

(2010) 06 BOM CK 0087
In the Bombay High Court
Case No : Writ Petition No. 2805 of 2010

Sou. Manisha Sanjay Waskar

APPELLANT

Vs

Anil @ Bajirao Balaso Dhavan (Panari) and Others

RESPONDENT

Date of Decision : 10-06-2010

Acts Referred:

Bombay Municipal Corporation Act, 1949 — Section 16, 16(1), 16(2), 33, 33(2)
Constitution of India, 1950 — Article 326
Maharashtra Zilla Parishad and Panchayat Samitis Act, 1961 — Section 100, 100(1), 100(2), 15, 16
Mumbai Municipal Corporation Act, 1888 — Section 33(2)

Citation : (2010) 4 BomCR 529 : (2010) 112 BOMLR 2891

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : N.V. Walawalkar and Amit P. Borkar, for the Appellant; S.S. Patwardhan, Chetan Patil for Respondent No. 1 and R.M. Patne, Assistant Government Pleader, for the Respondent

Judgement

R.C. Chavan, J.

Rule. By consent, rule made returnable forthwith.

1. This petition, by a Member of Zilla Parishad, Kolhapur, is directed against the Judgment of the learned District Judge, Kolhapur, setting aside her election and declaring respondent No. 1 Anil Bajirao Dhavan as elected in her place.

2. Facts which are material for to deciding this petition are as under:

The petitioner had filed her nomination for contesting the election to Kolhapur Zilla Parishad from Panchgaon, Block No. 40. Respondent No. 1 Anil Dhavan was also a candidate at that election. The petitioner secured 10751 votes whereas respondent No. 1 secured 7554 votes. Other contestants, who are respondent Nos. 3 & 4, had secured 546, 245 votes respectively. The petitioner was, therefore, declared elected as a Member of Zilla Parishad Kolhapur from Panchgaon constituency.

3. Respondent No. 1 questioned the election by filing a petition u/s 27 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 (hereinafter referred to as "the Act"). According to respondent No. 1, the petitioner was born on 21st December 1986 and therefore, would have completed the age of 21 years on 21st December 2007 and thus, was not qualified to contest the election on 24th February 2007, the relevant date.

4. The petitioner contested the said petition and claimed that she was, in fact, born on 21 December 1983 and not on 21st December 1986 and thus had completed 21 years of age on 21st December 2004 and therefore, was eligible to contest the election.

5. Upon considering the evidence tendered before him, the learned District Judge held that the petitioner was not qualified to contest the election to Zilla Parishad Kolhapur as she had not completed 21 years of age on the relevant date. He, therefore, set aside the petitioner's election and proceeded to declare respondent No. 1, who had secured 2nd highest number of votes, to have been elected as Member of the Zilla Parishad. Aggrieved thereby, the petitioner has filed this petition.

6. I have heard the learned Counsel for the petitioner, the learned Counsel for contesting respondent No. 1, and the learned AGP for respondent No. 5. According to the learned Counsel for the petitioner, the learned District Judge could not at all have declared respondent No. 1 as elected in place of the petitioner, even if it was to be held that he was justified in setting aside petitioner's election. He submitted that there is no provision in the Act which would entitle the learned District Judge to grant such a declaration. According to the learned Counsel of respondent No. 1, Clause (b) of Section 27(5) of the Act does so provide.

7. Before considering the arguments advanced, it may be useful to reproduce for ready reference the provisions of Section 27(5) of the Act as under:

(5)(a) If on holding such enquiry the Judge finds that a candidate has, for the purpose of election, committed a corrupt practice within the meaning of subsection

(6) (or submitted a false claim or a false Caste Certificate), he shall declare the candidate disqualified for the purpose of that election and of such fresh election as may be held under Sub-section (2) and shall set aside the election of such candidate if he has been elected.

(b) If in any case to which Clause (a) does not apply, the validity of an election is in dispute between two or more candidates, the Judge, after a scrutiny and computation of the votes recorded in favour of each candidate, is of opinion that in fact any candidate in whose favour the declaration is sought has received the highest number of the valid votes, the Judge shall after declaring the election of the returned candidate to be void declare the candidate in whose favour the

declaration is sought, to have been duly elected:

Provided that, for the purpose of such computation no vote shall be reckoned as valid if the Judge finds that any corrupt practice was committed by any person, known or unknown, in giving or obtaining it .

