving enquiry the same vitiates the order in entirety. It was also propounded by Mr. Agrawal that unless a clear cut case is made out writ court should be slow to issue a writ of "quo warranto" but the said basic principle has not been kept in mind while passing the order and that makes the order susceptible in law.

Mr. R.N. Singh, learned Senior Counsel appearing for the respondents No. 5 and 6, per contra, supported the order of the learned Single Judge and contended that as the appellant could not have contested in the election being not eligible as on 1.1.1999 the learned Single Judge has rightly declared him as an usurper to the public office and declared the post to have fallen vacant and hence, no

illegality has been committed. It is urged by him in absence of any error or any kind of unsoundness there is no warrant for interfering in this intra court appeal.

Before we enter into the spectrum and justifiability of the issue of "quo warranto" in the obtaining factual matrix, we think it apposite to deal with the facet which has been debated at length before us by the learned counsel for the parties, whether an election petition before the competent authority could have been filed. We are adverting to this aspect as we feel the controversy should be put to rest. Section 12 of the Act before the amendment which came into existence by Amendment Act No. 27 of 1997 provided for election of Chairman from amongst the members of the market committee. After the amendment he is being directly elected. Sub-section (6) of Section 12 as stood earlier provided for filing of an election dispute if it related to the validity of the election of Chairman or Vice-Chairman. The competent authority to entertain the election petition was the Collector. The decision of the Collector was appealable before the Commissioner and his decision was given the status of finality. Sub-section (6) of unamended Section 12 read as under :

(6) In the event of a dispute arising as to the validity of the election of a Chairman or Vice-Chairman, the Collector, if he is the presiding officer, shall decide the dispute himself and in any other case officer presiding shall refer the dispute to the Collector for decision. The decision of the Collector shall, subject to an appeal to the Commissioner be final and no suit or other proceeding shall lie in any court of law in respect of such decision.

We have referred to the aforesaid provision only to show how the election of Chairman could be assailed.

After the amendment sub-section (1) of Section 12 has been substituted as under :

12- Election of Chairman and Vice Chairman - (1) The Chairman shall be chosen by direct election by the person qualified to vote for the election of representatives of the agriculturists and traders in the prescribed manners:

Provided that no person shall be eligible for election as Chairman unless he is qualified to be elected under sub-section (2) and (3) of Section 11-B.

It is worthwhile to state here Section 79 of the Act enables the State Government to make rules. The State Government had framed 1974 Rules. Rule 43 of 1974 Rules reads as under.

43. Election petition. (1) No election of a member shall be called into question except by a petition in writing for determining the validity of the election and claiming any or both of the following reliefs, namely :

(a) a declaration that the election of all or any of the elected candidates is void;

(b) a declaration that he himself or any other candidate has been duly elected.

(2) The petition shall be presented to the Collector within fourteen days from the date on which the result of the election was published under Sub-rule (3) of rule 38.

(3) The petition shall be accompanied by a deposit of two hundred and fifty rupees as security for the costs of petition.

(4) The petition shall -

(a) contain a concise statement of the material facts on which the petitioner relies:

(b) set forth with sufficient particulars, the ground or grounds on which the election is called in question;

(c) be signed by the petitioner and verified, in manner prescribed in Code of Civil Procedure, 1908 (V of 1908), for verification of pleadings.

(5) Such petition may be presented by any candidate at such election or by a voter of the constituency concerned.

(6) A petition filed by any person other than those specified in sub-rule (5) shall not be accepted and it shall forthwith be dismissed.

(7) No petition shall be deemed to have been duly made unless such deposit as referred to in sub-rule (3) has been made and the Collector shall dismiss such petitions as are not accompanied by such deposit.

(8) The Collector may send the petition to any of his subordinate officers not below the rank of Deputy Collector, for enquiry and disposal. The decision of the Collector or his subordinate officer, as the case may be, shall be final.

Provided that before passing final orders by the appellate authority reasonable opportunity to be heard shall duly be given to the party concerned.

(9) If a petition filed by any person is rejected after being, the deposit, referred to in sub-rule (3), shall be forfeited and credited to the market committee fund.

(10) The election petition shall be disposed off within six months from the date of presentation thereof.

Sub-rules 13 and 14 of Rule 54 of 1974 Rules provided for filing of a dispute as to the validity of election of Chairman and Vice-Chairman. Sub-rule 13(a) stipulated that in the event of a dispute arising as to the validity of the election of Chairman or Vice-Chairman the same was required to be referred to the Collector within a period of 15 days from the date of the meeting concerned. The said rule further provided that reference was to be made by person concerned in writing giving a concise statement of materials.

Under Sub-Rule 13(b) it was stipulated if a person was aggrieved by the decision of the Collector on the reference he was entitled to prefer an appeal in writing to

the Commissioner within a period of 15 days from the date of receipt of communication of such decision. The rules further provided that decision of the Commissioner would be treated as final. Thus, the aforesaid rule dealt with the manner in which the election of the Chairman or Vice-Chairman could be referred to the Collector and how an appeal could be filed before the Commissioner. The said rule applied to both the Chairman and the Vice-Chairman, as both these functionaries were elected by an indirect method.

There has been a sea change in praesenti in as much as the election to the office, of the Chairman has become direct.

The learned Single Judge has observed that by the amendment section 11 and 12 have been substituted but no change has been effected in Section 79(2)(ii)(c) of the Act. A set of rules has come into existence which is called M.P. Krishi Upaj Mandi Nirvachan Rule, 1997. Rule 90 of the 1997 Rules deals with repeal and savings and the same reads as under:

90. Repeal and Savings.-On and from the date on which these rules come into force so much of the provisions of the Madhya Pradesh Krishi Upaj Mandi (Adhisuchana Prakashan Riti, Bharsadhak Samiti Tatha Mandi Samiti Ka Gathan) Rules, 1974, as relate to the matters covered by these rules stand repealed.

Provided that anything done or any action taken under any of the provisions so repealed unless such thing or action is inconsistent with the provisions of these rules, be deemed to have been done or taken under the corresponding provisions of the Rules.