Provided further that, after such computation if any equality of votes is found to exist between any candidates and the addition of one vote will entitle any candidate to be declared elected, one additional vote shall be added to the total number of valid votes found to have been received in favour of such candidates selected by lot drawn in the presence of the Judge in such manner as he may determine.

8. In Dnyaneshwar Rambhau Barabudhe Vs. Returning Officer/Dy.Collector (EGS), Amravati and others, on which the learned Counsel for the petitioner placed reliance, this Court held that in case votes of successful candidate are thrown out, it could never be held that all these votes could have gone to the next highest candidate only, and therefore, the Court ordered a fresh election. The Court was considering provisions of Section 16 of the Bombay Provincial Municipal Corporations Act, 1949 which may be usefully reproduced as under:"

16. Election petitions-(1) If the qualification of any person declared to be elected a councillor is disputed or if the validity of any election is questioned, whether by reason of the improper rejection by the (State Election Commissioner) of a nomination, or of the improper reception or refusal of a vote, or by reason of a material irregularity in the election proceedings, corrupt practice, or any other thing materially affecting the result of the election, any person enrolled in the municipal election roll may at any time within ten days after the result of the election has been declared, submit an application to the Judge for the determination of the dispute or question.

(2) The (State Election Commissioner) may, if it has reason to believe that an election has not been a free election by reason of the large number of cases in which undue influence or bribery has been exercised or committed, by order in writing, authorise any officer (of the Commission) to make an application to the Judge at any time within one month after the result of the election has been declared for declaration that the election of the returned candidate or candidates is void.

[(2A) No election to any Corporation shall be called in question except by an election petition presented to the Judge referred to in Sub-section (1) and no Judge other than the Judge referred to in Sub-section (1) shall entertain any dispute in respect of such election.]

(3) The Judge shall decide the applications made under Sub-section (1) or (2) after holding an inquiry in the manner provided by or under this Act.

Explanation-

For the purposes of this section (1) "corrupt practice" means one of the following practices, namely:

(a) any gift, offer or promise by a candidate or his agent or by any person with the connivance of a candidate or his agent of any gratification, pecuniary or otherwise to any person whomsoever, with the object directly or indirectly of inducing a person to stand or not to stand as, or to withdraw from being a candidate at an election or a voter to vote or refrain from voting at an election or as a reward to a person for having so stood or not stood or for having withdrawn his candidature or a voter for having voted or refrained from voting;

(b) any direct or indirect interference or attempt to interfere on the part of a candidate or his agent or of any other person with the connivance of the candidate or his agent with the free exercise of any electoral right, including the use of threats of injury of any kind or the creation or attempts to create fear of divine displeasure or spiritual censure, but not including a declaration of public policy or a promise of public action or the mere exercise of a legal right without intent to interfere with a legal right;

(c) the procuring or abetting or attempting to procure by a candidate or his agent or by any other person with the connivance of a candidate or his agent, the application by a person for a voting paper in the name of any other person whether living or dead or in a fictitious name or by a person for a voting paper in his own name when, by reason of the fact that he has already voted in the same or some other ward, he is not entitled to vote ;

(d) the removal of a voting paper from the polling station during polling hours by any person with the connivance of a candidate or his agent;

(e) the publication by a candidate or his agent or by any other person with the connivance of the candidate or his agent of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election;

(f) any acts specified in paragraphs (a), (b), (d) and (e) when done by a person who is not a candidate or his agent or a person acting with the connivance of a candidate or his agent.

(g) the application by a person at an election for a voting paper in the name of any other person, whether living or dead, or in a fictitious name, or for a voting paper in his own name when, by reason of the fact, that he has already voted in the same or another ward, he is entitled not to vote; or

(h) the receipt of, or agreement to receive, any gratification of the kind described in paragraph (a) as a motive or reward for doing or refraining from doing any of the acts therein specified.