The learned Single Judge in paras 37 and 38 of the order has held that 1974 Rules survive to that extent which are not covered by the present set of Rules but Rule 43 does not clearly provide for filing of election dispute before the Commissioner. It deals with filing of petition before the Collector with respect to election of members, however, rule has to be harmonised to the extent reference to Collector has to be understood as the Commissioner. While so saying the learned Single Judge has also expressed the view that no election proceeding has been prescribed for in the Rules, though an election petition lies u/s 66-A of the Act and hence, an imbroglio has been created. While so stating the learned Judge has also observe that writ petition cannot be thrown simply on the ground that the petitioners should have preferred an election petition in terms of Section 66-A of the Act when the respondents have not prescribed the clear procedure nor have framed fresh rules. In this context it is essential to refer to Section 66-A of the Act. It reads as under:

66-A. (1) An election under this Act shall be called in question only by a petition presented in the prescribed manner to the Commissioner of the Division.

(2) No such petition shall be admitted unless it is presented within thirty days from the date on which the election in question was notified.

(3) Such petition shall be enquired into or disposed of according to such

procedures as may be prescribed.

On a perusal of the aforesaid Section it is clearly noticeable that prescribed authority has been mentioned in the section; that a limitation has been provided, and that a stipulation has been made that it should be inquired into according to such procedure as may be prescribed. Rule 43 of the 1974 Rules provide for presentation of election petition before the authority, who is the Collector. It also prescribed the period of limitation as 14 days and also laid down the manner in which it shall be final. Rule 44 deals with declaration of election as void. It is apposite to reproduce the said Rule:

44. Declaration of election as void. (1) If after such enquiry as he considers necessary, the Collector or his subordinate officer, as the case may be, is of the opinion that the election complained of has been procured and induced or the result of the election has been materially affected by an corrupt or illegal practice or non-compliance with any rule he may pass an order :

(a) declaring the election of all or any of the elected candidates to be void" or

(b) declaring the election of all or any of the elected candidates to be void and the petitioner or any other candidates to have been duly elected. In the event of the election set aside the Collector shall take necessary steps for holding a fresh election.

(2) Grounds for declaring election to be void:

(a) that on the date of his election the elected candidate was not qualified or was disqualified to be chosen to fill the seat; or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of the elected candidate or election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election in so far as it concerns a elected candidate has been materially affected:

(i) by improper acceptance of any nomination; or

(ii) by any corrupt practice committed in the interest, of the elected candidate by a person other than that candidate or his election agent or a person acting with the consent of such candidate or his election agent; or

(iii) by the improper receipt, refusal of rejection of any vote or the reception of any vote which is void; or

(iv) by any non-compliance with the provisions of the Act or any rules or orders made hereunder.

(3) For the purposes of this rule following shall be deemed to be corrupt and

illegal practices.

Bribery, undue influence and personation at election, as defined u/s 171 (B), 171 (C) and 171 (D) of Chapter IX-A of the Indian Penal Code, 1860 (45 of 1860).

If the aforesaid Rule is read conjointly with the main provision, we perceive no difficulty how an election petition cannot be entertained. The section has taken care of many facets what the rules had taken earlier. The procedure is not inconsistent with 1997 Rules. Subs-rules (13) and (14) of Rule 54 of old Rules read as under:

(13) (a). In the event of a dispute arising as to the validity of the election of Chairman or Vice-Chairman, as the case may be, it shall be referred to the Collector within a period of fifteen days from the date of the meeting concerned, for decision. The reference shall be made by the person concerned in writing giving a concise statement of materials on which he relies.

(b) Any person aggrieved by the decision of the Collector on the reference under clause (a) of this sub-rule, may prefer an appeal in writing to the Commissioner within a period of fifteen days from the date of receipt of communication of such decision to him and the decision of the Commissioner in respect of such an appeal shall be final.

(14) The voting papers concerning the election of the Chairman and Vice-Chairman may be destroyed by the Chairman of the Market Committee after the decision of the Commissioner under sub-rule (13) above or a period of three months after the election, whichever may be later.

The learned Single Judge has observed that there cannot be a reference under the said Rules. If the amended rule is read it deals with election of the Vice Chairman and how that will be assailed. Thus, as far as election of Chairman is concerned the same is no more governed by Rule 54, there being a direct election to the said post. We are of the considered view that the old Rule which is inconsistent with the new Rule automatically stands repealed. We have already referred to Rules 43 and 44 of the 1974 Rules. If both the Rules are read in a cogent and purposeful manner there remains no scintilla of doubt that the rules which are not in consistent with 1997 Rules would indubitably survive. As far as the ground for declaring an election as void is concerned, we are of the considered view that they retain their place as there is nothing in the 1997 Rules to nullify the same. If some parts of the Rules like naming of the authority runs contrary to the main section, the same should be deemed to have been repealed inasmuch as no rule can be allowed to supplant the provisions engrafted under the main Act. We may hasten to mention here that Section 12 of the Act deals with election of Chairman and Vice Chairman. The election of Chairman has been made by direct election but the Vice Chairman is to be elected by from amongst the elected members. Section 66-A clearly lays a postulate that the election under this Act shall be called in question only by petition presented in the prescribed manner to the Commissioner of the Division. Indubitably, earlier on,

election of Chairman was by way of indirect election and Rules 54 and 74 of the Rules deals with the election of the Chairman and Vice-Chairman. Sub-Rules 13(a) and (b) of Rule 54 dealt with certain contingencies. As we are not presently concerned with the election of Vice Chairman, we only observe if there is any inconsistency in the Rule 54, 13(a) & (b) and the Rule 84 of 1997 Rules then the 1997 Rules would prevail. We may state here that learned Single Judge has rightly observed that the Rule 43 does not clearly provide for filing of election petition before the Commissioner. It has to be harmonised to the extent it refers to the Collector, it is to be understood as Commissioner. We entirely agree with the same. We also agree that it would have been better that the State should have framed the rules as per the mandate inserted in the year 1999 by Act No. 14 of 1999. We may state here that learned Single Judge has not clearly held that no election petition can lie but he has observed that no Rule has been framed in terms of Section 66-A and as some amendment was required in Rule 43 providing for procedure for filing the election petition, the writ petition cannot be thrown due to availability of alternative remedy. We would like to clarify here that though there has been no amendment to Rule 43 yet the section clearly states about the Commissioner and the earlier observation of the learned Single Judge that it should be harmonised and read with section is correct and sound. True it is, in rule 43 there is mention of "member" but the said Rule also deals with an election of an election candidate. u/s 12 the election of Chairman has been made direct and he is elected by direct process. Thus, in our considered view his election can be assailed by taking recourse to Section 66-A of the Act read with Rules 43 and 44 except to the effect the part of the Rules which run contrary to Section. Rule 44 clearly postulates the grounds where the election of candidate be declared as bad in law. In our considered view the same should apply in full force to the election of person who is also directly elected. It cannot be said that no procedure has been laid down. If the said rules are saved they should be read in proper perspective and only because there is mention of Collector or Member it should not be held that no rules have been provided for assailing the election by way of election petition. Hence, we hold that the election could have been assailed by filing an election petition. We at this juncture state that the State Government would be well advised to frame a set of rules to avoid any kind of confusion and ambiguity.