(2) A corrupt practice shall not be deemed to have been committed in the

interests of a returned candidate if the Judge is satisfied that it was of a trivial and limited character which did not affect the result of the election, that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents, that it was committed without the sanction, or connivance or contrary to the orders of the candidate or his agents, and that the candidate and his agents took all reasonable means for preventing the commission of corrupt practices at the election.

It may be seen that this Section does not at all provide for declaring any other candidate as elected. Therefore, this Judgment may not be of any help.

9. The learned Counsel appearing for the parties drew my attention to a judgment of a learned Single Judge delivered on 5th April 2004 in Writ Petition No. 8546 of 2003 in case of Sarika Srimant Kamble v. Sou. Mangal Bajirao Satpute and Ors. (referred to in paragraph 14 of the Judgment impugned in this petition) where too, this Court was considering a judgment of the District Judge setting aside the election of a returned candidate to a Zilla Parishad on the ground that she had not completed 21 years age, and declaring a candidate who had secured 2nd highest number of votes as elected. After carefully considering the provisions of Section 27 of the Act, as also provisions of Section 123 of the Representation of People Act and analogous provisions contained in Section 33 of the Bombay Municipal Corporation Act, this Court held that such a declaration could not have been issued by the District Judge and therefore, remitted the matter back to the District Judge for examining as to whether a declaration under Clause (b) of Sub-section 5 of Section 27 of the Act was warranted.

10. Relying on this Judgment, the learned Counsel for respondent No. 1 submitted that in case an election is set aside on the ground of corrupt practice, to which Clause (a) of Sub-section 5 would apply, election of the returned candidate has to be set aside and fresh elections have to be ordered. But in case where this Clause (a) does not apply, i.e. election is not set aside on the ground of corrupt practice, the Judge, has to declare the candidate who had secured 2nd highest number of votes and in whose favour the declaration was sought to have been duly elected. According to the learned Counsel, following the precedent in Sarika's case, a candidate who had secured the 2nd highest number of votes could be declared as elected, albeit upon a remand.

11. I am afraid that such is not the ratio of the said decision.

12. First, it cannot be forgotten that the Legislature was very much aware of a mechanism whereby it could have provided that in such a situation, a candidate who secured 2nd highest number of votes, could be declared as elected, as the legislature had provided in Sub-section 2 of Section 33 of the Bombay Municipal Corporation Act, (referred to in the Judgment in Sarika's case) which reads as under:

33[2] If the said Chief Judge, after making such inquiry as he deems necessary, finds that the election was a valid election and that the person whose election is

objected to is not disqualified he shall confirm the declared results of the election. if he finds that the person whose election is objected to is disqualified for being a councilor he shall declare such person's election null and void. If he finds that the election is not a valid election he shall set it aside. In either case he shall direct that the candidate, if any, in whose favour the next highest number of valid votes is recorded after the said person and against whose election, no cause or objection is found, shall be deemed to have been elected.

13. If the Legislature did not make a similar provisions in Section 27 of the Act, the Legislative intention is very clear and therefore, it would be impermissible to stretch Clause (b) of Sub-section 5 of Section 27 of the Act to cover even such a situation. Clause (b) of Sub-section 5 would come into play only if there is a dispute about computation of votes either because the counting was not properly done or votes were wrongly invalidated or invalid votes were wrongly counted. Though the Legislature has chosen the expression "in any case where Clause (a) does not apply", it does not follow that the Legislature intended that candidate who had secured 2nd highest number of votes should be declared as elected, in all cases other than those covered by Clause (a), because the clause provides for declaring a candidate who had secured the highest number of votes as elected and not the person who had secured 2nd highest number of votes. The clause does not provide for exclusion of votes polled by a candidate who was found to be not qualified. The Clause has to be read in its entirety. A declaration can be made in favour of a candidate only if he has secured the highest number of valid votes upon scrutiny and computation of votes. Even if for the sake of argument Clause (b) of Sub-section 5 is taken to contemplate a situation where a returned candidate was found to be not qualified for contesting the election, the consequence of such a finding, would not be that the candidate receiving 2nd highest number of votes as elected. This would amount to reading what is not there in the section. Remand of the matter by the learned Single Judge to District Court would only indicate that all aspects of the question were left open.