The next issue that we would like to advert to is whether the appellant has been erroneously recorded as bhumiswami and whether there has been any fraudulent act committed by her. The learned Single Judge has held that the Tahsildar had passed the order on the basis of "Fard" Batwara" in respect of four persons but the Patwari recorded the name of the appellant. He has taken note of the fact that the act of the Patwari was totally fraudulent for which he was suspended. It is also held by him that the Gram Panchayat had no jurisdiction to pass a resolution for the purpose of mutation and, therefore, the said resolution is to be treated as illegal and void. It is not disputed that the appellant had purchased certain land on 16.3.1999. The Gram Panchayat passed the resolution on

21.3.99. Mr. Sanjay K. Agrawal, learned counsel for the appellant has drawn our attention to certain provisions, of the M.P. Land Revenue Code. He has placed reliance on sections 108 and 110 of the Code. Section 110 deals with mutation of acquisition of right in Field Book and other relevant land records. The learned counsel has also drawn our attention to Section 24 of the Code. Section 24, 108 and 110 of the Code read as under:

24. Conferal by State Government of powers of Revenue Officers on Officials and other persons.

(1) The State Government may confer on any person the power conferred by or under this Code on any Revenue Officer.

(2) The State Government may confer on any Assistant Collector, Tahsildar or Naib-Tahsildar the powers conferred by this Code on a Revenue Officer of a higher grade.

Record of Rights - (1) A record-of-rights shall in accordance with rules made in this behalf be prepared and maintained for every village and such record shall include the following particulars:

(a) the names of all Bhumiswamis together with survey numbers or plot number held by them and their area, irrigated or unirrigated;

(b) the names of all occupancy tenants and Government lessees together with survey numbers or plot numbers held by them and their area, irrigated or unirrigated;

(c) the nature and extent of the respective interests of such persons and the conditions or liabilities, if any, attaching thereto;

(d) the rent or land revenue, if any, payable by such persons; and

(e) such other particulars as may be prescribed.

(2) The record-of-rights mentioned in sub-section (1) shall be prepared during a revenue survey or whenever the State Government may, by notification, so direct.

Mutation of acquisition of right in Field Book and other relevant land records. -

(1) The Patwari shall enter into a register prescribed for the purpose every acquisition of rights reported to him u/s 109 or which comes to his notice from intimation from Gram Panchayat or any other source.

(2) The Patwari shall intimate all the reports regarding acquisition of right received by him under sub-section (1) to the Tahsildar within thirty days of the receipt thereof by him.

(3) On receipt of the intimation from patwari under sub-section (2), the Tahisdar shall have it published in the village in the prescribed manner and shall also give

written intimation thereof to all person appearing to him to be interested in the mutation and also to such other person and authorities as may be prescribed.

(4) The Tahsildar shall after affording reasonable opportunity of being heard to the person interested and after making such further enquiry, as he may deem necessary, make necessary entry in the Filed Book and other relevant land records.

It is submitted by him that the State Government by notification dated 24.10.1994 conferred the powers to be exercised by Tahsildar u/s 110 of the Code on the Gram Panchayat with a rider that the power can be exercised if there is no dispute in regard to the same. We think it apposite to reproduce the relevant part of the notification:

The learned counsel has also drawn our attention to the notification dated 27.5.1996 wherein the said power has been reiterated in addition to some more powers. When these notifications were shown to us a submission was made by Mr. R.N. Singh, learned Senior Counsel that there is no proof that these notifications were in vogue at the time Gram Panchayat passed the resolution. On such a submission being made we inquired from Mr. A.K. Mishra, learned Deputy Advocate General for the State who took time and later on produced the notifications indicating that these notifications have been superceded in the year 2000. Thus, the fact remains, these notifications were in force on the date the Gram Panchayat passed the resolution. Admittedly, the appellant had purchased the land and the land owner had conceded for mutation. There was no dispute. In absence of any dispute we are of the considered view that the Gram Panchayat had the jurisdiction as per notification dated 21.10.94 to effect mutation by passing a resolution. Nothing more remained to be done by the Tahsildar.

We have been apprised at the Bar that this aspect was not brought to the notice of the learned Single Judge. As there is gazette notification we have taken cognizance of that and dealt with the matter. Had this notification been brought to the notice of the learned Single Judge, the finding possibly would have been different. Therefore, we only hold that the resolution passed by the Gram Panchayat is legal and confers the right of Bhumiswami on the appellant. The other aspect that has weighed with the learned Single Judge that a fraudulent has been practiced by the Patwari for which he had been suspended. It is to be noted here that voters' list has been prepared on the basis of resolution passed by the Gram Panchayat. The endorsement of inclusion of name of the appellant in the voters' list so indicates in a unequivocal manner.

In view of this what had happened prior to that in our opinion melts into insignificance and in any case the appellant cannot be made responsible for that. That apart, that would not be a facet to be gone into in a case of this nature: We may hasten to clarify that had the voters' list been prepared on the basis of "Fard Batwara" prepared by the Patwari, matter would have been definitely

different as fraud vitiates everything be it mundane or ecclesiastical. It is well settled in law that fraud vitiates that cause of justice. But in the instant case what emerges is that at this juncture, it cannot be said that the appellant had any role in that fraudulent act. That apart, entry in the voters' list is based on the resolution of the Gram Panchayat dated 21.3.1999. The voters' list was correctly prepared as the appellant was a Bhumiswami by then. The base or foundation of the voters list is not the entry made by the Patwari but the resolution passed by the Gram Panchayat. In view of this we are not able to subscribe to the view taken by the learned Single Judge.

The next aspect that requires determination is whether the appellant was eligible to contest the election. Section 11-B of the Act provides for qualification to vote and to be a representative of the agriculturists. The said provision is divided into two compartments. One deals with eligibility of a person to vote on the election of the representative of the agriculturists and other one a person who is qualified to be elected as a representative of the agriculturists. It is apposite to reproduce Section 11- in to:

11-B. Qualification to vote and to be a representative of agriculturist. (1) Every person

- (a) Whose name is entered as Bhumiswami in the village land record;
- (b) who ordinarily resides in the market area;
- (c) who has completed the age of 18 years: and
- (d) whose name is included in the voters' list prepared under the provisions of this Act and the rules made hereunder:

shall be qualified to vote at the election of representative of agriculturists.

Provided that no person shall be eligible to vote in more than one constituency.

Explanation: The word "Bhumiswami" shall have the same meaning as assigned to it in the Madhya Pradesh Land Revenue Code, 1959 (No. 20 of 1959).

No person shall be qualified to be elected as a representative of agriculturists unless-

- (a) his name is included in the list of voters of the market area;
- (b) he is an agriculturist;
- (c) he is otherwise not disqualified for being so elected.
- (d) he has not more than two living children one of whom is born on or after 26th January, 2001: (No. 21/2000)

Provided that any elected representative of agriculturists shall become disqualified to hold such office if one or after 26th January 2001 a child is born which increases the number of his children to more than two.

A person shall be disqualified for being a representative of agriculturist if he is disqualified for being an office bearer of a Panchayat u/s 36 of the Madhya Pradesh Panchayat Raj Adhiniyam, 1993 (No. 1 of 1994).

No person shall be eligible for election from more than one market committee or constituency as the case may be.

Mr. Agrawal, learned counsel for the appellant endeavoured hard to make certain distinction between Sub-sections 11-B(1) and 11-B(2) to highlight that there is a major difference between a person who would be a voter and a person who can be elected as representative of the agriculturists. There is some distinction as the some more riders have been added in respect of a person who is qualified to be elected. However, two aspects remain common, he must be a person whose name has been entered as bhumiswami in the village land record and whose name is included in the voters" list prepared under the provisions of the Act and the rules made therein. It is submitted by Mr. Agrawal that a person who is an agriculturist alone can also contest in the election. The learned Single Judge has held that Sub-sections 11-B(1) and (2) should be read together. It is apposite to mention here that requirement of qualification to vote at the election of a representative of the agriculturists one has to be a bhumiswami and his name must also be included in the voters" list. It is inconceivable that a man who will be in the voters" list but not a bhumiswami will be allowed to contest the election for the simple reason if his name is not entered as a Bhumiswami in the village land record, he will not be entitled to vote and if he is not entitled to cast his vote is would be absurd to think that he will be qualified to be elected. Thus, we are of the considered opinion that the learned Single Judge has rightly held that both provisions are to be read together in order to achieve harmony.

The next facet that requires determination is whether the voters" list could have been questioned in the manner in which it has been done. Mr. Agrawal, learned counsel for the appellant has drawn our attention on Rules 7,8,9,10,11,12 and 13. We think it apposite to reproduce the said rules.

7. Preparation of voter List. (1) The Collector shall subject to the provisions of Section 11,11-B and 12 cause to be prepared voter list in Form-I separately for each agriculturist and a list of voters for electing a trader"s representatives in Hindi written in Devnagri Script for each Market Committee.

The Collector shall appoint a Registration Officer for Market Committees in a district and such number of Assistant Registration Officers as may be found necessary to assist the Registration Officer in the preparation of Voters list for Market Committees.

Every Assistant Registration Officer shall subject to the control of the Registration officer perform all or any of the functions of the Registration Officer.

Publication of Voters" List for inviting claims and objection -

(1) (i) After the preparation of voters list, under rule 7 the Registration Officer

shall give a public notice in Form-2, inviting claims for inclusion of names in the list and objections to any entry therein, by exhibiting the notice at-

(a) Notice board in the office of concerned Market Committee;

(b) Notice board in the office of Janpad Panchayat.

(ii) The notice shall specify the period during which and the officer with whom an objection or claim may be lodged and the date, time and place for hearing of such objections and claims, if any by Registration Officer.

(2) Simultaneously with the publication of notice under sub-rule (1), the voters' list shall be made available by the Registration Officer for inspection, by keeping a copy thereof at his office and at the office of the concerned Market Committee.

Claims and objections- (1) Any person, whose name is not entered in the voters' list or is entered at an incorrect place or with incorrect particulars or any person whose name is entered in the list and who objects to the inclusion of his own name or the name of any person in that list, may prefer a claim or objection by delivering to the Registration Officer an application in writing duly signed not later than 3 O'clock in the afternoon of the last specified day from the date of the notice under rule 8 and no claim or objection received thereafter shall be entertained.

(2) Every claims or objections shall be presented to the Registration Officer or to such other Officer as may be nominated by him in this behalf.

(3) A claim or objection may be accompanied by any documents on which the claimant or objector relies.

Disposal of Claims and Objections- (1) The Registration Officer shall, after holding such summary inquiry into the claims or objections as he thinks fit, record his decision in writing and shall make available on demand copy of such decision to the objector free of charge forthwith.

(2) No person shall be represented by any legal practitioner in any proceeding under this rule.

(3) The Registration Officer shall amend the voters' list in accordance with the decision.

(4) The voters' list so amended shall subject to the decision in appeal, if any, be final and a copy thereof duly signed by the Registration Officer shall be kept in his office and another copy deposited in the office of District Election officer.

(5) Any person aggrieved by the decision of the Registration Officer may prefer an appeal to the Appellate Authority within seven days of such decision. Every appeal shall be presented, in writing, to the Appellate Authority accompanied with a copy of the decision of the Registration Officer. The Appellate Authority, after giving the appellant an opportunity of hearing and making such enquiry as it deems fit, shall pass suitable orders expeditiously and in the event of

succeeding, direct the Registration officer to amend the voters" list to give effect to its decision. The decision of the Appellate Authority shall be final:

Provided that no amendment shall be carried out in the voters" list according to the decision of the Appellate Authority after the last date and time fixed for filing of nomination and before the completion of election.

Inspection and Issue of Certified Copies - (1) Every member of the public shall have the right to inspect the voters" list on payment of a fee of rupees five and certified copies of the same may be issued by the Registration Officer to an applicant on payment of a fee of rupee one per page.