14. It is not that the votes secured by the petitioner, would have to be totally ignored from consideration. If the petitioner is held as not qualified for contesting the election, votes polled by her need not necessarily be taken to have gone to respondent No. 1. Therefore, it is not possible to conclude that Clause (b) of Sub-section 5 of Section 27 of the Act would apply even in a case where an election of a returned candidate is set aside on the ground that such candidate was not qualified to contest. In such a case, there would be no occasion to scrutinize or compute the votes recorded in favour of candidates or to declare the candidate who had secured 2nd highest number of votes as elected, because, even upon such a fresh computation and scrutiny of votes, the candidate who had been unseated, would again be found to have secured the highest number of votes. In fact, Clause (b), if read as a whole, would show that it deals with only the dispute about counting of votes, notwithstanding the choice of wide expression used at the beginning of the Clause. Viewed thus, there would be no question of remitting the matter back to the learned District Judge for examining if such a

declaration could be made, as was done in Sarika's case, as it would be an empty formality.

15. Even Section 101 of the Representation of the People Act, 1950 which reads as under, does not provide for declaring a candidate who has secured 2nd highest number of votes as elected.-

101. Grounds for which a candidate other than the returned candidate may be declared to have been elected. If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and (the High Court) is of opinion-

(a) that in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes,

(the High Court) shall, after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected.

16. For granting such a declaration, there has to be an express provision as is to be found in Section 33(2) of the Mumbai Municipal Corporation Act, 1888. What is not there in Section 27(5) of the Act cannot be added by judicial interpretation, since words of the Section are very clear and there is no ambiguity. Therefore, as far as the declaration given in favour of respondent No. 1 is concerned, obviously the petition has to succeed.

17. This takes me to the question whether the petitioner could be held to be disqualified because she was born on 21st December 1986 and not on 21st December 1983 as claimed by her. The evaluation of the evidence in this behalf by the learned District Judge cannot be faulted. There is a considerable merit in the contention of the learned Counsel for the respondent that the evidence tendered would point to the impossibility of petitioner having been born on 21st December 1983, particularly since the petitioner's own husband had filed before Tahsildar a certificate showing that the petitioner was born on 21st December 1986 for obtaining her caste certificate. Petitioner's elder brother Uday was shown to have been born on 14.04.1983 as per birth register extract at Exhibit 113 or on 19.04.1984 as per entry in School record proved by witness Shamala Pawar, in charge Head Mistress of the School. Ordinarily Petitioner could not have been born within 8 months of birth of her elder brother on 14.04.1983 or 4 months before his birth on 19.04.1984.

18. In this case, the petitioner had tendered evidence of Dr. Sudhir Deshmukh, Pandurang Ganpati Shinde, Pandit Mazgaonkar and Satish Vishnu Waskar, but not that of the petitioner's parents, particularly her mother, who would have

been the best persons to state that as to when the petitioner was born. The learned Counsel for the petitioner submitted that no such adverse inference could be drawn, and for that purpose relied on a judgment of the Supreme Court in *Birad Mal Singhvi Vs. Anand Purohit*, where the Court held that adverse inference could not be drawn as regards the candidate's age for the failure of the candidate to produce his parents to corroborate the claim about the date of birth. However, on facts in that case it was held that the two candidates whose nomination was rejected by the Returning Officer, as they had not attained the qualifying age of 25 years, had been rightly excluded. The Court had also considered the evidentiary value of entries in a school register and had observed that the deposition of Principal of a Government School did not show the basis on which the entry of the date of birth was made in the school register. The learned Counsel submitted that even in the instant case non examination of person at whose instance the entry was taken by the school authority would reduce the evidentiary value of the said entries in a school register. The learned District Judge had held against the Petitioner not because parents were not examined, but on the basis of other evidence on record. Even after excluding entries in School Register, impossibility of Petitioner being born on 21.12.1983 remained. Since this finding is neither improbable nor perverse it cannot be lightly disturbed in exercise of Writ Jurisdiction.