Duration of voters" List- (1) The Voters" List referred to in sub-rule (4) of rule 10 shall remain in force until it is revised.

(2) Every such list shall be revised and brought up up-to-date whenever a by-election or general election are due to take place or whenever any change in the limits of a constituency of Market Committee takes place, the provision of Rules 8,9 and 10 shall apply to such revision.

Finalisation of voters List - No correction, inclusion or exclusion in the voters" list shall be made after finalisation under rule 10:

Provided that clerical, technical or printing error or omission, apparent on the face of record, may be corrected by the Registration Officer at any time before the last date and time fixed for nominations.

On a perusal of the said rules we find that it is a complete Code in itself and once voters" list has been finalised the same should not be allowed to be questioned unless there are such astounding circumstances. Ordinarily such voters" list should be treated as final. In the case at hand initially the name of the appellant was not included in the voters" list but after she produced the resolution passed by the Gram Panchayat the voters" list was revised and the same was not objected to and it became final. We have already indicated that the Gram Panchayat had the jurisdiction to pass a resolution. Thence, the authority to prepare the voters" list accepted the resolution and entered the name of the appellant. Thus we do not perceive any difficulty in arriving at the conclusion that in recording the name of the appellant as a voter no illegality was committed.

23A. The next aspect which is a vital one is whether the appellant did have the qualification on the basis that her name was in the voters" list by its inclusion on 27.3.1999 after the Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972 was amended and M.P. Krishi Upaj Mandi Nirvachan Rules were also amended. Rule 12 deals with duration of voters" list which we have quoted hereinbefore. Sub-rules (3) and (4) were inserted on 6.3.1999. Initially the election was to be held in the month of March-April, 1999. The election was not held as there was an order of stay granted by this Court. The election took place in the year 2000. Revision of voters" list was undertaken in the month of March, 1999. It is submitted by Mr. R.N. Singh, learned Senior Counsel that as the appellant was not a bhumiswami

as on 1.1.1999 her name could not have been entered as a voter. Mr. Agrawal has submitted that the schedule election took place in the year 2000, therefore, cut off date should be 1.1.2000. It is also put forth by him that a clarification has been issued by the Mukhya Sachiv wherein it has been mentioned that the age shall be computed relating to the eligibility criterion keeping in view the cut off date as 1.1.1999. We are not inclined to advert to that aspect. We take it that the cut off date is 1.1.1999. However, the fact remains that the appellant was recorded as a voter in the voters' list prepared by the competent authority, who being satisfied recorded her name in the voters' list. The voters' list became final. None of the petitioners or for that matter anyone challenged the voters' list as per rules. Her filing of nomination was also not challenged.

The heart of the matter is even if the appellant was not a bhumiswami as on 1.1.1999 having duly got herself registered as a voter on the foundation of the resolution passed by the Gram Panchayat, can she be unseated by issue of a writ of quo warranto. We may at the outset unequivocally state the voters' list was not prepared on the basis of any fraudulent document. What the Patwari did has no connection with the voters' list as the voters' list was not prepared on the basis of the entry made by the Patwari. Had it been so, we are of the considered opinion, the matter would have been quite different as an act of, fraud would have penetrated into the marrows in preparation of the voters' list. That is not so.

Presently we shall advert to the facet where the courts should issue a writ of quo warranto. In this context we may profitably refer to the decision rendered by the Apex Court in the case of The University of Mysore and Another Vs. C.D. Govinda Rao and Another, wherein their Lordships of the Apex Court held as under.

Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether

the appointment of the said alleged usurper has been made in accordance with law or not.

In this context it is also apposite to refer to the decision rendered in the case of *Rajendra Singh vs. N.K. Shejwalkar and anr.* 1971 MPLJ 639 wherein this Court held as under :

17. ***

(i) ***

(ii) The essential conditions for issuance of a writ of quo warranto in respect of an office are:

(a) the office must be public;

(b) the office must have been created by the Constitution or by Statute;

(c) the office must be of a substantive character; and

(d) the occupier of office must not be legally qualified to hold or to remain in that office or must not have been appointed in accordance with law.

(iii) The existence of an alternative, adequate or suitable remedy is per se not an absolute bar to a writ of quo warranto being issued. This court is generally reluctant to issue that writ against the successful candidate in respect of an elective office. When there is such an alternative remedy to deal with the conduct of an election, a writ of quo warranto may be displaced, and the election may be challenged in the manner laid down by the statute. However, that is merely a material circumstance to be taken into account having regard to the facts of each case.

(iv) It is incontestable that this Court has, under Article 226 of the Constitution, power to determine the validity of an impugned election in a proceeding for a writ of quo warranto or other suitable writ on direction. Therefore, notwithstanding the provisions for an alternative remedy, i.e. by way of an election petition, this Court has the discretion to issue a writ of quo warranto.

(v) The existence of an alternative remedy does not bar the jurisdiction of this Court to issue a writ of quo warranto although in appropriate cases quo warranto may be refused on the ground of existence of an alternative remedy.

(vi) The decision whether to grant or to refuse a writ of quo warranto has to be exercised in accordance with sound judicial principles.

(vii) Where an election is held in breach of imperative provisions of the law so that the election is not an election in the eye of law, this Court would not refuse to issue a writ of quo warranto.

(viii) A quo warranto will not be issued in a case of mere irregularity which can be cured.

(ix) In proceedings for a writ of quo warranto the petitioner does not seek to enforce any right of his own as such, nor complains of any non-performance of any duty towards him. It is the right of the respondent to hold the office which is in question. The test to be applied is whether there has been a usurper of an office of a public nature and substantive in character, These propositions find support in a number of reported decisions, some of which may be cited here. The University of Mysore Vs. CD. Govind Rao, The King vs. Speyer, G.D. Karkare vs. T.L. Shevde, Kangla Baula Kotwal vs. Chief Executive Officer Janpada Sabha, Durg and Piara Singh Vs. The Punjab State. See also 11 Halsbury (Simonds) 145. As respondent No. 1 was not eligible for the election patently, we feel compelled to issue a writ of quo warranto.

In this context we may profitably refer to the decision rendered in the case of Statesman (Private) Ltd. Vs. H.R. Deb and Others, wherein the Apex Court expressed the view as under:

...The High Court in a quo warranto proceeding should be slow to pronounce upon the matter unless there is a clear infringement of the law.

Mr. Agrawal, learned counsel for the appellant, has also commended us to the decisions rendered in the cases of Bhairulal Chunilal Vs. State of Bombay, and Sukhdeo Narayan and Others Vs. Mahadevananda Giri, . It is appropriate to state here that the law laid down in the case of Bhairulai Chunnilal (supra) has been placed reliance upon by the Patna High Court in the case of Sukhdeo Narain (supra). A Division Bench of the High Court of Patna in the case of Sukhdeo Narayan (supra) in para 10 held as under:

(1). Although the circumstances of the case do indicate that the petitioners have come forward to this Court on the 10th of May, 1960, after the dismissal of the two election petitions on the 7th of March, 1960, at the instance of the petitioners in the election petitions, I do not propose to rest my refusal of the exercise of the discretion on that ground. The law for exercise of discretion by the Court for an information in the nature of quo warranto or an injunction in lieu thereof is stated in Article 281 (p. 148) of Halsbury's Laws of England, 3rd Edition, Volume 11 thus:

An information in the nature of a quo warranto was not issued, and an injunction in lieu thereof will not be granted, as a matter of course. It is in the discretion of the Court to refuse or grant it according to the facts and circumstances of the case. The Court would inquire into the conduct and motives of the applicant, and the Court might in its discretion decline to grant a quo warranto information where it would be vexatious to do so, or where an information would be futile in its results, or where there was an alternative remedy which was equally appropriate and effective. It is conceived that the Court will follow similar principles in determining whether to grant an injunction in lieu.

In Bhairulal Chunilal Vs. State of Bombay, Chagla, C.J., sitting in Division Bench, has observed at page 120 column (2):

It is well settled that where you have statutory provisions dealing with the conduct of an election the writ of "quo warranto" is displaced. An election then can only be challenged in the manner laid down by the statute.

In *Hari Shankar Prasad Gupta Vs. Sukhdeo Prasad and Another*, , a Full Bench of the Allahabad High Court refused to entertain an application under Article 226 of the Constitution of India for grant of information in the nature of quo warranto to invalidate the constitution of the Election Tribunal on the ground that one of the members was not qualified to act as such member at the date of his appointment, as at the date of the hearing of the petition he had become so qualified and there was nothing to bar his reappointment.

In this regard we may also note that as has been held in catena of cases a writ of quo warranto is not issued as a matter of course. The Court is required to use its discretion. This view has been taken by the High Court of Orissa in the case of *Surendra Mohan Patnaik Vs. Gopal Chandra Patnaik and Others*, and by the High Court of Kerala in the case of *K.J. Joseph Vs. Hon'ble Justice, K. Sukumaran and Others*, . The courts may refuse to issue a writ of quo warranto if it finds that the petitioner is guilty of laches. In the case of *S.K. Dubey Vs. Union of India*, (1983) 2 SCR 44 it was held that a writ of quo warranto can be refused on the ground of delay and laches. An irregularity also would not be a factor to issue a writ of quo warranto. An alternative remedy may also be a factor not to issue a writ of quo warranto.

In this context we may also usefully refer to the decisions rendered in the case of *Miss Avit Cama vs. Banwarilal Agarwal and ors.* AIR 1953 Nag 81 wherein the Court expressed the view that the alternative remedy is also a circumstance to be borne in mind while entertaining a petition for quo warranto. In the said case, it is worth noting, election of an elected member of Municipality was called in question.

Mr. Sanjay K. Agrawal, learned counsel, has commended us to the decision rendered in the case of *Kabul Singh Vs. Kundan Singh and Others*, wherein in paragraph 9 the Apex Court has ruled thus:

9. It is not the case of the appellant that Tarsem Singh had incurred any of the disqualifications mentioned therein. No other provision of law in the Act or in any other law was brought to our notice disqualifying him from exercising his vote. The right to vote being purely a statutory right, the validity of any vote has to be examined on the basis of the provisions of that Act. We cannot travel outside those provisions to find out whether a particular vote was a valid vote or not. In view of Section 30 of the 1950 Act, Civil Court have no jurisdiction to entertain or adjudicate upon any question whether any person is or is not entitled to register himself in the electoral roll in a constituency or to question the illegality of the action taken by or under the authority of the electoral registration officer or any decision given by any authority appointed under that Act for the revision of any such roll. Part III of the 1950 Act deals with the preparation of rolls in a

constituency. The provisions contained therein prescribe the qualifications for being registered as a voter (Section 19), disqualifications which disentitle a person from being registered as a voter (Section 16), revision of the rolls (Section 21), correction of entries in the electoral rolls (Section 22), inclusion of the names in the electoral rolls (Sec. 23), appeals against orders passed by the concerned authorities under Sections 22 and 23 (Section 24). Sections 14 to 24 of the 1950 act are integrated provisions. They form a complete code by themselves in the matter of preparation and maintenance of electoral rolls. It is clear from those provisions that the entries found in the electoral roll are final and they are not open to challenge either before a Civil Court or before a Tribunal which considers the validity of any election. In *B.M. Ramaswamy Vs. B.M. Krishnamurthy and Others*, , this Court came to the conclusion that the finality of the electoral roll cannot be challenged in a proceeding challenging the validity of the election.

Learned counsel for the appellant has also relied upon the decision rendered in the case of *Wopansao Vs. N.L. Odyuo and Others*, wherein in paragraph 6 a two Judge Bench of the Apex Court held a under:

6. This Court in *B.M. Ramaswamy Vs. B.M. Krishnamurthy and Others*, , held that the finality of the electoral roll cannot be challenged in a proceeding impeaching the validity of the election. The effect of Section 30 of the 1950 was construed by this Court in the recent decision in *Kabul Singh Vs. Kundan Singh and Others*, to be that Sections 14 to 24 of the 1950 Act are a complete Code in the matter of preparation and maintenance of electoral rolls and Section 30 of the 1950 Act does not confer jurisdiction on a Civil Court to entertain or adjudicate upon a question whether a person is or is not entitled to register himself in the electoral roll in a constituency or to question the illegality of the action taken by or under the authority of the Electoral Registration Officer or any decision given by the authority appointed under the 1950 Act for the revision of any such roll.