19. The learned Counsel for the petitioner, however, submitted that election is a process which has various stages and as the process crosses each stage, the proceedings prior to that stage get closed or finalized. Therefore, if Petitioner was allowed to contest elections on the basis of entry of her name in the electoral roll, her election could not now be questioned. There is a considerable merit in the contention of the learned Counsel for the petitioner that election process is one which proceeds in stages and it would be improper to allow the process to be reopened at the last stage on a ground which would have been available to a party when the voters list itself was finalized. However, since the question of eligibility of the petitioner to be elected on the ground that she had not attained 21 years of age at the relevant time, goes to the root of her entitlement to contest the election to Zilla Parishad, failure of raise objection at the stage of finalization of voters list may not be fatal.

20. The learned Counsel for Petitioner submitted that voters list would determine as to who can participate in the election process and therefore, Section 15 of the Act provides that every person whose name is in the list of voters of any electoral division, unless disqualified under the Act or under any other law for the time being in force, be qualified to be elected. The learned Counsel for the petitioner further submitted that in view of provision of Section 18 of the Act an entry in list of voters is conclusive of the question of qualification to contest. In *Dhondba Adku and Another Vs. Civil Judge, Junior Division, Hinganghat and Others*, the question of conclusiveness of the evidence in the electoral role had come up before this Court and it was held that entry in the voters list was conclusive evidence even if there is no provision in the Act to correct the voters

list.

21. In order to examine this contention relevant provisions of the Act may be reproduced for ready reference as under:

15 Persons qualified to be elected: Every person [who is not less than twenty one years of age on the last date fixed for making nominations for every general election or by election and] whose name is in the list of voters of any electoral division in a District, shall, unless disqualified under this Act or under this Act or under any other law for the time being in force be qualified to be elected, and every person [who is not of twenty one years of age as aforesaid and] whose name is not in such list shall not be qualified to be elected from any electoral divisions of that District."

16. Disqualification: (1) Subject to the provisions of Sub-section (2), a person shall be disqualified for being chosen as, and for being, a Councillor

(a) if, whether before or after the commencement of this Act, he has been convicted or has, in proceeding for questioning the validity or regularity of an election, been found to have been guilty of-

(i) any corrupt practice u/s 27 or Section 28 entailing disqualification for membership of a Zilla Parishad or a Panchayat Samiti, unless such period as is mentioned in the decision of the Judge u/s 27 or as provided by Section 28 has elapsed;

(ii) any corrupt practice entailing disqualification on for membership of any local authority constituted or established, by or under any law for the time being in force, unless the period of disqualification was elapsed or the disqualification is removed under such law;

[(a1) "if he has been disqualified by or under any law for the time being in force for the purposes of elections to the Legislature of the State.

Provided that no person shall be disqualified on the ground that he is less than 25 years of age, if he has attained the age of 21 years.

18 List of voters to be conclusive evidence for determining right to vote or to be elected: Subject to any disqualification incurred by a person, the list of voters, shall by conclusive evidence for the purpose of determining under Sections 15 and 17 whether any person is qualified or is not qualified to vote, or as the case may be, is qualified or is not qualified to be elected, at any election.

22. The learned Counsel for the petitioner submitted that the list of voters which has been filed on record of this petition would show that the name of the petitioner has been entered at Sr. No. 983 in the electoral role. She is shown to be a female, 44 years in age. The names of other members of her husband is family are shown at Sr. No. 809 to 815 in the voters list. The name of her husband " Waskar Sanjay Bhairu" appears at Sr. No. 815 and his age is shown to be 32 years. Though a person, whose name appears in the voters list may be

qualified u/s 15 of the Act to contest at the election, if the voters list, itself, has such a glaring defect, particularly in respect of petitioner's age, it may be difficult to accept whatever is stated in the voters list to be correct.

23. The learned Counsel for respondent No. 1 submitted that, this voters list was not before the learned District Judge and therefore, it may not be permissible for this Court, in exercise of writ jurisdiction, to examine this question of fact based on a document which had not been produced before the District Court. Considering the nature of the documents produced, as also the fact that even the learned District Judge had considered this aspect, non production of the voters list before the District Judge may be immaterial.