The learned counsel has also commended us to the decision rendered in the case of *Shri Shreewant Kumar Choudhary Vs. Shri Baidyanath Panjiar*, wherein in paragraph 12 their Lordships expressed thus :

12. Appellant's counsel, however, referred to the decision of this Court in *Chief Commissioner, Ajmer Vs. Radhey Shyam Dani*, and submitted that as the electoral roll has been illegally prepared, there was no electoral roll in the eye of the law and as the existence of an electoral roll legally prepared is the foundation for a valid election the election in question must be declared to be bad. In that case, the respondent in this Court whose father's name was recited wrongly in the electoral roll for the municipality in question applied for rectification of the mistake in the Parliamentary Electoral Roll, on August 10, 1955, but it was rejected on the ground that the roll of the Municipal elections had been finally published on August 8, 1955, and therefore, no correction could be made. The respondent challenged the validity of the notification and the electoral roll in a writ petition. The High Court allowed the petition and in appeal this Court held

that, under S.30(2) of the Ajmer-Merwara Municipalities Regulation, 1925, the electoral roll for the Parliamentary constituency was only treated as the basis for the electoral roll of the Municipality and that the rules in so far as they made no provision for the revision of the electoral roll, for the adjudication of claims to be included therein, or for entertaining objections to such inclusion, were defective and, therefore, the electoral roll of the Ajmer Municipality, which was authenticated and published by the appellant on August 8, 1955, was not in conformity with the provisions of Section 30 (2) and the relevant provisions of the Regulation, and could not form the basis of any valid elections to be held to the Ajmer Municipal Committee. There is no dispute here that the electoral roll in question has been validly prepared. The only question is whether the entry of the names of the 31 commissioners appointed by the Minister in pursuance of his order in the electoral roll of the constituency was legal or not. That question, we think, cannot be gone into in a petition challenging the validity of the election. In other words, even assuming that the inclusion of the names of these persons was illegal as their appointment as commissioners of the Area Committee in question was in contravention of the provisions of the Bihar Municipality Act, it was not open to the High Court, when trying an election petition, to go behind the electoral roll and enquire into the question whether these persons were validly appointed as commissioners and the inclusion of their names in the electoral roll was legal. Besides, the decision of this Court in *Chief Commissioner, Ajmer Vs. Radhey Shyam Dani*, *ibid* was not in an appeal from an order in a writ petition directly challenging the validity of the electoral roll and can have no application here.

In the case of *Hari Prasad Mulshanker Trivedi Vs. V.B. Raju and Others*, the constitution Bench ruled thus:

The decision on the question whether a person is ordinarily resident in the constituency in the electoral roll of which his name is entered has been entrusted to the exclusive jurisdiction of the registering officers and the appellate authorities under the Act, Ss. 14 to 24 of which provide a complete code in the matter of preparation and maintenance of electoral rolls. A wrong decision on that question cannot be treated as a jurisdictional error and cannot be judicially reviewed either in a civil court or before an election tribunal. The intention of the Parliament to oust the jurisdiction of the court trying an election petition to go into that question is manifest from the scheme of Representation of the People Acts of 1950 and 1951 and specially S.30 of the 1950 Act which expressly ousts the jurisdiction of the Civil Court to try that question.

Mr. Agrawal has also relied upon the Constitution Bench decision rendered in the case of *Inderjit Barua and others vs. Election Commission of India*, AIR 1984 SC 1912 wherein in paragraph 3 it was held as under :

3. We are of the view that once the final electoral roll are published and elections are held on the basis of such electoral rolls, it is not open to any one to challenge the election from any constituency or constituencies on the ground that the

electoral rolls were defective. That is not a ground available for challenging an election under S.100 of the Representation of People Act 1951. The finality of the electoral rolls cannot be assailed in a proceeding challenging the validity of an election held on the basis of such electoral rolls vide *Kabul Singh Vs. Kundan Singh and Others*, . Article 329 (b) in our opinion clearly bars any writ petition challenging the impugned elections on the ground that the electoral roll of 1979 on the basis of which the impugned elections were held were invalid.

In the case of *Indrajit Barua and Others Vs. Election Commission of India and Others*, the Constitution Bench elaborating the reason in paragraph 6 held as follows :

6. These are clear authorities - and the position has never been assailed - in support of the position that an election can be challenged only in the manner prescribed by the Act. In this view of the matter, we had concluded that writ petitions under Art. 226 challenging the election to the State Legislature were not maintainable and election petitions under S.81 of the Act had to be filed in the High Court. "The Act does not contemplate a challenge to the election to the Legislature as a whole and the scheme of the Act is clear. Election of each of the returned candidates has to be challenged by filing of a separate election petition. The proceedings under the Act are quite strict and clear provisions have been made as to how an election petition has to be filed and who should be parties to such election petition. As we have already observed, when election to a Legislature is held is not one election but there are as many elections as the legislature has members. The challenge to the elections to the Assam Legislative Assembly by filing petitions under Art. 226 of the Constitution was, therefore, not tenable in law.

Mr. Agrawal has also placed reliance on the decision rendered in the case of *Jaspal Singh Arora Vs. State of M.P. and Others*, wherein in paragraph 3 their Lordships stated thus:

3. These appeals must be allowed on a short ground. In view of the mode of challenging the election by an election petition being prescribed by the M.P. Municipalities Act, it is clear that the election could not be called in question except by an election petition as provided under that Act. The bar to interference by courts in electoral matters contained in Articles 243-ZG of the Constitution was apparently overlooked by the High Court in allowing the writ petition. Apart from the bar under Article 243-ZG, on settled principles interference under Article 226 of the Constitution for the purpose of setting aside election to a municipality was not called for because of the statutory provision for election petition and also the fact that an earlier writ petition for the same purpose by a defeated candidate had been dismissed by the High Court.

We have referred to the aforesaid decisions to indicate that ordinarily when an election petition is provided for in the statute the same has to be taken recourse to and the extraordinary jurisdiction under Article 226 is not invocable.