24. In *R. Chandran Vs. M.V. Marappan*, on which the learned Counsel for the Petitioner placed reliance, a bench of the Supreme Court held that in respect of person whose names are found in the electoral roll, question of their age cannot be gone into a petition challenging the election. The case arose out of provisions of Section 20 of the Madras Village Panchayat Act. The Court held in paragraph 7 as under:"

7. After the decision of this Court in *B. M. Ramaswamy's* case there was no room for any further difference of opinion on the matter. It is, therefore, all the more surprising that the Andhra Pradesh High Court in *Goverdhanareddy v. Elec. Tribunal (supra)* and the Madras High Court in *Viswanathan v. Rangaswamy (supra)* took a different view even after taking note of the decision of this Court. Both these decisions, as we have pointed out earlier, proceed on a wholly wrong assumption. Their attempt to distinguish the decision of this Court in *B. M. Ramaswamy's* case is pointless. The provisions of Article 326 of the Constitution are not attracted in deciding upon the validity of the inclusion of a person's name in the electoral roll for a Panchayat merely because the Panchayats Act has adopted a part of the electoral roll for an Assembly constituency as the electoral roll for the Panchayat. And in any case all the decisions of this Court on the finality of the electoral roll and their not being liable to be questioned would equally apply to the electoral rolls for local bodies. For the reasons we have already given the view consistently taken by this Court that when once a name is found in the electoral roll its conclusion could not be questioned in any election petition must be followed. The decisions of the Madras, Andhra and Kerala High Courts, already referred to, should be held to be erroneous and that of the Gujarat High Court in *Mahmadhusein Kurbanhusein Mithiborwala Vs. Onali Fidaali and Others*, ; Allahabad High Court in *Ghulam Mohiuddin Vs. Election Tribunal for Town Area Sakit and Another*, ; Bombay High Court in *Jagannath Pundlik and Others Vs. Sukhdeo Onkar Wankhede and Others*, and Punjab and Haryana High Court in *Roop Lal Mehta v. Dhan Singh (supra)* as correct. In this case, therefore, it was not open either for the Election Tribunal or for the High Court to go into the question regarding the appellant's age. The latest decision of *Kailasam. J. in P. Subramaniam v. S. Panchamuthu and Ors. 85 L.W.567* . is consistent with the view we have taken.

25. In paragraph 6 of the Judgment of the Supreme Court had referred to and quoted from a Judgment of a five Judge bench in Durga Shankar Mehta's case . In Durga Shankar Mehta Vs. Thakur Raghuraj Singh and Others, the Supreme Court, while considering the improper acceptance of nomination of a candidate, found that if the nomination paper of the candidate is, on the face of it, valid and the candidate appears to be properly qualified on the face of electoral role and no objection is raised to the nomination, the Returning Officer would have to accept the nomination and such acceptance must be held to be proper. But such acceptance would not be final and the Election Tribunal may, on evidence placed before it, come to a finding that the candidate was not qualified at all. In such case, the election should be held as void on the ground of the constitutional disqualification and not on the ground that the nomination was improperly accepted. The Court held that the Election Tribunal has the jurisdiction to enquire into the age of the candidate and to find out whether the candidate was qualified, as also to set aside the election if the successful candidate had not acquired the qualification as regards the age. Since superficially it may appear that a two Judges bench of Supreme Court deciding R. Chandran had taken a different view, even after quoting from five Judges bench in Durga Shankar Mehta, it may be useful to quote paragraphs 8 and 9, from the Judgment in Durga Shankar Mehta" case is as under:

8) The first point for our consideration is whether the nomination of Vasant Rao was improperly accepted by the Returning Officer and that has materially affected the result of the election. It is not suggested on behalf of the respondent that the nomination paper filed by Vasant Rao was in any manner defective. It is admitted that the names and electoral numbers of the candidate and his proposer and seconder as entered there were the same as those entered in the electoral rolls.