Per contra, Mr. R.N. Singh, learned senior counsel, has placed reliance on a two Judge Bench decision of the Apex Court rendered in the case of K. Venkatachalam Vs. A Swamickan and Another, . It is apposite to mention here that the learned Single Judge has also placed heavy reliance on paragraphs 20,25,26, 27 and 28 of the aforesaid judgment. We feel it apposite to refer to paragraphs 24, 25, 26, 27 of the aforesaid decisions. They read as under :

24. From this judgment it is clear that this Court held that Article 191, which lays down the same set of disqualification for election as well as for continuing as a member and Article 193, which prescribes the penalty for sitting and voting when disqualified, are naturally phrased in terms wide enough to cover both pre and supervening qualifications. But is also held that it does not necessarily follow that Articles 190(3) and 192(1) must also be taken to cover both. It, therefore, held that Articles 190 (3) and 192 (1) go together and provide remedy when a member incurs a disqualification after he is elected as a member. This Court was examining the issue if action under Article 192 could be taken when the respondent Venkata Rao had already incurred disqualification prior to his nomination for being elected to the Madras Legislative Assembly and that after his release from the conviction prescribed for him to file his nomination was yet not over. This Court, therefore, held that action under Article 192 could not be taken against Venkata Rao.

In the present case the appellant was not an elector in the electoral roll of Lalgudi Assembly constituency. He, therefore, could not be elected as a member from that constituency. How could a person who is not an elector from that constituency could represent the constituency ? He lacked the basic qualification under clause (c) of article 173 of the Constitution read with Section 5 of the Act which mandated that a person to be elected from an Assembly constituency has to be elector of that constituency. The appellant in the present case is certainly disqualified for being a member of the Legislative Assembly of Tamil Nadu. His election however was not challenged by filing an election petition u/s 81 of the Act. Appellant knows he is disqualified. Yet he sits and votes as a member of Legislative Assembly. He is liable to penalty of five hundred rupees in respect of each day on which he so sits or votes and that penalty is recoverable as debt but to the State. There has not been any adjudication under the Act and there is no other provision of the Constitution as to how penalty so incurred by the appellant has to be recovered as a debt due to the State. Appellant is liable to penalty nevertheless as he knows he is not qualified for membership of the Legislative Assembly and yet he acts contrary to law.

The question that arises for consideration is if in such circumstances High Court cannot exercise its jurisdiction under Article 226 of the Constitution declaring that the appellant is not qualified to be member of the Tamil Nadu Legislative Assembly from Lalgudi Assembly Constituency. On the finding recorded by the High Court it is clear that the appellant in his nomination form impersonated a person known as Venkatachalam s/o Pethu, taking advantage of the fact that

such persons bears his first name. Appellant would be even criminally liable as he filed his nomination on affidavit impersonating himself. If in such circumstances he is allowed to continue to sit and vote in the Assembly his action would be fraud to the Constitution.

In view of the judgment of this Court in the case of Election Commission, India Vs. Saka Venkata Subba Rao and, , it may be that action under Article 192 could not be taken as the disqualification which the appellant incurred was prior to his election. Various decisions of this Court which have been referred to by the appellant that jurisdiction of the High Court under Article 226 is barred challenging the election of a returned candidate and which we have noted above do not appear to apply to the case of the appellant and now before us. Article 226 of the Constitution is couched in widest possible term and unless there is clear bar to jurisdiction of the High Court its powers under Article 226 of the Constitution can be exercised when there is any act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. In circumstances like the present one bar of Article 329 (b) will not come into play when case falls under Articles 191 and 193 and whole of the election process is over. Consider the case where the person elected is not a citizen of India. Would the Court allow a foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under Article 226 of the Constitution?

We have referred to the aforesaid decisions to highlight under what circumstances a writ of "quo warranto" should be issued and what is the role of the Court while exercising such power. The present factual matrix is to be tested on the anvil of the aforesaid decision. We find that the learned Single Judge has taken note of the fraudulent act by which the name of the appellant got entered into the electoral roll. We have already held that no fraud was practiced by the appellant. The Gram Panchayat had the authority to pass a resolution and to pass appropriate orders u/s 110 of the M.P. Land Revenue Code by virtue of conferral of such powers on it. There is no jurisdictional error in the same. These notifications were not brought to the notice of the learned Single judge. The emphasis given on the act of Patwari by the learned Single Judge, in our considered view, is not correct. Once it is held that entry was granted and on the basis of the said entry the registering officer rectified the voters' list within the stipulated period as provided under 1997 Rules and there was no objection and no appeal was preferred, it is difficult to come to the conclusion that the appellant, was not a voter. In the case of Venkatchallai (supra) the petitioner therein had impersonated himself and had taken advantage of the name of a similar person. There was a clear-cut commission of fraud and it was within his knowledge that he had got himself elected by practicing fraud. That apart, the Apex Court placed reliance on provisions enshrined under Articles 173 and 192 of the Constitution of India. There was clear-cut violation of the constitutional provisions. The petitioner therein, had attempted to defeat the constitutional provisions. "Fraus et dolus nemini patrocinar debent"- "Fraud and deceit should

defend or excuse no man", and again "Fraus et jus nunquam cohabitant" "Fraud and justice never dwell together". Thus, in that factual backdrop the Apex Court affirmed the judgment of the Madras High Court but in our considered opinion the decision rendered in the case of Venkatchaliah (supra) is distinguishable and is not applicable to the present factual scenario. The appellant was registered as a voter; that her registration was not challenged in appeal; that the Election Commission clarified with regard to the requirement on the cut off date by stating that it pertained to the age; that the appellant had not practised fraud; that the entry in the record of bhumiswami was correctly made by the Gram Panchayat having been vested with jurisdiction by notification u/s 24 of the M.P. Land Revenue Code; that it is not a case of impersonation; that her nomination was not challenged at the time acceptance; that no election proceeding was instituted to set aside the election though such a proceeding was tenable in law; that the writ court was approached after one and half years; and Section 66-A of the Act clearly postulates no election can be called in question except by filing of an election petition. These aspects weigh with us and we are disposed to think that they fresco a different scenario and the cumulative effect of the same persuade us to hold that it is not a fit case for issue of "quo warranto". Ergo, we are unable to subscribe to the view expressed by the learned Single Judge.

We may hasten to add that we may not be understood to have arrived at the aforesaid conclusion because of availability of an alternative remedy. We have taken into consideration the entire gamut of facts, cumulative range of grounds and considered the totality of circumstances including the factum of delay and the aspect relating to laches to arrive at conclusion that a writ of "quo warranto" a discretionary writ, should not have been issued declaring the appellant as an usurper to the office in question.

Consequently, the L.P.A. is allowed and the order passed by the learned Single Judge is set aside. The appellant shall reap all benefits and continue to remain in the office for the remaining period. However, in the facts and circumstances of the case there shall be no order as to costs.