It is also not disputed that the nomination paper was received within proper time as it is laid down in Section 33, Sub-section (4) of the Act. Section 36 of the Act provides for scrutiny of nominations and under Sub-section (2) of the Returning Officer has got to examine the nomination papers and decide all objections that may be made to any nomination and he may either on such objection or on his own motion, after such summary enquiry, if any, as he thinks necessary, refuse any nomination on any of the grounds which are specified in the different clauses of the subsection.

The ground mentioned in Clause (a) of the Sub-section is that the candidate is not qualified to be chosen to fix the seat under the Constitution or the Act.

The contention of the respondent No. 1 is that the nomination of Vasant Rao should have been rejected on this ground and as the Returning Officer did not do that, his act amounted to an improper acceptance of nomination within the meaning of Section 100(1)(c) of the Act. We do not think that this contention is sound. If the want of qualification of a candidate does not appear on the face of the nomination paper or of the electoral roll, but is a matter which could be

established only by evidence, an enquiry at the stage of scrutiny of the nomination papers is required under the Act only if there is any objection to the nomination. The Returning Officer is then bound to make such enquiry as he thinks proper on the result of which he can either accept or reject the nomination. But when the candidate appears to be properly qualified on the face of the electoral roll and the nomination paper and no objection is raised to the nomination, the Returning Officer has no other alternative but to accept the nomination. This would be apparent from Section 36 Sub-section (7) of the Act which runs as follows:

(7) For the purposes of this section-

(a) the production of any certified copy of an entry made in the electoral roll of any constituency shall be conclusive evidence of the right of any elector named in that entry to stand for election or to subscribe a nomination paper, as the case may be, unless it is proved that the candidate is disqualified under the Constitution or this Act, or that the proposer or seconder, as the case may be, is disqualified under Sub-section (2) of Section 33

In other words, the electoral roll is conclusive as to the qualification of the elector except where a disqualification is expressly alleged or proved. The electoral roll in the case of Vasant Rao did describe him as having been of proper age and on the face of it therefore he was fully qualified to be chosen a member of the State Legislative Assembly. As no objection was taken to his nomination before the Returning Officer at the time of scrutiny, the later was bound to take the entry in the electoral roll as conclusive; and if in these circumstances he did not reject the nomination of Vasant Rao, it cannot be said that this was an improper acceptance of nomination on his part which Section 100(1)(c) of the Act contemplates.

It would have been an improper acceptance, if the want of qualification was apparent on the electoral roll itself or on the face of the nomination paper and the Returning Officer overlooked that defect or if any objection was raised and enquiry made as to the absence of qualification in the candidate & the Returning Officer came to a wrong conclusion on the materials placed before him. When neither of these things happened, the acceptance of the nomination by the Returning Officer must be deemed to be a proper acceptance. It is certainly not final and the Election Tribunal may, on evidence placed before it, come to a finding that the candidate was not qualified at all. But the election should be held to be void on the ground of the constitutional disqualification of the candidate & not on the ground that his nomination was improperly accepted by the Returning Officer. In our opinion Mr. Sen is right that a case of this description comes under Sub-section (2)(c) of Sub-section 100 and not under Sub-section (1)(c) of the section as it really amounts to holding an election without complying with the provisions of the Constitution, and that is one of the grounds specified in Clause (c) of Sub-section (2). The expression "noncompliance with the provisions of the Constitution" is in our opinion sufficiently wide to cover such cases where the

question is not one of improper acceptance or rejection of the nomination by the Returning Officer, but there is a fundamental disability in the candidate to stand for election at all. The English law after the passing of the Ballot Act of 1872 is substantially the same as has been explained in the case of *Stowe v. Jolliffe* (1874) 9 C. P. 734 (D). The register which corresponds to our electoral roll is regarded as conclusive except in cases where persons are prohibited from voting by any statute or by the common law of Parliament.

(9) It is argued on behalf of the respondent that the expression "noncompliance" as used in Sub-section (2)(c) would suggest the idea of non acting according to any rule or command and that the expression is not quite appropriate in describing a mere lack of qualification. This, we think, would be a narrow way of looking at the thing. When a person is incapable of being chosen as a member of a State Assembly under the provisions of the Constitution itself but has nevertheless been returned as such at an election, it can be said without impropriety that there has been noncompliance with the provisions of the Constitution materially affecting the result of the election. There is no material difference between "noncompliance" and "nonobservance" or "breach" and this item in Clause (c) of Sub-section (2) may be taken as a residuary provision contemplating cases where there has been infraction of the provisions of the Constitution or of the Act but which have not been specifically enumerated in the other portions of the clause. When a person is not qualified to be elected a member, there can be no doubt that the Election Tribunal has got to declare his election to be void. u/s 98 of the Act this is one of the orders which the Election Tribunal is competent to make. If it is said that Section 100 of the Act enumerates exhaustively the grounds on which an election could be held void either as a whole or with regard to the returned candidate, we think that it would be a correct view to take that in the case of a candidate who is constitutionally incapable of being returned as a member there is noncompliance with the provisions of the Constitution in the holding of the election and as such Sub-section (2)(c) of Section 100 of the Act applies. The result therefore is that in our opinion the contention of the appellant succeeds. We allow the appeal in part and modify the order of the Election Tribunal to this extent that the election of respondent No. 2 Vasant Rao only is declared to be void; the election of the appellant however will stand. We make no order as to costs of this appeal.

26. This position was reiterated by the Supreme Court in *Sushil Kumar Vs. Rakesh Kumar*, on which the learned Counsel for Respondent No. 1 placed reliance and where too the question of age of the candidate was raised. It had been held that if the candidate was not of qualifying age, even though the Returning Officer accepted the nomination and the person is elected, the election would be void, since the candidate did not at all qualify to be the member of the body. The Court had considered the evidence tendered, including the entries in register of school, horoscope etc. After considering the evidence in its entirety, on facts, the Court concluded that the candidate was not qualified as he had not completed the age of 25 years on the date of filing of nominations, and

therefore, declared his election as void. It may be useful to quote paragraphs 25 and 26 of the Judgment as under:"

25. It is beyond any cavil that in the event a person is elected who does not fulfil the constitutional requirements, the election would be void despite the fact that the Returning Officer has accepted his nomination paper. (See *Durga Shankar Mehta v. Thakur Raghuraj Singh*)

26. Such a question indisputably would fall for consideration in an election petition where the parties would be entitled to adduce evidence in support of their respective cases. (See *Birad Mal Singhvi v. Anand Purohit*) Present controversy

27. The learned Counsel for Respondent No. 1 therefore submitted that in spite of provisions of Section 18 of the Act, on an analysis of these Judgments the learned District Judge had rightly concluded that the entry in the electoral roll would not be conclusive of the matter and the tribunal was entitled to examine the question of petitioner's age. He submitted that the learned District Judge has rightly come to the conclusion upon the analysis of the evidence tendered before him that the petitioner was not qualified to be elected and therefore, no interference was called for in the factual conclusion drawn by the learned District Judge.

28. Apart from the Judgment in *Durga Shankar Mehta's* case, which clearly entitles an election tribunal to examine the question of disqualification on the ground of age, even the provisions of Sections 16 and 18 of the Act (quoted in earlier paragraph) would clearly show that conclusiveness of the entry in electoral roll is subject to disqualification which may be incurred.

29. It may be seen from the proviso to Clause (a1) of Section 16 that a person shall not be disqualified on the ground that he is less than 25 years of age only if he has attained the age of 21 years. In this case, as a fact the petitioner was held to have been born on 21st December, 1986. The relevant date, for the purpose of computing her age was 24th February, 2007. Thus, on that date, the petitioner was less than 21 years of age and therefore, disqualified under the provisions of Section 16 of the Act.

30. In view of this, while the learned District Judge rightly held that Petitioner was not qualified to contest the election and therefore, rightly unseated her, he was not justified in declaring Respondent No. 1 as elected in place of the Petitioner.

31. Therefore, the Petition is partly allowed.

The impugned Judgment, in so far as it sets aside the Petitioner's election, is upheld, and insofar as it declares Respondent No. 1 as elected it is set aside. In the circumstances, parties are left to bear their own costs. Rule is made absolute in these terms.